

IN THE COURT OF APPEAL
AT SUVA

CRIMINAL APPEAL NO. AAU0092 OF 2011
(High Court Criminal Action No. HAC 49 of 2008L)

BETWEEN : 1. SHEIK MOHAMMED
2. MICHAEL ASHLEIGH CHANDRA

Appellants

AND : THE STATE

Respondent

Coram : Chandra RJA

Counsel : Mr. A. J. Singh for the 1st Appellant
Mr. I. Savou for the 2nd Appellant
Ms. M. Fong for the Respondent

Date of Hearing : 31 January 2014

Date of Ruling : 21 March 2014

RULING

[1] This is an application for leave to appeal against the judgment of the High Court at Suva.

[2] The Appellants were charged with possession of an illicit drug contrary to section 5(a) of the Illicit Drugs Control Act No.9 of 2004 having possessed 3764.4 grams of Cannabis without lawful authority.

[3] After trial the Appellants were found not guilty by the Assessors but the learned trial Judge overturned the said verdict and found them guilty and they were convicted and sentenced to 9 years imprisonment with a minimum of 7 years before they were eligible for parole.

[4] The Appellants filed a joint notice of appeal on 22nd September 2011 against their conviction and sentence. On 30th September 2013 the 1st Appellant filed amended grounds of appeal.

[5] The amended grounds of appeal of the 1st Appellant are as follows :

- “1. *The learned trial Judge erred in law in misdirecting himself on the issue of possession and failed to consider the principles regarding possession laid down in Filippetti (1978) 13 A Crim R 355 and as such the trial miscarried, causing the conviction to be unsafe.*
2. *The learned trial Judge has misdirected himself in law as he failed to direct himself, that the only actus reus required to constitute possession was that the drug should be physically, in the custody or under the control of the Accused, as a result there was a miscarriage of justice.*
3. *The learned trial Judge misdirected himself in law by not considering that before a person can be said to be in possession of any object he must not only know of its existence, but he must have laid some claim to it or exercised some control over it, as such the trial miscarried.*
4. *The learned trial Judge misdirected himself by equating knowledge with possession and in a joint trial the judge should have considered whether the drugs formed a common pool from which both had right to draw at will thus causing the trial to miscarry.*

5. *The learned trial Judge misdirected himself on section 32 of Illicit Drug Control Act 2004 as there was uncontradicted evidence that the car did not belong to the Accused and that the outside of the vehicle could be accessed by others and as such the conviction was unsafe and miscarriage of justice resulted.*
6. *The learned trial Judge misdirected himself by relying on evidence of an informer who could have placed the drug where it was found and when such an informer was not registered informant and his background was unknown causing a miscarriage of justice.*
7. *The learned trial Judge misdirected himself on the issue of chain of custody or possession as there was no evidence of chain, in the form of exhibit book and diary entries to exclude interception and in particular there was no evidence of what happened to the drugs from 15 November, 2007 to 10 of January, 2008 and as such the trial miscarried.*
8. *The learned trial Judge misdirected himself on the law and erroneously over-ruled the unanimous opinion of the Assessors and more so when the issues before the court were factual in regards to the knowledge and possession thus allowing a miscarriage of justice.*
9. *The learned trial Judge should not have over ruled the Assessors as he had previously tried the Appellant and such he was aware of his conviction, which may have been perceived as reason for over-ruling the Assessors causing miscarriage of justice.*
10. *The learned trial Judge misdirected himself on the onus of the Accused to prove that he is not in possession by not applying the principles laid down in **He Kaw Teh** (1985) 157 CLR 523 thereby causing a miscarriage of justice.*
11. *The learned trial Judge should not have allowed photocopies to be used for replacement of original as the potential for contamination was high and therefore he fell into error, causing miscarriage of justice.*

Appeal Against Sentence

1. *The learned trial Judge misdirected himself on sentence and should have sentenced the Appellant In line with the subsequent guideline judgment and should not have imposed a sentenced of more than 4 years as the sentence imposed was manifestly high.*
2. *The Court of Appeal should correct the sentence which has been shown by the guideline judgment to be incorrect and in any event it was not in accordance with case law on sentencing for similar matters.*
3. *That the learned Judge should have waited for the completion of the second trial before proceeding to sentence and as such he has given the Appellant justifiable grievance.”*

[6] The 2nd Appellant filed an Amended Petition of Appeal on 27th January 2014 wherein the following grounds of appeal were set out:

“Appeal Against Conviction

1. *The learned trial Judge erred in law when he failed to direct the assessors in his summing up on the law concerning ‘Joint Control’ and ‘Possession’.*
 - a. *That as a result of the learned trial Judge’s error your petitioner as a result was prejudiced when the learned trial Judge at paragraph 2 of the Judgment directed himself on his own summing up when he did not concur with the majority not guilty opinion of the assessors.*
2. *The learned trial Judge erred in law and fact when he directed himself in his judgment on the issue of rebuttal evidence against the ‘presumption of possession’ at paragraph 5 in the following manner:*
 - a. *That your petitioner did not proffer any evidence to challenge the presumption of possession;*

b. That your petitioner's bare denials in the caution interview did not meet the threshold of proof required under the balance of probabilities."

Appeal Against Sentence

1. The learned trial Judge erred in law when he sentenced your petitioner to a term of 9 years and non-parole period of 7 years considering the facts of the offending."

[7] Acting on information the Police had stopped a vehicle in Sigatoka town which was driven by the 1st Appellant with the 2nd Appellant as a passenger. When the vehicle was searched 15 newspaper wrapped parcels of dried leaves had been found concealed in the rear bumper of the vehicle. When analysed by the Government Chemist, they were found to be 3764.4 grams of marijuana.

[8] After the prosecution case was closed the Appellants did not give evidence and the Assessors returned a verdict of not guilty.

[9] The learned trial Judge overturned the decision of the Assessors and in his judgment convicted the Appellants and sentenced them to 9 years imprisonment with a non parole period of 7 years.

[10] At the hearing of the applications for leave to appeal Counsel for the Appellants submitted that the grounds of appeal involved questions of law and therefore the Appellants did not require leave to appeal.

[11] Counsel for the Respondent conceded that the grounds of appeal involved questions of law and therefore no leave was required except for ground 9 which required leave.

[12] The Supreme Court in **Simeli Bili Naisua –v- The State** Cr Appeal No.CAV0010 of 2013 – Judgment dated 20th November 2013) discussed in detail the application of Section 21(1)(a), according to which section leave is not required if the proposed grounds of appeal raise ‘a question of law alone’. Having discussed several decisions from England and Fiji, the following conclusion was reached:

*“[14] A summary of these cases show that questions that have been accepted as a point of law alone include causational issue in homicide case, jurisdiction to try an offence, existence of a particular defence, mens rea for a particular offence, construction of a state and defective charge. The list, is not exhaustive. In **Hinds** (1962) 46 Cr App R 327 the English Court of Appeal did not define the phrase ‘a question of law alone’, but suggested that the determination of whether a ground of appeal involves a question of law alone be made on a case by case basis.”*

[13] The above basis can be applied to the grounds of appeal filed by the Appellants in the present case to determine whether the grounds of appeal set out in the respective notices of appeal raise questions of law alone.

[14] The first ground of appeal raised by the 1st Appellant is based on the principles laid down in the case of **Filippeti** (1978) 13 A Crim R 355 which dealt with the aspect of possession. There is no definition of ‘possession’ in The Illicit Drugs Control Act 2004 and the learned trial Judge had in his summing up relied on the definition of ‘possession’ under the Common Law. The definition of ‘possession’ includes the mental element in relation to the offence that the Appellant was charged with. This ground therefore brings about a question of law and no leave is required.

[15] Grounds 2, 3 and 4 also relate to the elements of the offence that the Appellant was charged with and therefore they also give rise to questions of law.

- [16] Ground 5 relates to the interpretation of Section 32 of the Illicit Drug Control Act 2004 and therefore a question of law arises regarding its interpretation.
- [17] Ground 6 deals with the position of an informant and the direction of the learned Judge regarding same which again brings about a question of law.
- [18] Ground 7 relates to the direction of the learned judge regarding the chain of custody of possession of the substance detected and would relate to a question of law.
- [19] Ground 8 is in respect of the direction of the learned trial Judge over-ruling the unanimous opinion of the Assessors. A trial Judge is empowered to over-rule such an opinion by giving cogent reasons and the learned trial Judge has given his reasons for doing so but as to whether such reasons are cogent is a matter that can be looked into by the Full Court and gives rise to a question of law.
- [20] Ground 9 is in respect of bias on the part of the learned trial Judge as he had tried the Appellant in a previous case and convicted him which fact was not brought out during the trial although in an affidavit filed by the Appellant after the conviction he has deposed to the fact that he had instructed his Lawyer to take up that position. This is a ground which again should be considered by the Full Court and leave is granted for same.
- [21] Ground 10 relates to the onus of the Appellant to prove that he is not in possession, and as to whether the caution interview statement would be sufficient for that purpose with the Accused remaining silent at the end of the prosecution case. This brings about a question of law.

- [22] Ground 11 is with reference to the producing of photocopies in place of originals in respect of relevant documents. There had been an objection at the trial, although the 1st Appellant had deposed in his affidavit filed after their conviction that he had not instructed his Counsel to agree to such at the pre trial stage. This is a question of law and no leave is required.
- [23] The grounds of appeal against sentence also give rise to questions of law as they involve a consideration of the judgment in Sulua –v- State [2012] FJCA 33;AAU0093.2008(31 May 2012) which lays down guidelines regarding cases of this nature.
- [24] As regards the 2nd Appellant the grounds of appeal urged on his behalf also give rise to questions of law and they too are on the same lines as the grounds set out by the 1st Appellant and therefore no leave is required.
- [25] As the grounds urged by the Appellants relate to questions of law as set out above no leave is required and the appeals can be dealt with by the Full Court and in respect of ground 9 of the 1st Appellant leave is granted to appeal to the Full Court.

Orders of Court

Leave to appeal is not required except for ground 9 of the 1st Appellant for which ground leave is granted.

Hon. Justice S. Chandra
Resident Justice of Appeal