

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 073 of 2014

STATE

v.

AIDAN ALEC HURTADO

Counsel: Mr. M. Deleny and Ms. S. Navia for State
Ms. S. Vaniqi for Accused

Hearing: 5th, 6th, 7th, 8th, 9th, 12th and 13th June 2017

Summing Up: 20th June 2017

Judgment: 21st June 2017

Sentence: 27th June 2017

SENTENCE

1. You, Mr. Aidan Alec Hurtado stands convicted for one count of Unlawful Importation of Illicit Drugs, contrary to section 4 of the Illicit Drugs Control Act, 2004 (hereinafter referred as The Act), which carries a maximum penalty of life imprisonment or fine not exceeding \$ 1,000,000 or both.
2. Having considered the evidence presented during the course of the hearing, the court found you guilty for this offence of Unlawful Importation of Illicit Drugs and convicted accordingly.

3. It was proved at the conclusion of the hearing, that you first came to Nadi, Fiji on the 7th of February 2014, by Fiji Airways Flight FJ 910 bound from Sydney. Upon your arrival, you made a complaint that your bag did not come on the Flight FJ 910. You provided details of your bag with your ticket and boarding details. Having obtained your details, the Baggage officers of the Nadi International Airport found your bag in the On-Hand System of Sydney Airport. The bag eventually reached Nadi on the 9th of February 2014. It was opened and checked by the Custom and Bio Security on the 10th of February 2014. Subsequent to the opening of the bag, the Custom and Bio Security found 20.5 kg of Cocaine inside the bag. You were later arrested by the Police on the 18th of February 2014, while you were staying at Kiran Palace Apartment in Lautoka. According to the Analysis Report, the purity level of the 20.5 kg of the substance is 89%.
4. Cocaine, that is extracted from the leaves of the coca plant is a highly addictive central nervous system stimulant. According to the report on “ **Terminology and Information of Drugs**” published by United Nations Office of Drugs and Crimes, the use of Cocaine causes myriad of adverse and negative effects, both personally and socially, short and long term and also physically and psychologically.
5. Having considered the significantly large quantity of drugs involved in this matter, I find that the drugs were imported for commercial purposes. It is obvious that it was not for the local market as Fiji is still not considered as a viable market for such illicit drugs. Hence it appears that this large quantity of Cocaine was in transit from a foreign destination to another foreign destination.
6. The evidence adduced in this hearing revealed a dark truth that Fiji is no longer safe from the venomous attention of transnational illicit drugs traffickers and syndicates and the locally operated agent and facilitators of them. The geographical location, small populations, lack of sophisticated technology in Fiji, facilitates the drug barons and transnational criminals to utilize this part of the globe as a transit hub in the process of transportation and trafficking of illegal substance.

7. Justice Goundar in *State v Balaggan* ((2012) FJHC 1147;HAC049.11 (4 June 2012)) held that:

“When sentencing drug-smugglers, regard must be made to the circumstances that exist in Fiji. Fiji does not have a sophisticated intelligence service to detect drug-smuggling. Our boarder security measures are not apt to deal with sophisticated drug-smuggling. Unless there is a tip off, it is easy to sneak in and out, hard drugs. In all cases, the hard drugs were for the overseas market. So Fiji is just being used by the drug-smugglers as a transit point for the reasons I have mentioned. Any punishment for dealing in hard drugs must therefore reflect the vulnerability of Fiji becoming a hub for the international drug-smugglers”.

8. As Justice Goundar emphasized in *Balaggan (supra)*, it is the duty of the Judiciary in sentencing process to contribute constructively and effectively to prevent offenders of this nature in repeating such crimes or deterring offenders and other persons from committing offence in this nature in Fiji before it becomes a complicated social disarray. Therefore, it is a judicial responsibility in sentencing offenders of this nature to demonstrate that the society denounces and condemns this type of offending without any reservation.
9. Having considered the reasons discussed above, and Section 4 (1) of the Sentencing and Penalties Act, the main purpose of this sentence is founded on the principle of deterrence and protection of the community. I am mindful of the principle of rehabilitation, however, it is my opinion that the need of deterrence outweighs the principle of rehabilitation.

Starting Point

10. I now turn onto determine the appropriate starting point for the sentence. In doing that, it would be prudent to discuss the sentencing approaches adopted by the Courts of Fiji and other main commonwealth jurisdictions such as United Kingdom.
11. The Sentencing Guideline of the Sentencing Council of United Kingdom in respect of the drug offences, has set down a tariff limit of three (3) years and six (6) months to Sixteen

(16) years of imprisonment for the offence of importation and exportation of Class A controlled drugs. The maximum penalty for the importation and exportation of class A controlled drugs is life imprisonment. Cocaine has been listed as Class A controlled drugs under the Schedule 2 of the Misuse of Drugs Act 1971.

12. Class A controlled drugs has been further divided into four categories based on the quantity of drug concerned. Five kilograms of Cocaine has been listed under category one. If the accused has played a leading role in the offending and the quantity is five kilograms or above, the starting point should be 14 years and tariff range is 12 to 16 years of imprisonment. If the accused has played a significant role but not a leading role, then the starting point should be 10 years and the tariff range is 9 to 12 years of imprisonment. If the accused has played a lesser role, the starting point should be 8 years and the tariff range is 6 to 9 years of imprisonment. The Sentencing Guideline has further stated that a sentence of 20 years and above may be appropriate, if the offence is in most serious nature and commercial scale, involving a quantity of drugs significantly higher than the category one.
13. The Court of Appeal of UK in Scamaronie and Pacheco-Nunez (1992) 13 Cr. App. R (s) 702 upheld that the sentence of twenty (20) years imprisonment for importing 20 kg of Cocaine of 95% purity as appropriate punishment for an offender who pleaded guilty for the offence. Brown J further held in Scamaroine (supra) that the appropriate sentence for importing 20 kg of Cocaine without early guilty plea would have been in the region of 25 years.
14. I now draw my attention to the sentencing approaches adopted by the Courts in Fiji in relation to importation and possession of Cocaine and Heroin.
15. In State v Bravo [2008] FJHC 172; HAC145.2007L (12 August 2008) the High Court of Fiji sentenced the convict for a period of eight (8) years imprisonment for importation of 2.1 kg of Cocaine.

16. The convict appealed to the Fiji Court of Appeal against the above conviction and sentence. The Fiji Court of Appeal in Bravo v State [2008] FJCA 72; AAU0094.2008S (5 November 2008) refused the leave to proceed the appeal and stated that:

“Leave to appeal is refused because no error of law by the trial judge appears in the trial judge’s approach or in the summing up. Not only would an appeal be bound to fail there would be a real risk that a cross-appeal on sentence would see the sentence increased. I pointed out to Ms. Bravo that two weeks after her sentence a first time offender found guilty of possessing 5 kg of cannabis was sentenced to 8 years in prison and that many judges would consider her offences much more serious than that one.

17. In State v Balaggan [2012] FJHC 1147; HAC049.11 (4 June 2012) the High Court sentenced the convict for a period of eleven (11) years and six (6) months imprisonment for the possession of 521.6 g of Cocaine.
18. In State v Abourizk [2016] FJHC 340; HAC126.2015 (29 April 2016) the High Court sentenced each of the two convicts for a period fourteen (14) years for the possession of 49.9 kg of Cocaine. This matter is presently on appeal before the Fiji Court of Appeal.
19. In State v Kai [2015] FJHC 665; HAC01.2015 (16 September 2015) the High Court sentenced the convict for a period of fifteen (15) years imprisonment for the importation of 29.9 kg of Heroin. This matter is presently on appeal before the Fiji Court of Appeal.
20. Having considered the above mentioned Judicial Authorities, the Fiji Court of Appeal in Lata v State [2017] FJCA 56; AAU0037.2013 (26 May 2017) held that:

“There have been only a few cases in Fiji in respect of possession of cocaine. They are State v G. G. F. Bravo [HAC 145 of 2007L] where the convict was sentenced by the High Court to 8 years imprisonment for possession of 2 Kg of cocaine; State v M. Balaggan [HAC 049 of 2011]

where the convict was sentenced by the High Court to 11 ½ years, for possession of 521.6 grams of cocaine; and State v J. N. Aburizk and J. Muriwaga [HAC 126 of 2015] where both convicts were sentenced by the High Court for periods of 14 years imprisonment, for possession of 49.9 Kg of cocaine. In State v Ethan Kai [HAC 01 of 2015] the convict had been sentenced by the High Court to 15 years imprisonment for importation of 29.9 Kg of heroin. This case on appeal before us, is the highest sentence given so far for a Class A drug. I am conscious that there needs to be a consistency in sentencing of those convicted of possession of Class A illicit drugs in commercial quantities, however in basing it purely on the quantity possessed, we may encourage drug dealers to deal in drugs, as stated earlier in smaller quantities at given times”.

21. Having emphasized the need of consistency in Sentencing of those convicted under Illicit Drugs Act, the Fiji Court of Appeal selected twelve (12) years as the starting point in **Lata v State (supra)** for the possession of 1990.4 grams of Cocaine. Upon considering the aggravating and mitigating factors, the Court eventually reached to the final sentence of fifteen (15) years of imprisonment period. After the deduction of the period spent in remand custody, the court held that the actual period of the sentence is fourteen (14) years and eleven (11) months.
22. In view of the approach adopted in **Lata v State (supra)** where the Court of Appeal selected starting point of 12 years for the possession of 1990.4 grams of Cocaine, I find the quantity of drugs involved in this matter is substantially high and obviously for commercial purpose. Hence, the level of harm is very high. You were instrumentally involved in getting the bag contained with this illicit drugs in to Fiji. Therefore, you have performed a significant leading role in the importation of illicit drugs into the country, thus making your level of culpability very high. Under such circumstances, I select 15 years as the starting point.

Aggravating Factors

23. It was proved at the conclusion of the hearing that this was a calculatedly planned act of concealment in order to avoid detection. The drugs were packed in four separate plastics bags and put them in four big plastic containers of body building formula. The containers were covered with factory type paper seal, in order to make an impression that the containers had not been opened and still with factory seal.
24. Apart from the planned concealment of the drugs, you also carried out this crime in a manipulative manner in order to avoid any possible suspicion of your conduct. You used the SIM card obtained under the name of Mr. Isei in your communication in Fiji. You entered the country using your USA passport. You then used the details of your USA passport in order to check-in at the Peninsula Hotel. However, once you started to disconnect your communication and contacts with the people, who knew your whereabouts, upon understanding that the authorities in Nadi International Airport was going to open and check your bag, you started to use your Columbian identity in order to avoid any possible detection of your whereabouts. In view of these reasons, I find that this was a manipulatively planned crime.
25. You had no respect and regard to the law and order of this county. You entered into this county pretending as a tourist visiting Fiji. On that ground you were allowed and welcomed by this country. The people embraced you with warm friendliness. They helped you in various ways believing you were a genuine tourist who lost the baggage while traveling. Having committed this crime, you have breached the guest and host relationship, the trust and the friendliness extended to you as a visitor by this country.
26. The UK Sentencing Guidelines suggests that the purity level of the substance need to be taken into account, when considering the aggravating and mitigating circumstances of the crime. The court considered the quantity of the substance in determining the level of harm, but did not consider the level of purity. Hence, I consider the level of purity as an aggravating factor. According to the Analysis report tendered by the prosecution, the purity level of this 20.5 kg of Substance is 89%.

27. According to the statistic published by the United Nations Office of Drug and Crime, the street value of one gram of Cocaine in USA in the year 2010 was \$160. Accordingly, the street value of this drug is more than three millions of US dollars.
28. I consider the above grounds as aggravating factors of this crime.

Mitigating Factors

29. You are 27 years old young offender. You do not have any previous convictions. However, the good character of an offender on this nature is not a strong mitigatory value. Justice Goundar in **State v Balaggan (Supra)** held that:

“In Aramah (1983) 76 Cr.App.R.190, the English Court of Appeal remarked that the good character of a courier, as he usually was, is of less importance than the good character of an accused in other cases. The Court took the view that drug-smuggling organizers deliberately recruit persons who will exercise the sympathy of the court. The point the Court makes is that the personal circumstances of an accused are secondary because of the deterrent element to sentences imposed in respect of drug-smuggling offences”

30. I consider above ground for your mitigation.
31. Having considered the above discussed aggravating grounds, I increase three (3) years and reaches an interim imprisonment of eighteen (18) years. Considering your young age and unblemished character, I reduce one (1) year, reaching the final sentence of seventeen (17) years of imprisonment.
32. Having considered the purpose of this sentence that is founded on the principle of deterrence and protection of the community from the offenders of this nature, I find fifteen (15) years of non-parole period would serve the said purpose, while preserving the opportunity for the accused to rehabilitate himself as a law abiding individual.

Head Sentence

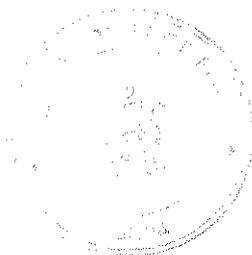
33. Accordingly, Mr. Aidan Alec Hurtado, I sentence you for a period of Seventeen (17) years of imprisonment for the offence of “Unlawful Importation of Illicit Drugs” contrary to Section 4 of the Illicit Drugs Control Act 2004. Furthermore, you are not entitled for any parole for a period of fifteen (15) years pursuant to Section 18 (1) of the Sentencing and Penalties Act.

Actual period of Sentence

34. You have been in remand custody for this case since 18th of February 2014 as you were not granted bail by the court. In the meantime you have been convicted and sentenced for three (3) months imprisonment period for one count of Giving False Information or Misleading Answers, contrary to Section 5 (4) of the Immigration Act 2003 by the Magistrates’ court in Suva on the 25th January 2016. In that sentence the learned Magistrate has given a discount of 21 days for the time you have spent in remand custody. Accordingly, you have been in remand custody for this matter approximately for a period of three (3) years and one (1) month. In pursuant of Section 24 of the Sentencing and Penalties Act, I consider the period of three (3) years and one (1) month as a period of imprisonment that have already been served by you.

35. Accordingly your actual sentencing period is thirteen (13) years and eleven (11) months of imprisonment period, with eleven (11) years and eleven (11) months non-parole period.

36. Thirty (30) days to appeal to the Fiji Court of Appeal.




R.D.R.T. Rajasinghe
Judge

At Suva
27th June 2017

Solicitors
Office of the Director of Public Prosecutions for the State
Vaniqi Lawyers for the Accused