

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 347 of 2017

STATE

vs.

KRITESH KUMAR

Counsel: Ms. J. Fatiaski for the State
Mr. A.K. Singh for the Accused

Date of Hearing: 23rd, 26th, 27th and 28th November 2018

Date of Summing Up: 06th December 2018

Date of Judgment: 12th December 2018

JUDGMENT

1. The accused has been charged with three counts of Unlawful Possession of an Illicit Drugs, contrary to Section 5 (a) of the Illicit Drugs Control Act and one count of Unlawful Cultivation of an Illicit Drugs, contrary to Section 5 (a) of the Illicit Drugs Control Act. The particulars of the offences are that:

COUNT 1

Statement of Offence

UNLAWFUL POSSESSION OF AN ILLICIT DRUG: *Contrary to Section 5 (a) of the Illicit Drugs Control Act No. 9 of 2004.*

Particulars of Offence

KRITESH KUMAR, on the 30th day of October 2017, at Nasinu in the Central Division without lawful authority possessed 1.4 kilograms of Methamphetamine, an illicit drug.

COUNT 2

Statement of Offence

UNLAWFUL POSSESSION OF AN ILLICIT DRUG: Contrary to Section 5 (a) of the Illicit Drugs Control Act No. 9 of 2004.

Particulars of Offence

KRITESH KUMAR, on the 30th day of October 2017, at Nasinu in the Central Division without lawful authority possessed 0.3 grams of Indian Hemp botanically known as Cannabis Sativa, an illicit drug.

COUNT 3

Statement of Offence

UNLAWFUL POSSESSION OF AN ILLICIT DRUG: Contrary to Section 5 (a) of the Illicit Drugs Control Act No. 9 of 2004.

Particulars of Offence

KRITESH KUMAR, on the 1st day of November 2017, at Nasinu in the Central Division without lawful authority possessed 0.8 grams of Indian Hemp botanically known as Cannabis Sativa, an illicit drug.

COUNT 4

Statement of Offence

UNLAWFUL CULTIVATION OF AN ILLICIT DRUG: *Contrary to Section 5 (a) of the Illicit Drugs Control Act No. 9 of 2004.*

Particulars of Offence

KRITESH KUMAR, on the 1st day of November 2017, at Nasinu in the Central Division without lawful authority cultivated 1 plant of Indian Hemp botanically known as *Cannabis Sativa*, an illicit drug weighing 0.1 grams..

2. The accused pleaded not guilty to these four counts, hence, the matter proceeded to the hearing. The hearing commenced on 23rd of November 2018 and concluded on the 28th of November 2018. The prosecution adduced the evidence of eight witnesses and tendered thirteen (13) items and documents as the exhibits of the prosecution. The accused gave evidence for the defence. Subsequently, the learned counsel for the prosecution and the defence made their respective closing addresses, which was followed by the summing up.
3. The three assessors, in their opinion unanimously found the accused guilty to each of the four counts.
4. Having carefully considered the evidence presented during the hearing, the closing addresses of the counsel of the prosecution and the defence, the summing up and the unanimous opinion of guilty given by the three assessors, I now proceed to pronounce my judgment as follows.
5. Having carefully considered the evidence presented by the prosecution and the defence, I find that the defence suggested that there is a reasonable doubt whether the white substance that was eventually tested at the Fiji Police Forensic Laboratory on the 31st of October 2017, is the same white substance that was uplifted by the Police at the house of the accused on the 30th of October 2017. The learned counsel for the defence in his closing address fondly referred to the term "chain of custody" claiming that the prosecution has failed to prove the chain of custody of the white substance.

6. The above contention of the defence is based upon two main grounds. The first ground is that the white substance was taken away by SC Paula to an unknown location, while the team led by Cpl Eloni was still searching the house. The accused said in his evidence that the team had searched the house for about an hour after SC Paula left his house with the substance. The second ground is that the police officers who uplifted the white substance has failed to make any marks or numbers on the white plastic in which the white substance was packed, in order to identify the substance on a subsequent occasion.
7. The chain of custody is a legal term that refers to the chronological sequence of the movement of a substance, or a documentation of certain evidence. Such a chronological sequence of the events or movements is important to establish that alleged substance has not been contaminated or interfered with any other foreign objects, or the integrity of the original version of the substance had not been interfered or contaminated until it was tested and documented.
8. I now take my attention to the contention of the defence that SC Paula had taken the white substance to an unknown location before it was taken to the police station. The learned counsel for the defence during the cross examination of Cpl Eloni, SC Paula and DC Daniela asked them about the entire made into the station diary on the 30th of October 2017, in respect of this operation. According to the entry number 153, SC Paula had left the police station with another operation team at 19.45 hours. SC Paula in his evidence explained that while he was attending to another operation, SC Peni called him about this raid. He had then gone to the accused house. However, he denied that he took the possession of the white substance at the accused's house and went to another location with it. According to the entry number 166, the accused and the search team had arrived at the police station at 20.16, that was nearly 30 minutes after SC Paula had left the police station. Therefore, it is not possible that the police had searched the house of the accused for an hour after SC Paula had taken the substance to another location as claimed by the defence.

9. I take my attention of the inconsistent nature of the evidence given by SC Peni and SC Paula in respect of SC Paula's presence at the scene. SC Peni said that he could not recall whether SC Paula was present at the scene when they conducted the search. SC Paula said that he received a called from SC Peni stating about this raid while he was attending to another operation. Upon receiving the call, SC Paula had gone to the scene of the search. However, this inconsistence nature of the evidence has no adverse effect of the main issues of whether SC Paula had taken the white substance to an unknown location before it was taken to the Police Station.
10. Cpl. Eloni in his evidence explained that white plastic containing the white substance was given to him by SC Peni. Thereafter, it was in custody until it was taken to the testing at the Fiji Police Forensic laboratory on the 31st of October 2017. Cpl. Eloni explained that he took the white substance to the Police Station and locked it in the locker. He has locked the locker with a key and the key was with him until the next morning. On the following morning that was on the 31st of October 2017, he had opened the locker using the same key, and then taken the white substance to the Fiji Police Forensic Laboratory. Mrs. Mili in her evidence said that she received the same white substance which was submitted by the police to one of her assistance namely Vinti Chandra.
11. Cpl. Eloni admitted in his evidence that neither him nor SC Peni made any marks or signature on the white plastic, even though it is required under the Force Standing Orders. The Fiji Police Force Standing Orders are not laws and only the guidelines for the best and good practices to be adopted during the investigations. As stated above, the court has to determine whether the integrity of the substance which was uplifted at the house of the accused, was preserved without any interference or contaminations with any foreign substances until it was tested and documented.
12. Goundar JA in Lata v State [2015] FJCA 120; AAU0037.2013 (13 March 2015) found that the prosecution does not require to produce the package of the substance to the court to established the chain of custody, where his Lordship held that:

"The appellant's contention is that since the alleged drugs were found in a knapsack bag, the bag should have been produced in court to prove the chain of possession. This contention is misconceived. The chain of possession rule applies to the illicit substance and not to its storage facility. In the present case, the prosecution relied upon DC Sauvakacolo's evidence to establish the chain of possession. DC Sauvakacolo's evidence was that after seizing the substance, he took it to the Government Analyst for an analysis and obtained a report. At para 43 of the summing up, the trial judge gave clear directions on the issue of chain of possession. Grounds 1-3 are not arguable.

13. The learned counsel for the defence in his legal submissions relied on **Sivaro v State [2000] FJCA 8; AAU0043,98S (11 February 2000)**, where the Fiji Court of Appeal found that deficiencies in the making of search list and the gap between the time of arrest and taking the substance to the analyst test have affected the reliability of the evidence of chain of custody. In that case, the Court found many deficiencies in the search list and the prosecution has failed to provide the evidence of the custody between the time of arrest, which was on 1 May 1994 and the time of testing, that was on 9th June 1994.
14. In this matter the arrest was made on the 30th of October 2017 and the substance was taken to the Forensic Laboratory on the 31st of October 2018. Evidence of Cpl. Eloni in respect of the custody and the movement of the substance was not challenged or discredited. Therefore, I find that the court can safely rely on the evidence of SC Peni, SC Pita, SC Paula, Cpl. Eloni and Mrs. Mili as reliable and credible evidence in respect of the chain of custody of the white substance and also dried leaves found in the accused's house in respect of the second count.
15. DC Pita, said in his evidence that he found some dried leaves scattered over the drawer. He had then taken them on to his palm and handed it over to Cpl. Eloni. However, during the cross examination he admitted that he found the dried leaves in two plastic and handed them over to Cpl. Eloni. DC Pita had stated in his statement made to the police that he

found two plastic containing dried leaves. Explaining the reasons for this inconsistency, DC Pita said that he was confused with some other drug raids. However, this position was cleared by Cpl. Eloni, where he said that DC Pita handed him over two plastics containing dried leaves. The search list, that was prepared on the 30th of October 2017, clearly states about the two plastics of dried leaves. Therefore, I do not find the above inconsistency in the evidence of DC Pita has adversely affected the reliability and credibility of the evidence presented by the prosecution in respect of the two plastics containing the dried leaves.

16. Mrs. Mili in her evidence said that she cannot confirm the plastic containing white substance that was marked as prosecution exhibit 10 is the same white substance that she tested on the 31th of October 2017. However, she confirmed that she tested the same substance that was brought to her office by the police on the 31st of October 2017. Therefore, I do not find this evidence of Mrs. Mili has adversely affected the chain of custody of the white substance from the time of arrest to the time of testing.
17. In view of these reasons, I am satisfied that the prosecution has proven beyond reasonable doubt that the white substance found in the secret locker of the cabinet at the accused's house is methamphetamine. Moreover, I am satisfied that the prosecution has proven beyond reasonable doubt that the dried leaves found in the bed room of the accused is cannabis sativa.
18. Accordingly, I find that the prosecution has successfully proven beyond reasonable doubt that the police has found methamphetamine and cannabis sativa in the house, which was under the control of the accused. Hence, the court is allowed to presume that the accused was in possession of these illicit drugs, namely methamphetamine and cannabis sativa until the contrary is proved by the accused on the balance of probability (*vide Section 32 of the Illicit Drugs Control Act*).
19. The accused in his evidence stated that the substance was given to him by a friend namely Vikash. The friend has told the accused that it was battery acid. However, the accused has

not provided the name of the friend when he was interviewed. According to the record of the caution interview of the accused, he has only said that it was battery acid given to him by a friend. He did not know the name of the friend. The accused claim that he told the police about the name of the friend but it was not recorded properly.

20. If the police wanted to fabricate the answers in the caution interview, in order to incriminate the accused, the police would have omitted the claim of battery acid from the record of the interview as well. The police have recorded everything of the accused's explanation apart from the name of the friend. The accused admitted that he was given an opportunity to read the record of the interview and also to alter, delete or add to the interview if he wanted, before he signs on it. He had chosen not to do so by himself. In view of these reasons, I find that accused has not given the name of the friend when he was interviewed. Moreover, I find the evidence of accused, claiming that he told the police about the name of the friend is not true.
21. The accused stated that he had three remote keys for the gate and three sets of house keys. He then said that one of the remote keys was with Rodney with whom he had an argument in the early part of the afternoon on the 30th of October 2017. He then called Rakesh and gave him the taxi to drive. He had given the second remote key to Rakesh. The accused then said that when the police was at the gate and wanted to come into the compound to search for drugs, he found that he had left his remote key and the house key in the taxi as he drew the taxi during the day. According to these evidence, there cannot be any other remote key inside the house, if the court believes about his evidence about Rodney and Rakesh. Accordingly, I do not find the explanation given by the accused to the delay in fifteen minute to open the gate is credible. In view of these reasons, I find the evidence of the accused is not reliable and credible. Hence, I refuse to accept his evidence.
22. Accordingly, I hold that the accused failed to rebut the presumption of possession on the balance of probability as required under Section 32 of the Illicit Drugs Control Act and sections 60 and 61 of the Crimes Act. Therefore, the court can safely presume that the

accused was in possession of the methamphetamine and cannabis sativa as charged under count one and two.

23. In view of these reasons, I find that the prosecution has proven beyond reasonable doubt that the accused guilty to the first and second count as charged.
24. I now draw my attention to the third and fourth counts as charged.
25. DC Inoke in his evidence said that he found a plastic containing dried leaves under the bed in the first bedroom of the accused house. DC Peni and DC Pita in their evidence said that they too searched this bedroom during the first search on the 30th of October 2017. However, two days later, when the second police team searched the same bedroom, they have found this plastic containing dried leaves under the bed. DC Inoke has then gone out of the house and found a green plant beside the flower hedge.
26. DC Elike in his evidence said that DC Inoke gave him some dried leave packed in a plastic. The search list has not mentioned anything about a green plant of cannabis sativa. When the Forensic Laboratory unpacked the plastic, they have found some dried leaves covered in aluminum foil. According to these inconsistencies in the evidence of DC Inoke and DC Elike, I find there is a reasonable doubt whether the dried leaves and the plant of cannabis sativa were found at the house of the accused on the 1st of November 2017. The prosecution failed to provide any reasonable explanation for these inconsistencies. Therefore, I find that the prosecution has failed to prove beyond reasonable doubt that the accused guilty to the third and fourth counts as charged.
27. Accordingly, I find no cogent reasons to disagree with the opinion of guilty given by the three assessors in respect of the first and second counts as charged. However, I find cogent reasons to disagree with the opinion of guilty given by the three assessors in respect of the third and fourth counts.

28. In conclusion, I hold that the accused guilty to the first and second count as charged and convict him to the same accordingly.
29. Moreover, I hold that the accused not guilty to the third and fourth counts as charged and acquit him from the same accordingly.




R.D.R.T. Rajasinghe
Judge

At Suva
12th December 2018

Solicitors
Office of the Director of Public Prosecutions for the State.
A.K. Singh Law for the Defence.