IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO.AAU0043 OF 1998S
(High Court Criminal Case No. HAA 0095 of 1998)

BETWEEN:

SULIASI SIVARO

Appellant

AND:

THE STATE

Respondent

Coram: **The Hon. Sir Moti Tikaram, President**
The Rt. Hon. Sir Thomas Eichelbaum, Justice of Appeal
The Hon. Sir Ian Barker, Justice of Appeal

Hearing: **Tuesday, 8 February 2000, Suva**

Counsel: **Mr. N. Goodenough for the Appellant**
Mr. J. Naigulevu for the Respondent

Date of Judgment: **Friday, 11 February 2000**

JUDGMENT OF THE COURT

In the Magistrate's Court the Appellant was convicted on a charge that on 1 May 1994 he was found in possession of 662.4 grams of dangerous drug, namely Indian hemp, contrary to the Dangerous Drug Act 114, sections 8(b) and 41(2). He was sentenced to 5 years imprisonment. His appeal to the High Court against conviction and sentence having been dismissed, he now appeals to this Court.

At the hearing before the Magistrate, for the prosecution evidence was given by Corporal Inia, who was in charge of an operation on the day of the offence, apparently looking for escaped prisoners. On a search of the appellant's house, conducted pursuant to a search warrant, one of the corporal's team found a bag of dry leaves. The bag was handed to the corporal who in turn handed it to Constable Apenisa, the officer in charge at the Valelevu police station. Corporal

Inia purported to identify the bag shown to him in court as that found in the course of the search. Under cross-examination by the appellant, who represented himself at the trial and on the appeal to the High Court, the witness showed the search warrant to the appellant.

Constable Gounder, a member of Corporal Inia's unit, stated he found a plastic bag of green leaves in a corner of the appellant's bedroom, underneath a pile of clothes. He identified the "parcel" shown to him as the one recovered at the appellant's house.

Constable Apenisa's evidence was that after being handed the plastic bag by Corporal Inia, he kept it in custody until he took it to the Government analyst. On collecting the bag from the Analyst, he handed it to the exhibits officer at the Valelevu police station. When (in 1995) the case was ready for hearing, he uplifted the bag of drugs from the "crime writer", brought it to court, handed it to the prosecuting officer, and produced it as an exhibit when he gave his evidence.

As is common ground, that hearing resulted in the appellant's acquittal; but as a result of a prosecution appeal, the case was directed to be re-heard before a different Magistrate. In the meantime the analyst had left the country, which accounts for Constable Apenisa's further evidence that on 9 June 1998 he uplifted the bag of drugs from the crime writer, Constable Sharma, took it again to the Government analyst's office, and later collected it from there. He identified and produced the plastic bag as an exhibit.

With the appellant's consent, the Government Analyst's certificate, dated 9 June 1998, was produced as an exhibit. It certified that the dried leaves were Indian hemp, "botanically known as cannabis sativa". It stated that the weight of the sample was 375.6 grams, and referred to

details attached, but these were either not produced as part of the exhibit, or not reproduced in the Record for the High Court appeal. However, as is obvious the contents of the certificate sufficed to enable the Magistrate to hold that the leaves analysed were Indian hemp.

The only other detail of the prosecution evidence which need be mentioned at this stage concerns Constable Apenisa's interview of the appellant. In his introduction to the interview the officer stated that *two* parcels believed to be Indian hemp had been found in appellant's house during a search for escaped prisoners. In the course of questioning under caution the appellant said that during the search some marijuana had been found in his room and that he was the owner. Asked why he had it, he said "it had just been brought in" the previous Sunday and that he did not smoke marijuana. When the interview was resumed after the leaves had been taken to the analyst, the officer told the appellant that they had been found to be Indian hemp and weighed 662.4 grams. Asked to name the person from whom he had obtained the drugs, the appellant said he could not do so as he was too drunk.

The appellant elected to give evidence. He said the police were looking for an escaped prisoner. They did not have a search warrant, but he allowed the search. They did not find any prisoner, but when they returned later with a warrant and conducted a further search, they found the drugs. He said he was not a drug user, and did not have any drugs. He claimed the police had framed him.

After the appellant had given evidence, the prosecution recalled Corporal Inia. He referred to the search list; this showed that the items found included a yellow plastic container of dry leaves believed to be marijuana (item 2); a bag of dry leaves, also believed to be marijuana (item

4), and 2 small plastic containers, the contents again believed to be marijuana (item 5). Which of these was the "plastic bag" taken to the analyst remained (and still remains) unclear. Corporal Inia also produced the search warrant (exhibit 4A) which however has not been reproduced in the Record for this appeal. He said that before the search was carried out, he was aware the object of the search was drugs.

In his judgment the Magistrate stated he believed the evidence of the prosecution witnesses, and in particular, the evidence of Constable Grounder regarding the finding of the plastic bag containing dried leaves. He pointed out there was no evidence as to where (or how) the drugs were kept from the time of the first hearing (which according to the High Court judgment, was on 4 October 1995) until they were delivered (for the second time) to the Government Analyst's office on 9 June 1998. Nevertheless he was satisfied as to the chain of custody, holding that the plastic bag analysed on 9 June 1998 was the same bag, with the same contents, initially taken into possession by Constable Grounder. In regard to the defence contention that the drugs had been planted, he said he had scrutinised the prosecution evidence very critically but was satisfied beyond reasonable doubt that the charge had been proved.

In his appeal to the High Court the appellant relied on a number of grounds:

1. That the Magistrate held that the appellant had been in possession of 662.4 grams, notwithstanding that the certificate of analysis stated the weight to be 375.6 grams;
2. That there were inconsistencies between the evidence of Constable Grounder, who said in his statement that he had found 2 small plastic bags allegedly containing marijuana, and the statement given by

another officer involved in the search but not called as a witness, Constable Nacanieli;

3. That the Magistrate was biased, in that he allowed the prosecution to call only some, rather than all, of the members of the police search party. In the appellant's contention, the evidence of the others would have raised contradictions and doubts in the prosecution case;

4. That Constable Grounder lied in his evidence in saying he had found the marijuana, when a statement by another officer, who was not called, said that it was the latter officer who found it;

5. That there were missing links in the chain of custody, as indeed the Magistrate noted in his judgment;

6. That the Magistrate was wrong to hold that the plastic bag whose contents were analysed on 9 June 1998 was the same bag as that found in the search on 1 May 1994. There were strong indications that someone had tampered with the evidence, particularly having regard to the discrepancy in the weight.

7. That the sentence was manifestly excessive.

In his judgment the Judge described as the main plank of the appellant's argument the contention that the material analysed on 9 June 1998 was not the material seized on 1 May 1994. Describing the argument as spurious, the Judge said it was not necessary to prove such a chain of identity, although it might perhaps be desirable. In any event he considered that the overwhelming evidence was that the material was in fact the same. But the point which, the Judge said, had been overlooked was that in his interview the appellant had admitted that the substance in his bedroom was marijuana, and that it was his. Further, when the interviewing officer informed the appellant

of the result of the analysis, namely that the material had been found to weigh 662.4 grams, the appellant did not demur, and (as the Judge put it) admitted the result of the analysis by conduct. Having regard to this evidence, which was unchallenged, in the Judge's view questions of who found the material, and whether there were one, two or 3 packets, were beside the point. As to the alleged conflicts of evidence, the Judge pointed out that the statements by the officers who were not called were not part of the evidence. That of course was correct.

The Judge acknowledged that there were deficiencies in the prosecution case. The search list form made provision for naming the police personnel present during the search but although five officers were named, Constable Gounder, who claimed to have found the hemp, was not among those listed. Further, no explanation was given of the discrepancy between the total of four bags or containers listed in the search list, and the evidence of the finding of a single bag and the subsequent analysis of its contents alone. The detailed results, said to have been attached to the analyst's certificate, were not produced to the Court. The chain of custody was not proved, as noted earlier in this Judgment. There was no justification for allowing Corporal Inia to be recalled. When the appellant gave evidence claiming, or at least implying, that the marijuana had been planted by the police, the prosecutor did not cross-examine him on his signed acknowledgement that the material was his. When the appellant was interviewed the police should have had him sign an acknowledgement on the bag of material. Finally, the Magistrate ought not to have used language capable of being criticised as reversing the onus of proof. Despite this formidable catalogue of deficiencies, the Judge said the conviction appeal had no merit whatsoever. As to sentence, in regard to the quantity involved the Judge said on interview the appellant had not challenged the figure of 662.4 grams. The Judge said that the common sense explanation for the apparent discrepancy in the weights was that in the course of the four years that elapsed the material had dried out further. The

sentence of 5 years was the minimum under the legislation (that is, on the assumption that the quantity involved was proved to be 662.4 grams).

In written submissions in support of the appeal the appellant again advanced a number of separate points. These however were overtaken by those filed on his behalf by the Legal Aid Commission when it took up the case, this being the first time the appellant had had legal representation. As the comprehensive submissions filed by the Commission included grounds not stated in the Notice of Appeal, the appellant sought leave to file an amended notice. The respondent opposed the application on the basis that some of the proposed grounds did not involve questions of law only (Court of Appeal Act, Section 22(1)); but bearing in mind that this is the first stage at which the appellant has had legal assistance, we consider it appropriate to grant leave.

The ground of most substance is one the Appellant has advanced throughout the appeal process, namely that the evidence adduced in the Magistrate's Court was insufficient to sustain a conviction, for the reason that the prosecution failed to prove a chain of possession linking the material seized with that analysed. As noted earlier Constable Gounder had stated he found a plastic bag of green leaves. The search list set out three items believed to contain Indian hemp. None of these was described as a plastic bag. However, the 1998 analysis report (admittedly in wording which formed part of a printed standard form) described the sample as "in a sealed container". At the Valelevu Police Station the "plastic bag" had been handed to Constable Apenisa who took it to be analysed. When he returned with it he gave the plastic bag to the "exhibits officer". In 1995 he brought it to court for the first prosecution. There is no evidence as to how the bag was then returned to the Police Station. There is none as to the detail of the custody of the bag in the periods 1994 to 1995, and 1995 to 1998. At no stage was there any evidence as to any

identifying marks on the bag which would assist the court to have confidence in the claim by prosecution witnesses that the bag shown to them in court was the one they had handled in 1994, or in Constable Apenisa's assertion that the bag he took to the second analyst in 1998 was the same as that handed to him following the search in 1994.

The High Court Judge considered that this line of inquiry was irrelevant, because the appellant had admitted that marijuana had been found in his house during the search, and that he was the owner of the drug. However, when he gave evidence the appellant was not cross-examined about his admission, and the Magistrate did not rely on it in his reasons for decision. Thus there was no finding of fact regarding the making of an admission, or (if made) that it was true. Further we must point out that any admission of ownership could not be relied on in proof that the appellant had possession of the particular quantity charged. We are quite unable to read the record of the interview in which the admission was made as an admission relating to any particular quantity. In order to justify the sentence of 5 years imposed, the State had to prove the appellant was in possession of an amount exceeding 500 grams, see the third schedule of the Dangerous Drugs Act (Amendment) Decree 1990.

On the critical issue of proof of the chain of custody the Magistrate grounded his decision on the acceptance of Constable Apenisa's evidence that the material he took to the analyst in 1998 was the same as that which he had handled in 1994-1995. We have already commented on the absence of any evidence available to add credibility to the witness's assertion, such as the mode of custody in the interval, or that the bag bore some identifying mark or label. Counsel for the respondent submitted that there must have been some such means of identification, but we cannot supplement the record by assumptions of this kind. Given the length of the time interval, the

paucity of information about the custody of the material in the meantime, and the unexplained discrepancy between the search list and the other evidence, we do not consider that reliance on this evidence alone could constitute proof beyond reasonable doubt.

Pointing out that section 22 of the Court of Appeal Act (cap 12) provides for a further appeal to this Court on a ground involving a question of law only, the respondent argued that the appellant's contention regarding the continuity of custody was an issue of fact incapable of raising a question of law qualifying under the section, or at the most, a mixed question of fact and law.

There are of course cases where there is some evidence to support proof of the offence charged, or of a particular element, and the question for the court hearing the charge, or the High Court on a first appeal, is whether the evidence ought to be accepted or is of sufficient weight to sustain a conviction. Generally such a situation will not create the right to a second appeal on a point of law only. However, the issue in the present case is whether, accepting the prosecution evidence on the chain of custody as honest, it is capable of constituting proof beyond reasonable doubt. We hold that because of the gaps and deficiencies to which we have drawn attention, such evidence is incapable of proving a chain of custody from the time the material first came into Constable Apenisa's custody on 1 May 1994 down to the delivery of drugs to the analyst on 9 June 1998, with the result that an essential element of the offence charged, namely that the material in the appellant's possession was Indian hemp, has not been proved. The latter conclusion, in our judgment, falls within the description "a question of law only" under section 22. A helpful analogy can be drawn from ***R v Howard*** (1910) 13 GLR 566 where the issue was the sufficiency of evidence to put the case to the jury. Although the point was not argued, a court of 6 Judges raised no objection to considering that issue as a question of law.

Section 22 (3) authorises this Court to intervene if it thinks the decision of the Magistrate's Court or of the High Court should be set aside on the ground of a wrong decision on a question of law. As this Court stated in ***Osea Palagi v The Queen*** (Criminal Appeal 72/1984, 27 March 1985) this provision enables the court to go behind the High Court decision under appeal and consider the conduct of the case in the Magistrate's Court. Mr Naigulevu relied on that judgment as indicating that such a step should be taken only in "most exceptional" circumstances. That statement must however be read in the context of the particular case where most unusually, the Appellant raised an allegation of bias against the Magistrate (which this Court believed had substance) for the first time on the hearing of the second appeal. We do not construe the Court's remarks as a general reading down of the section 22(3) jurisdiction where this Court, on a second appeal, discerns a wrong decision of a question of law in the original court of hearing.

Pursuant to section 22(3) we set aside the decision of the Magistrate's Court on grounds of a wrong decision on a question of law, in that the evidence was insufficient to support a conviction for possession of a dangerous drug. It follows that the decision of the High Court must also be set aside.

In view of those conclusions, it is unnecessary to deal in detail with the other grounds of appeal, but we will comment on them briefly.

Ground 1 related to the prosecution being allowed to call further evidence at the end of the defence case, as already related. The record does not show that leave for this course was sought or granted. We point out that the prosecution cannot reopen its case without leave, which should be granted only in exceptional circumstances : ***The Queen v Chin*** (1985) 157 CLR 671. However, in the present case, although the course taken was irregular, we do not consider any substantial miscarriage of justice resulted.

The next grounds alleged there was an error of law in that the appellant was not informed of his right to make a statement from the dock, or to call witnesses. On the information contained in the record, we are not satisfied there was in fact any failure in these respects. However, it would be desirable if the record made it clear that these important rights had in fact been explained to an unrepresented accused.

The final grounds related to the absence of proof that the quantity of Indian hemp seized exceeded 500 grams in weight, this figure being required to justify a minimum sentence of 5 years. As seen the analyst certificate was for a lesser quantity. The Magistrate did not advert to this issue, but on appeal the High Court Judge purported to take judicial notice of the fact that plant material would dehydrate and lose weight over a period of time, so as to account for the difference between the analyst's certificate, and the weight alleged in the charge. We do not consider that behaviour of any particular plant material under storage is a notorious matter in respect of which judicial notice can be taken, let alone accept the proposition that the rate of dehydration could be a matter of common knowledge.

Orders:

Leave to file amended notice of appeal granted.

Appeal allowed.

Decisions of Magistrate's Court and High Court set aside.

Conviction and sentence quashed.

Appellant acquitted.

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Sir Moti Tikaram
President

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Sir Thomas Eichelbaum
Justice of Appeal

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Sir Ian Barker
Justice of Appeal

Solicitors:

Office of the Legal Aid Commission, Suva for the Appellant
Office of the Director of Public Prosecution, Suva for the Respondent

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