

IN THE RESIDENT MAGISTRATES COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Criminal Case No: CF 1929 of 2016

STATE

-v-

MEENA KUMARI

Appearances : **Sergeant F. Mohammed** for the State
 Present with **Mr. A. Patel**, *of counsel* of the Legal Aid Commission

JUDGMENT

1. You stood trial for **Unlawful Possession of Illicit Drugs** contrary to section 5 (a) of the *Illicit Drugs Control Act 2004* in that you “on the 12th day of November, 2016 at Namena Road in the Central Division, without lawful authority, possessed 5.2 grams of illicit drugs namely cannabis sativa.”

2. The State called four witnesses to the stand. **Prosecution Witness 1 (PW 1) Sergeant Tevita Ketedromo** testified that he and a team of officers conducted a raid at the home of a **Meena Kumari** located at Namena Street, Suva at 5.40am on 12 November 2016. The occupants of the home, **Ms. Kumari** and her son **Simon Shah** were at home at the time. **WSC Mele** found drugs, namely marijuana, wrapped in aluminium inside the bathroom unit. The items, and both **Ms. Kumari**, and **Mr. Shah** were then conveyed to Raiwaqa Police Station.

3. **Prosecution Witness 2 (PW 2) Woman Police Constable Mele Leba** testified that on 12 November 2016 at 5.40am she had been part of a team that raided your home. Inside your home, and in particular, inside a bathroom attached to your bedroom, she found 16 bullets of dried leaved wrapped in aluminium foil that she and her team believed to be marijuana. She said that you had been present throughout the search and that she had shown you and the rest of the team the items that she had found. The items were counted in front of you and then you and the bullets of dried leaves were taken to the Raiwaqa Police Station for further investigations.

4. **Prosecution Witness 3 (PW 3) Detective Constable Ravuama Namata** testified that he is a member of the Southern Division Drug Unit, a Unit he had been a part of

since 2013. The role of that unit is to gather information, conduct surveillance, conduct raids and undertake other policing operations. He had been part of the team that raided your home at 5.40am on 12 November 2016. He testified that the team had received information of possible drug dealings at your residence. They were tasked to search your home. During the course of search, **PW 2** found evidence of illicit drugs and this evidence and the suspect were taken to the Raiwaqa Police Station.

5. He testified that the drugs had been found in the bathroom outlet in your home. They found 16 bullets of aluminium foil that contained dried leaves. You had been present throughout the search and you were present when the items were discovered and removed from the outlet. The search took about an hour and you had been present throughout. Visibility had been good and the lighting in the house bright he said. They escorted you to Raiwaqa Police Station. They brought the items found in your house with them and these were handed over to the Investigating Officer, **PW 4**. He testified that he had experience dealing with drugs and that he knew what marijuana looked like, smelt like and how it is ordinarily folded and packaged.
6. **Constable Namata** testified that prior to the discovery of these items at your home, he had been part of over a hundred drug raids. He said that over 50 % of these raids led to the discovery of illicit drugs. Fifty percent of that, he testified, led to the discovery of items suspected to be marijuana. In 100 % of the cases where he had suspected marijuana, laboratory tests confirmed that the items that had been seized and were believed to be marijuana were in fact marijuana.
7. In addition, **Constable Namata** testified that he had been to over ten local and overseas trainings related to illicit drugs. The overseas training he was part of were organized and facilitated by the **Drug Enforcement Agency** of the **United States of America** and the **Public Security Agency** of the **People's Republic of China**. He learnt of the composition and characteristics of cannabis sativa and how one might identify cannabis. He had examined the dried leaves in the 16 bullets found at your residence and he testified that in his professional opinion the dried leaves were cannabis also known as marijuana.
8. **Prosecution Witness 4 (PW 4) Detective Constable Aceni Toga** testified that he had been at Raiwaqa Police Station on 12 November 2016. He received the 16 bullets seized from your residence. It was shown to you during the course of your interview and then he took it to the laboratory for testing. He properly labelled each item pursuant to internal protocols and he handed it over for testing. He then received the items back in a sealed container and he confirmed that the items shown to him Court were in the exact condition he had received it in when he picked them up from the laboratory. The items seized and handed to him were tendered as **Prosecution Exhibit 1**.
9. The State and the Defence tendered your Record of Interview by consent. In it you indicated that that was your house and that you shared that house with your son and your tenants. You also agreed that 16 bullets of dried leaves wrapped in aluminium foil had been found in the outlet to your bathroom drain in that house that morning.

10. At the conclusion of the State's case, I found a case to answer and I explained the substance of the State's allegation to you and I then informed you of your three rights pursuant to section 179 of the **Criminal Procedure Act 2009**. You opted to remain silent and you opted not to call any witnesses on your behalf.

Presumption of Innocence

11. You are presumed innocent unless and until proven guilty.

Burden and Standard of Proof

12. I remind myself that it is the State that bears the burden of proving each element of the offence against you and that this burden never shifts.

13. **Section 57** of the **Crimes Act 2009** makes clear that the prosecution bears the legal burden of proving every element of an offence relevant to the guilt of the person charged and **section 58** of the **Crimes Act 2009** makes clear that this legal burden must be discharged by the prosecution beyond reasonable doubt.

Elements of the Offence

14. The elements that the State must prove beyond reasonable doubt are as follows:

- (1) You
- (2) without lawful authority
- (3) intentionally¹
- (4) possessed
- (5) an illicit drug.

15. Pursuant to section 32 of the **Illicit Drugs Control Act 2004**, there is a factual presumption relating to possession. The provision reads:

“32. Where in any prosecution under this Act it is proved that any illicit drug...was on or in any premises...under the control of the accused, it shall be presumed until the contrary is proved, that the accused was in possession of such illicit drug.”

16. In **Abourizk v. State** [2019] FJCA 98; AAU0054.2016 (7 June 2019), at [73]

“[73] It is clear that the burden of proof on an accused when the presumption under section 32 of the Illicit Drugs Control Act 2004 becomes operative is a legal burden in terms of section 60(c) of the Crimes Act due the specific words ‘until the contrary is proved’ found in section 32. The word ‘unless’ in section 60(c) of the Crimes Act and the word ‘until’ in section 32 of the Illicit Drugs Control Act 2004 have the same meaning here. Legal burden means the burden of proving the existence of the matter (vide section 57 (3) of the Crimes Act) and the legal burden must be discharged on a balance of probabilities (vide section 61 of the Crimes Act).”

¹ **Lata v. State** [2017] FJCA 56; AAU0037.2013 (26 May 2017) at [30].

17. It is for the Accused to prove on the balance of probabilities that she was not, in fact, in possession of the illicit drug. Once she has proved that to the requisite standard, it will then be for the State to prove beyond reasonable doubt that she did indeed have possession of the illicit drugs to the exclusion of others. If she is unable to prove that she did not have possession of the illicit drugs on the balance of probabilities, than the Court may safely presume that she had possession.
18. The State must prove that the Accused intentionally possessed the illicit drug. Possession is a circumstance², and intention in respect of a circumstance is proved if the State can show that the Accused believed herself to have been in possession of an illicit drug.³
19. Moreover, section 124 of the **Criminal Procedure Act 2004** makes clear:

“124. (1) Any exception, exemption, proviso, excuse or qualification –

(a) whether it does or does not appear in the same section as the description of the offence in the Act creating the offence; and

(b) whether or not it is specified or negated in the charge or complaint;

is to be proved by the accused on a balance of probabilities.

(2) No proof in relation to any relevant exception, exemption, proviso, excuse or qualification applying under any Act to any offence shall be required from the prosecution.”

20. It is for the Accused to prove on the balance of probabilities that she had lawful authority to have the illicit drugs in her possession
21. Finally, something is an illicit drug if it is listed under Schedule 1 to the **Illicit Drugs Control Act 2004**.

Analysis

22. You do not dispute that the search took place at your home and that items were seized therein. You do not dispute the fact that you owned that home.

Identification

23. Identification is not in dispute. This element is proved beyond reasonable doubt.

Illicit Drugs

24. First, I need to be satisfied beyond reasonable doubt that the items seized from your home were in fact illicit drugs. If I am so satisfied than there is utility in then proceeding to examine whether the evidence was sufficient to prove each of the other elements of the offence beyond reasonable doubt. If I am not so satisfied than an analysis of the other elements becomes moot.

² **Abourizk v. State** [2019] FJCA 98; AAU54.2016 (7 June 2019) at [90].

³ Section 19 (2) of the **Crimes Act 2009**.

25. No chemical analysis report was produced in Court. No evidence from the Government Analyst was proffered. This was largely because on trial day, it was discovered that the State had not disclosed this evidence to the Defence. At the conclusion of the other evidence proffered by the State, the prosecutor simply closed his case.
26. I now pause to consider the evidence of **Prosecution Witness 3**. The Defence did not object to his evidence that in his professional opinion, “the dried leaves were cannabis sativa known as marijuana”, although counsel did delve a little into his qualifications and his experience and expertise. It is not for me to delve into the whys and wherefores of that strategic decision. As was observed in **Rodi v. The State of Western Australia** [2017] WASCA 81 (21 April 2017) at [113]:

“113. *The Australian criminal justice system involves a contest between the State or the Crown and the accused. In general, the accused is bound by the conduct of his or her counsel. The accused’s counsel has a broad discretion in the conduct of the defence. As Gleeson C.J (McInerney J agreeing) noted in R v. Birks* (1990) 19 NSWLR 677:

Decisions as to what witnesses to call, what questions to ask or not to ask, what lines of argument to pursue and what points to abandon, are all matters within the discretion of counsel and frequently involve difficult problems of judgment, including judgment as to tactics. The authorities concerning the rights and duties of counsel are replete with emphatic statements which stress both the independent role of the barrister and the binding consequences for the client of decisions taken by a barrister in the course of running a case.”

27. In the circumstances, I find that **Prosecution Witness 3: Ravuama Namata** had extensive experience in the detection and identification of cannabis sativa. He struck me as an honest, forthright and competent man. I am satisfied beyond reasonable doubt that he had examined the 16 bullets of dried leaves found in the bathroom outlet in your home and that based on his examinations he formed the professional opinion informed by his expertise and training in the composition, characteristics and identification of cannabis sativa, that the dried leaves found were in fact cannabis sativa.
28. I accept his expert opinion and I am satisfied beyond reasonable doubt, on the basis of that opinion, that the 16 bullets of dried leaves found in the bathroom outlet in your house was cannabis sativa, an illicit drug under Schedule 1 of the ***Illicit Drugs Control Act 2004***.

Possession

29. I am satisfied beyond reasonable doubt that the cannabis sativa was found in premises under your control at the material time.
30. There was evidence that the house had tenants and that your son also resided in that house with you. However, **WPC Mele** testified that the bathroom in question was the

bathroom to your bedroom and in your record of interview, you used the possessive “my” when referring to the bathroom and bathroom outlet that the illicit drugs were found in.

31. I am satisfied beyond reasonable doubt that you were in possession of the illicit drugs at the time in question.

Intentionally

32. I am satisfied beyond reasonable doubt that you intentionally had possession of these illicit drugs. Here I look at the manner in which the items were packaged and hidden. They were tucked away in a bathroom outlet, a rather extraordinary place to keep items that one believed to be innocuous. It is clear that you believed yourself in possession of an illicit drug and you hid them away so that they would not be detected by others.


Without Lawful Authority

33. There being no law in Fiji permitting the possession or use of cannabis sativa, and there being no evidence before me to show that you had lawful authority to possess the cannabis sativa found in your possession, I am satisfied that this element too has been proven beyond reasonable doubt.

Result

34. In the result and for the reasons set out above, I am satisfied beyond reasonable doubt that the State has proven each and every element of the offence.
35. I find you guilty and I convict you of **Unlawful Possession of Illicit Drugs** contrary to section 5 (a) of the ***Illicit Drugs Control Act 2004*** as charged.
36. Please present your plea in mitigation.




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Seini K Puamau
Resident Magistrate



Dated at Suva this 24th day of October 2019.