

Burden of Proof

6. It is imperative to highlight that as a matter of law, the onus or burden of proof rests on the prosecution throughout the trial and it never shifts to the accused. There is no burden on an accused to prove his or her innocence as an accused is presumed to be innocent until proven guilty.
7. It is for the prosecution to prove the accused's guilt beyond a reasonable doubt. If there is doubt, so that the court is not sure of the accused's guilt, or if there be any hesitation in the court's mind on any of the ingredients or on the evidence led by prosecution, the accused must be found not guilty of the charges and accordingly acquitted.

Summary of Evidence

8. It is expected that to arrive at a proper conclusion, the matter ought to be considered in its logical progression with formulated reasons for the ultimate conclusion with the general rule being that a judgment should set out the relevant events and the material evidence in the correct sequence in narrative form with the identifying number of each pertinent witness being incorporated at the appropriate places – vide *Pal v R* [1974] 20 FLR 1 (17 January 1974) as referred to in *Wang v State* Criminal Petition No. CAV 0013 of 2021 (26 October 2023) and *State v Wang* Criminal Appeal No. HAA 30 of 2019 (19 February 2021).
9. Prosecution's evidence is that on 12 October 2020, PC Savenaca, PC Vunaki, PC Saimoni and PC Sekove had to conduct a raid at the home of Jai Narayan – the Accused. Upon being issued the search warrant, they had gone to the home of Jai Narayan. PC Sekove stated that he had shown the search warrant to the Accused and this was confirmed by PC Vunaki. The Accused was at home with his parents as such a search was conducted.
10. The Accused's room was then searched and PC Savenaca testified that he searched the bed with a mosquito net. When PC Savenaca searched the mosquito net, he saw a white clear plastic which had a paper inside it. Upon opening the paper, PC Savenaca stated that he found 6 stems of marijuana leaves. PC Savenaca further testified that the Accused admitted to the marijuana leaves being his. PC Vunaki also testified that the Accused admitted this in his presence.
11. PC Savenaca then stated that after the Accused admitted to the marijuana leaves belonging to him, the Accused then fled the scene. The Accused could not be located as such, the marijuana leaves were seized and taken to the Ba Police Station. Photographs were then shown to PC Savenaca and he confirmed that the photographs were of the 6 stems of marijuana leaves they had seized from the Accused's room at his home. The photographs were tendered as 'PEX3' by Cpl Vimal, who testified that he had taken the same. PC Vunaki and PC Sekove further testified that the Accused was arrested after a few days when he came to the Station with his lawyer.
12. PC Sekove confirmed that he had done 3 search lists on 12 October 2020 with respect to the items seized from the home of the Accused. One of the search lists pertained to the 6 stems of marijuana leaves which was found. This was tendered as 'PEX2B'.
13. PC Aman testified that on 14 October 2020, he had been informed that he would be going to Suva to take the drugs in this matter for testing. He testified that he had taken a brown envelope which had been sealed and that he had taken it to the Forensic Unit at Nasova and gave it to the person in charge for testing. The Certificate of Analysis was tendered as 'PEX1' which confirmed that the sample was cannabis sativa with a weight of 26.1 grams.

14. The Accused categorically denies that he was in possession of the drugs that had been found in his bedroom on 12 October 2020. He testified that his bedroom has a window, and his bed is near the window and if someone threw anything inside, it might land inside. The Accused further testified that he never admitted to the Police that the marijuana belonged to him and that they are lying with respect to him making an admission. Moreover, the Accused further stated that he is the sole breadwinner supporting his elderly and that he is hardly at home.

Evaluation of Evidence

15. For a proper analysis of the evidence for the offence of Unlawful Possession of Illicit Drug, it is imperative for the Court to turn its mind to the elements of the offending, which are:
- i. the accused
 - ii. without lawful authority
 - iii. possesses
 - iv. an illicit drug
16. From the outset there is no issue with the identification of the Accused as the Accused agrees that on 16 October 2020, he had been at home when the Police came with the search warrant to search his home. The Accused also agrees that 6 stems of marijuana leaves were found in his bedroom.
17. The dispute that arises is that the Accused denies that the 6 stems of marijuana leaves belonged to him whereas Prosecution is alleging that as the 6 stems of marijuana leaves were found in the Accused's bedroom on top of the mosquito net over his bed that the dried leaves found belonged to the Accused. Thus, the contention before the Court is whether the Accused was in possession of the 6 stems of marijuana leaves on 16 October 2020.
18. In State v Prasad Criminal Case No. HAC 72 of 2021 (20 June 2024) His Lordship Justice Rajasinghe referred to the Liberato principle as expounded in Liberato and Others v The Queen [1985] HCA 66; 159 CLR 507 at 515 where Brennan J held that:
- "When a case turns on a conflict between the evidence of a prosecution witness and the evidence of a defence witness, it is commonplace for a judge to invite a jury to consider the question; who is to be believed? But it is essential to ensure, by suitable direction, that the answer to that question (which the jury would doubtless ask themselves in any event) if adverse to the defence, is not taken as concluding the issue whether the prosecution has proved beyond reasonable doubt the issue which it bears the onus of proving. The jury must be told that; even if they prefer the evidence for the prosecution, they should not convict unless they are satisfied beyond reasonable doubt of the truth of that evidence. The jury must be told that, even if they do not positively believe the evidence for the defence, they cannot find an issue against the accused contrary to that evidence if that evidence gives rise to a reasonable doubt as to that issue. His Honour did not make clear to the jury, and the omission was hardly remedied by acknowledging that the question whom to believe is "a gross simplification."*
19. Prasad [supra] also made reference to the case of Naidu v State [2022] FJCA 166; AAU0158.2016 (24 November 2022) where His Lordship Prematilaka highlighted the importance of modifying the Liberato principle and held:

[29] On the other hand Liberato has not uttered the final word on this issue. In Johnson v Western Australia [2008] WASCA 164; (2008) 186 A Crim R 531 at 535 [14]-[15] Wheeler JA identified one possible shortcoming in using Brennan J's statement in Liberato as a template for the direction: a jury may completely reject the accused's

evidence and thus find it confusing to be told that they cannot find an issue against the accused if his or her evidence gives rise to a 'reasonable doubt' on that issue.

[30] For that reason, it was usefully held in Anderson [2001] NSWCCA 488; (2001) 127 A Crim R 116 at 121 [26] that it is preferable that a Liberato direction be framed along the following lines (i) if you believe the accused's evidence (if you believe the accused's account in his or her interview with the police) you must acquit; (ii) if you do not accept that evidence (account) but you consider that it might be true, you must acquit; and (iii) if you do not believe the accused's evidence (if you do not believe the accused's account in his or her interview with the police) you should put that evidence (account) to one side. The question will remain: has the prosecution, on the basis of evidence that you do accept, proved the guilt of the accused beyond reasonable doubt?

20. His Lordship Justice Rajasinghe in Prasad [supra] further stated "if the Court believes the evidence given by the Accused is true or may be true, then the Court must find the Accused not guilty of the offences. Even if the Court rejects the Accused version, that does not automatically imply that the Prosecution has established that the Accused is guilty of the crime. The Prosecution must satisfy that it has established, on the evidence accepted by the Court, beyond a reasonable doubt, that the Accused committed these offences as charged in the information".
21. Thus, the Court will need to evaluate the evidence by Prosecution whilst keeping in mind the evidence presented by the Accused insofar as they relate to the issue it is considering. The evidence presented by the parties will be evaluated to determine the testimonial trustworthiness of the evidence which will be done by evaluating the credibility – the correctness or veracity of the evidence and the reliability of evidence – the accuracy of the evidence - vide State v Prasad Criminal Case No. HAC 72 of 2021 (20 June 2024). In doing this, the Court should consider the promptness/spontaneity, probability/improbability, consistency/inconsistency, contradictions/omissions, interestedness/disinterestedness/bias, the demeanour and deportment in Court and the evidence of corroboration where it is relevant. (vide State v Moroci Criminal Case No. HAC 161 of 2023 (26 April 2024)).
22. The Accused testified that on 16 October 2020 when the Police came to his home, they showed him the search warrant and he allowed them to do their search. The Accused testified that initially they found nothing which was when PC Sekove went to his neighbour's home, whom the Accused had been having issues with for the past 3 months. The Accused stated that his younger brother's wife eloped with his neighbour's brother.
23. The Accused states that when PC Sekove went to his neighbour's home, they swore at him. PC Sekove then returned and went back into the house and that's when the marijuana was found in the Accused's room.
24. The Accused denies that he fled from his home thereafter, but he maintains that they released him and he went to his brother's home to get his father as he knew he would be arrested and his mother was sickly. He further denied that he had admitted to the Police that the marijuana that they found belong to him; he maintained that they were lying about him making such an admission. He further went on to explain that his bedroom has a window and as his bed is near the window, if someone threw anything inside, it might land inside.
25. In cross examination, the Accused agreed that the window in his room was the kind that you had to use a piece of stick to push it up/open and that his mosquito net is about 2 feet below the roof over his double bed with the mosquito net being adjacent to the wall where the window is with there being only a little bit of space.

26. The Court is mindful of the probability of the Accused's version of events especially with respect to PC Sekove going over to the Accused's neighbour's house after supposedly not finding anything in the Accused's home and that only upon PC Sekove returning then the 6 stems of marijuana leaves were found – if the Accused was attempting to suggest that his neighbour had framed him by throwing the marijuana in his room then why would they have allegedly behaved in an aggressive manner towards the PC Sekove when he approached them, further why would PC Sekove even go to the neighbour's home especially if they were the ones who allegedly framed the Accused. Additionally, if the Accused's neighbour did in fact frame the Accused then why didn't the Police find the marijuana on their first search especially if the Accused's neighbour had been the one to alert the Police.
27. Further, the Accused never suggested to PC Savenaca, PC Sekove and PC Vunaki - the Police Officers who were present during the search that there was a small canteen at his home which meant that people were coming and going from his home. Although this was never suggested, the Court is mindful that the Accused in his evidence had stated that he was the sole breadwinner, looking after his elderly parents and that he hardly ever stayed home as most of the time he was out at sea.
28. Moreover, the Accused never questioned the Police Officers about the possibility of people throwing things into his bedroom from the window to allow them to comment on the same.
29. The Court, thus, finds that the Accused's evidence has not created a reasonable doubt.
30. I now turn my mind to Prosecution's case. Considering that the Court needs to consider the issue whether the Accused was in possession, the Court is mindful of section 32 of the Illicit Drugs Control Act, which states:

"Where in any prosecution under this Act, it is proved that any illicit drug, controlled chemical or controlled equipment was on or in any premises, craft vehicle or animal 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, controlled chemical or controlled equipment"

31. Further, in the case of Lata v State: Criminal Appeal No. AAU 0037 of 2013 (26 May 2017) the Court of Appeal discussed the law relating to possession where it stated:

*[30] Lord Hope in the House of Lords in Lambert [2001] UKHL 37, [2002] 2 AC 545, stated that **"there are two elements to possession. There is a physical element, and there is the mental element."** **The physical element involves proof that the thing is in the custody of the accused or subject to his control.** The facts of this case show and the Appellant herself accepts that she had constructive possession of the bag containing the illicit drugs on the 13th of June 2010, which satisfies the actus reus element of the offence. In the absence of a definition of 'possession' in the Illicit Drugs Control Act guidance can be obtained from the Crimes Act 2009 as regards 'possession'. As per the definition of possession in the Crimes Act 2009 'Possession' includes "not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person;...". **In Korovuki v State [2013] FJCA 15 AAU 0018.2010 the Court of Appeal adopted a similar approach by stating: "Possession is proven if the accused intentionally had the drugs in his physical custody or control to the exclusion of others..."** **The offence of unlawful possession necessarily requires proof of the requisite mental or fault element before a conviction can be entered.***

[31] *The law separates the physical element of possession (the corpus) from the mental element (the animus possidendi), i.e. the intention to possess. The fault element of possession is knowledge and intention. A person has knowledge of something if he or she is aware that it exists or will exist in the ordinary course of events. There are circumstances in which the requisite knowledge may be imputed. Knowledge includes deliberately shutting one's eyes to the truth. Mere knowledge of the presence of illicit drugs cannot be equated with control. A person has intention with respect to possession if he or she means to engage himself or herself in possessing the substance. It is therefore implicit that in every case of possession, a person must know of the existence of the thing which he or she has or controls, although it may not be apparent whether a person knew of the quality of the thing in question. A person will not be liable if he neither believed, nor suspected, nor had any reason to suspect that the substance was an illicit drug.* Lord Scarman remarked in *Boyesen* [1982] 2 A.E.R. 161 adopting the description of possession given by Lord Wilberforce in *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256 said: "The question to which an answer is required...is whether in the circumstances the accused should be held to have possession of the substance rather than mere control. In order to decide between these two, the jury should, in my opinion, be invited to consider all the circumstances...the manner and circumstances in which the substance, or something which contains it, has been received, what knowledge or means of knowledge or guilty knowledge as to the presence of the substance, or as to the nature of what has been received, he had at the time of receipt or thereafter up to the moment when he is found with it..." I would venture out to say the manner in which the substance was dealt with by the accused, after it has been received, like in this case, would also be indicative of the intention of the person who received it.

32. Thus, it is evident that possession requires there to be the physical element which is proof that the thing is in the custody of the accused or subject to his control as well as the fault element which is knowledge and intention.
33. It is Prosecution's case that on 12 October 2020, PC Savenaca, PC Vunaki, PC Saimoni and PC Sekove had conducted a raid at the home of Jai Narayan – the Accused. Upon being issued the search warrant, they had gone to the home of Jai Narayan. PC Sekove stated that he had shown the search warrant to the Accused and this was confirmed by PC Vunaki. The Accused was at home with his parents as such a search was conducted.
34. PC Savenaca testified that the Accused's bedroom was then searched and that he searched the bed which had a mosquito net. PC Savenaca stated that when he searched the mosquito net, he saw a white clear plastic which had a paper inside it. Upon opening the paper, PC Savenaca found 6 stems of marijuana leaves. PC Savenaca further testified that the Accused, in his presence, admitted to the marijuana leaves belonging to him. PC Vunaki and PC Sekove also testified that they heard the Accused make such an admission.
35. PC Savenaca then went onto testify that after the Accused admitted to the marijuana leaves belonging to him, the Accused then fled the scene. The Accused could not be located as such, the marijuana leaves were seized and taken to the Ba Police Station. Photographs which had been tendered as 'PEX3' were shown to PC Savenaca and he confirmed that the photographs were of the 6 stems of marijuana leaves they had seized from the Accused's room at his home. Moreover, both PC Vunaki and PC Sekove further testified that the Accused was arrested after a few days when he came to the Station with his lawyer.
36. PC Aman testified that on 14 October 2020, he had taken a brown envelope which had been sealed and that he had taken it to the Forensic Unit at Nasova and gave it to the person in charge for testing.

37. Whilst the physical drugs were not introduced into evidence, the Court finds the evidence of the PC Sekove, PC Vunaki and PC Savenaca credible and reliable and therefore truthful with respect to finding the cannabis sativa in the Accused's bedroom. The Court also finds the evidence of PC Aman credible and reliable and therefore truthful with respect to him taking the cannabis sativa for testing which led to the Certificate of Analysis 'PEX1' which confirmed that the sample was cannabis sativa with a weight of 26.1 grams.
38. The above evidence in totality allows the Court to draw an indisputable inference from the whole situation that due to the Police finding the 6 stem of marijuana leaves in the Accused's bedroom in the mosquito net above his bed, the Accused for no other reason fled his home and the Police knowing that he would be arrested as the Accused had the knowledge that the 6 stems of marijuana leaves belonged to him and that he had the intention to possess these 6 stems of marijuana leaves.
39. Thus, considering the circumstances, the Court finds that Prosecution has proven beyond a reasonable doubt that the Accused had 26.1 grams of illicit drugs namely Cannabis Sativa and that he had knowledge of the presence of the illicit drugs in his bedroom and that he had the intention of possessing the said substance.

Determination

40. I find that Prosecution has discharged its burden in proving all the elements for Unlawful Possession of Illicit Drugs beyond reasonable doubt.
41. I, therefore, find the Accused, Jai Narayan, guilty as charged for the offence of Unlawful Possession of Illicit Drugs.


N. Mishra
Resident Magistrate

