

**IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION**

CRIMINAL CASE NO: HAC 059/2011

BETWEEN: THE STATE
AND: 1. ISIKELI TAMANI
2. AMENA ARAIBULU

COUNSEL: Mr J Niudamu and Ms R Uce for the State
Mr I Ramanu for the 1st Accused
Mr S Waqainabete for the 2nd accused

Date of Trial: 24-27/09/2013
Date of Summing-Up: 30/09/2013
Date of Judgment: 02/10/2013
Date of Sentence: 04/10/2013

SENTENCE

[1] The Director of Public Prosecution had preferred the following charges against the accused persons above.

FIRST COUNT Statement of Offence

IMPORTATION OF CONTROLLED CHEMICALS: Contrary to Section 6(b) of the Illicit Drugs Control Act, 2004.

Particulars of Offence

ISIKELI TAMANI, on the 6th day of January, 2010, at Suva, in the Central Division, imported into Fiji controlled chemical namely pseudoephedrine hydrochloride weighing approximately 2.680kilograms without lawful authority.

SECOND COUNT

Statement of Offence

AIDING AND ABETTING: contrary to Section 21(c) of the Penal Code, Cap, 17 and Section 6(b) of the Illicit Drugs Act, 2004.

Particulars of Offence

AMENA ARAIBULU, on the 6th day of January, 2010 at Suva in the Central Division, aided and abetted Isikeli Tamani to import into Fiji controlled chemicals namely pseudoephedrine hydrochloride weighing approximately 2.680kilograms without lawful authority.

- [2] After trial on the charges, the accused persons were found guilty to their respective charge. They were convicted accordingly.
- [3] In this case a parcel detected with illicit drugs at Carpenters FEDEX bond at Nadi International Airport. It was properly delivered to Carpenter Shipping Suva under the supervision of custom and the police. The parcel was addressed to Jack Wilson of 77 Malau Place, Vatuwaqa. On 06/01/2010 1st accused and 2nd accused tried to clear the parcel from Carpenters Shipping Bond Yard at Edinburgh Drive Suva. They were arrested by CID Officers. The Drugs which were detected at that time were properly weighed and sealed before it is produced in the court.
- [4] On 06/01/2010 1st accused had gone to Carpenter Shipping in order collect a parcel to be delivered to one Jack Wilson. He appearing himself as Jack Wilson and claimed the parcel from Carpenter Shipping. Due to the timely intervention of officers from Criminal Investigation Department both accused were arrested with the parcel which contained pseudoephedrine hydrochloride a controlled chemical under Illicit Drugs Act, 2004.
- [5] 2nd accused knowing Isikeli Tamani is not Jack Wilson assisted Isikeli Tamani to clear the parcel. He did not inform this to either police or custom officers. He showed

Isikeli Tamani as Jack Wilson to Carpenter Shipping and the customs. He had tried to bribe an employee of the Carpenter Shipping and a custom officer.

- [6] Australian Government National Measurement Institute submitted a report confirming both samples contains pseudoephedrine. This chemical can be used to produce mind altering drugs.
- [7] The evidence led by the prosecution revealed the offence was a well planned and organized.
- [8] As Section 6 (b) of the Illicit Drugs Control Act, 2004 the maximum sentence is a fine not exceeding \$1,000, 000.00 or life imprisonment or both.

Tariffs

- [9] In the case of **Wong v R [2001] HAC 64; CLR 584; 185 ALR 233; 76 ALJR 79 (15 November 2001)** the High Court of Australia stated at paragraph 64:
“In general, however, the larger the importations, the higher the offender’s level of participation, the greater the offender’s knowledge, the greater the reward the offender hoped to receive, the heavier the punishment that would ordinarily be exacted. It is by these kinds of criteria that the comparisons are to be made between examples of the offence and the sentences that are or were imposed”.
- [10] A case which involved importation offences under the Illicit Drugs Control Act 2004 was **State v Bravo FJHC 172; HAC 145.2007L (12 August 2008)**, where the Court imposed a sentence of 8 years imprisonment for importing 2kg of cocaine (73.1% purity) on a 46 year old woman, after trial. She appealed her sentence to Court of Appeal. In refusing leave to Appeal, Poweell JA said at paragraph 11:
“Not only would an appeal be bound to fail there would be a real risk that a cross-appeal on sentence would see the sentence increased”.
(**Bravo v State FJCA 72; AAU0094.2008S (5 November 2008)**)
- [11] In **State v Muskhan Balagan-Sentence [2013] FJHC 1147; HAC049.11 (4 June 2012)**, Justice Goundar at paragraph 17 of his sentence stated:
“When sentencing drug-smugglers, regard must be made to the circumstances that exist in Fiji. Fiji does not have a sophisticated intelligence service to detect drug-

smuggling. Our boarder security measures are not apt to deal with sophisticated drug-smuggling. Unless there is a tip off, it is easy to sneak in and out, hard drugs. In all cases, the hard drugs were for the overseas market. So Fiji just being used by drug-smugglers as a transit point for the reason I have mentioned. Any punishment for dealing in hard drugs must therefore reflect the vulnerability of Fiji becoming a hub for the international drug-smugglers”

[12] In **Aramah (1983) 76 Cr.App.R.190** the English Court of Appeal remarked that the good character of a courier, as he usually was, is less importance than the good character of an accused in other cases. The Court took the view that drug smuggling organizers deliberately recruit persons who will exercise the sympathy of the court. The point the court makes is that the personal circumstances of an accused are secondary because of the deterrent elements to sentence imposed in respect of drug-smuggling offences.

[13] The 1st accused is 50 years of age a divorcee and has three children. He is declared as a quadriplegic, which is permanent. He needs 24 hours attendance, given the fact that he has no bowel control and needs to turn around.

[14] 2nd accused is 36 years old and the sole bread winner of the family. He is married has two children. He is the first offender.

[15] In **O’Keefe v State [2007] FJHC: 34** the Fiji Court of Appeal held that the following principle of sentencing:

“When sentencing in individual cases, the court must strike a balance between the seriousness of the offence as reflected in the maximum sentence available under the law and the seriousness of the actual acts of the person”

[16] I have carefully considered these submissions in light of the provisions of the Sentencing and Penalties Decree No: 42 of 2009 especially those of the sections set out below in order to determine the appropriate sentence.

[17] Section 15(3) of the Sentencing Decree provides that:
“as a general principle of sentencing, a court may not impose a more serious sentence unless it is satisfied that a lesser or alternative sentence will not meet the objectives of sentencing stated in Section 4, and sentence of imprisonment should be regarded as the sanction of last resort taking into account all matters stated in the General Sentencing Provisions of the decree”.

[18] The objectives of sentencing, as found in Section 4(1) of the Decree, are as follows:

1. To punish offenders to an extent and a manner, which is just in all the circumstances;
2. To protect the community from offenders;
3. To deter offenders or other persons from committing offences of the same or similar nature;
4. To establish conditions so that rehabilitation of offenders may be promoted or facilitated;
5. To signify that the court and the community denounce the commission of such offences; or
6. Any combination of these purposes.

[19] Section 4(2) of the Decree further provides that in sentencing offenders, a Court must have regarded to:

- (a) The maximum penalty prescribed for the offence;
- (b) Current sentencing practice and the terms of any applicable and guideline Judgments;
- (c) The nature and gravity of the particular offence;
- (d) The defender's culpability and degree of responsibility for the offence;
- (e) The impact of the offence on any victim of the offence and the injury, loss or damage resulting from the offence;
- (f) Whether the offender pleaded guilty to the offence, and if so, the stage in the proceedings at which the offender did so or indicated an intention to do so;

[20] Now I consider the aggravating factors in this case:

1. The offence was committed with a high degree of planning and sophistication.
2. The trafficking from one country to another without detection and the purpose for importing being purely commercial.
3. The substantial amount of controlled drugs being imported is a significant amount.(total 2.680kg)
4. The 1st accused being the principal offender committed the offence despite his medical condition as being confined to a wheel chair.
5. Total disrespect to the law put in place to protect our travel borders against such activities.

- [21] Now I consider the mitigating circumstances of 1st accused:
1. 1st accused is 50 years old, and a divorcee.
 2. He has two children.
 3. He has medical complications.
 4. His medical condition is deteriorating day by day.
 5. He needs 24 hours attention.
 6. He is declared as quadriplegic which is permanent.
- [22] Now I consider the mitigating circumstances of 2nd accused:
1. 2nd accused is 36 years old.
 2. He has been terminated from work.
 3. He has two children.
 4. He is a first offender.
 5. He is the sole breadwinner of the family.
- [23] Considering all aggravated and mitigating circumstances of 1st accused I take 08 years imprisonment as the starting point. I add 02 years for aggravating factors to reach the period of imprisonment at 10 years. I deduct 02 years for the mitigating factors.
- [24] Considering all aggravated and mitigating circumstances of 2nd accused I take 08 years imprisonment as the starting point. I add 02 years for aggravating factors to reach the period of imprisonment at 10 years. I deduct 02 years for the mitigating factors.
- [25] Each of you is sentenced to 08 years imprisonment.
- [26] Counsel for the 1st accused request from this court to consider medical condition of 1st accused and the problems that the Prison Authority will encounter if he is sent to prison. The offence committed is very serious and well planned. Had this controlled chemical fallen into wrong hands there would be a calamity in the peaceful Fiji society.
- [27] Considering all and acting in terms of Section 18(1) of the Sentencing and Penalties Decree, I impose 06 years as non-parole period against 2nd accused. I am not imposing a non-parole period against 1st accused.

[28] 30 days to appeal.

P Kumararatnam

JUDGE

At Suva

04/10/ 2013