

IN THE HIGH COURT OF FIJI
CRIMINAL JURISDICTION
AT LAUTOKA

CRIMINAL CASE: HAC 126 OF 2015

BETWEEN : STATE

AND : 1. JOSEPH NAYEF ABOURIZK
2. JOSESE MURIWAQA

Counsel : Mr Semi Babitu for Prosecution
Mr. M. Thangaraj S.C., with Mr. Iqbal Khan and Mr
Warwick Korn for 1st Accused
Mr. Mark Anthony for 2nd Accused

Date of Hearing : 11th of April 2016 to 15th of April 2016

Date of Closing Submissions : 15th of April 2016

Date of Legal Submissions : 15th and 19th of April 2016

Date of Summing Up : 20th of April 2016

Date of Judgment : 22nd of April 2016

Date of Sentence : 29th of April 2016

SENTENCE

1. Mr. Joseph Abourizk and Mr. Josese Muriwaqa, stand convict for one count of Unlawful Possession of Illicit Drugs, contrary to Section 5 (a) of the Illicit Drugs Control Act 2004,

which carries a maximum penalty of life imprisonment or a fine not exceeding \$ 1,000,000 or both.

2. Having considered the evidence presented by the prosecution and the defence, the court found both of you guilty for this offence of Unlawful Possession of Illicit Drugs and convicted accordingly.
3. It was proved by the prosecution that both of you were found in possession of 49.9 kilograms of Cocaine at a remote location close to Vuda Point, Lautoka on the 13th of July 2015. The drugs were packed in 34 parcels wrapped with plastic wrappers and masking tapes. They were found inside a travelling bag and a suitcase. The traveling bag and the suitcase were in the vehicle bearing the registration number HM 046, which was under both of your control. According to the Analysis Report of the drugs, it was proved that seventeen (17) parcels contain 76% of purity, three (3) parcels contain 62% of purity and fourteen (14) parcels contain 54% of purity.
4. Cocaine is a highly addictive central nervous system stimulant, extracted from the leaves of the coca plant. United Nations Office of Drugs and Crimes in its report on "*Terminology and Information of Drugs*" has stated that the use of Cocaine consists myriad of adverse and negative effects, both personally and socially, short and long term and also physically and psychologically.
5. Justice Gounder in **State v Balaggan (2012) FJHC 1147;HAC049.11 (4 June 2012)** has emphasised the nature and the effect of Cocaine in an inclusive manner, where his lordship found that:

"In the drugs world, cocaine is classified as the "rich man's speed". Cocaine is administered either by snorting or injecting. In R v Farlane [1992] 3 NZLR 424, Cooke P in delivering the judgment of the New Court of Appeal stated the effects of cocaine use at p.426:

"An effect of the drug is rapid and intense but short-lived euphoria, which may be followed by a 'crack' with severe depressions and paranoia. In turn a craving for and psychological dependence on the drug may arise. Regular users face increased risks of heart attacks and strokes from bleeding into the brain resulting from high blood pressure. Among pregnant woman who use cocaine there is a high incidence of miscarriages and their babies may have cocaine related disorders. Hallucinations, as of insects crawling under the skin, occur in heavy users."

Further on at p.426, Cooke P went on to say:

"Addicts spend heavily to obtain their weekly supplies and sometimes are driven to crime to support their habit. The high profits also attract criminal elements....In addition to the social dangers of increased cocaine use, there is the cost to the community of detection and enforcement measures."

6. In view of the significantly large quantity of the drugs found in possession of the accused persons, it appears that the drugs were not for their personal recreational purpose. It is obvious that it was not for the local market as Fiji is still not considered as a viable market for such illicit drugs. Fiji is not producing or manufacturing Cocaine. Hence it appears that this large amount of Cocaine was in transit from a foreign destination to another foreign destination.
7. It is alarming to note that at present, the South Pacific Region including Fiji has been dramatically exposed to the phenomenon of illegal movements of precursor chemicals, hard narcotic drugs such as Cocaine and amphetamine type stimulants (ATS) in a frightening manner causing an unprecedented and destructive threat, both domestically and regionally.
8. Justice Gounder in **State v Balaggan (supra)** held that;

"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 is just being used by the drug-smugglers as a transit point for the reasons 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”.

9. The geographical location, small populations, lack of sophisticated technology in Fiji facilitates the drug barons and transnational criminals to utilise this part of the globe as a transit hub in the process of transportation and trafficking of illegal substance.
10. Apart from the risk of becoming a transit hub for the drug smugglers, the escalating infiltration of such illicit drugs in to the country undoubtedly creates a risk of spilling it over to the local market. The clam and peaceful population in this South Pacific Archipelago has not exposed to the use of hard psychotropic substance such as Cocaine. If such drugs spill over into the local market, that could undoubtedly create an unprecedented socio-economic and cultural desolation.
11. As Justice Gounder emphasised in Balaggan (supra), it is the duty of the Judiciary in sentencing process to contribute constructively and effectively to prevent offenders of this nature in repeating such crimes or deterring offenders and other persons from committing offences in this nature in Fiji before it becomes a complicated social disarray. Therefore, it is a judicial responsibility in sentencing offenders of this nature to demonstrate that the society denounces and condemns this type of offending without any reservation.
12. Having considered the reasons discussed above, and the Section 4(1) of the Sentencing and Penalties Decree, the main purpose of sentencing of these two offenders is founded on the principle of deterrence and protection of the community. I am mindful of the principle of rehabilitation, however, it is my opinion that the need of deterrence outweighs the principle of rehabilitation.

13. Justice Temo in Kini Sulua and Michael Ashley Chandra v The State (2012) FJCA 33; AAU0093.2008 (31 May 2012) has expounded a guideline of tariff for the offences under section 5(a) and 5 (b) of the Illicit Drugs Control Act, where his lordship held that;

“Category 1: possession of 0 to 100 grams of cannabis sativa - a non-custodial sentence to be given, for example, fines, community service, counselling, discharge with a strong warning, etc. Only in the worst cases, should a suspended prison sentence or a short sharp prison sentence be considered.

Category 2: possession of 100 to 1,000 gram of cannabis sativa. Tariff should be a sentence between 1 to 3 years imprisonment, with those possessing below 500 grams, being sentenced to less than 2 years, and those possessing more than 500 grams, be sentenced to more than 2 years imprisonment.

Category 3: possessing 1,000 to 4,000 grams of cannabis sativa. Tariff should be a sentence between 3 to 7 years, with those possessing less than 2,500 grams, be sentenced to less than 4 years imprisonment, and those possessing more than 2,500 grams, be sentenced to more than 4 years.

Category 4: possessing 4,000 grams and above of cannabis sativa. Tariff should be a sentence between 7 to 14 years imprisonment”.

14. Justice Gounder in **State v Balaggan (supra)** selected 10 years as a starting point for the offences of Attempt to Export and Unlawful Possession of 521.6 g of pure Cocaine. Justice Gounder in **State v Graciela Bravo (HAC 145 of 2007L)** has imposed an imprisonment period of eight years for Unlawful Possession of Illicit Drugs, namely Cocaine. Justice Thurairaja in **State v Roshini Lata (HAC 83 of 2010)** has found 17 years as the starting point for Unlawful Possession of 1990.4 grams of Cocaine.
15. Bearing in mind the above mentioned sentencing approaches, I now turn on to discuss the level of culpability and harm of this offence in order to determine the starting point. I do

not find any distinction between the roles played by the first and second accused persons in assessing the level of culpability and harm. It was proved that both of them acted in concert and found in joint possession of these illicit drugs.

16. The prosecution proved that the two accused persons had transported these drugs in their vehicle HM 046 along the Queen's highway from the direction of Lautoka City and stopped at a remote location close to Vuda Point, Lautoka. There is no other evidence to determine the level of involvement of the two accused persons in handling or transportation of these drugs. Hence, I find that they have performed the role of carriers or drug mules.
17. However, the quantity found in their possession was significantly higher than that of the quantity of drugs found in the cases of **Balaggan (supra)** , **Bravo (supra)** and **Roshini Lata (supra)**. Therefore the level of harm in this offence is remarkably high. Hence, it is perceptible that the starting point of this instant case is needed to be higher than that of the above discussed sentencing precedents. Therefore, it is my view that the starting point must be closer to the higher end of the tariff set down in **Sulua (supra)**. I accordingly select 13 years as the starting point.
18. The drugs were concealed in wrapped parcels and packed inside a bag and a suitcase. The bag and the suitcase had then placed among few other suitcases in the boot of the vehicle HM 046. In view of the manner in which the drugs were concealed, it appears that this is a calculatedly planned concealment of drugs in order to avoid the detection or attention of law enforcement authorities.
19. You both had no respect and regard to the law and order of this county. Mr. Abourizk, you entered into this county pretending as a tourist visiting Fiji. On that ground you were allowed and welcomed by this country. Having committed this crime, you have breached the guest and host relationship, the trust and the friendliness extended to you by this country as a visitor.
20. Mr. Muriwaqa, you failed to discharge your responsibility as a citizen of this country. You have breached the trust reposed in you by your own fellow countrymen and by dragging the

lives of your own kith and kin into danger by committing this heinous and disgraceful crime. In committing this crime, both of you have risked the lives of the people and the country in exposing them to the venomous and sinister consequences of infiltration of illicit drugs in to the country. I consider these factors as aggravating circumstances of this offence.

21. I now turn onto the mitigation submissions filed by the learned counsel of the first and second accused persons.
22. Mr. Josep Abourizk, I consider following grounds for your mitigation, that you are;
 - i) 30 years old,
 - ii) Married with one child,
 - iii) The sole financial supporter to your young family, to your mother and to your two young siblings,
 - iv) First offender,
 - v) Ten (10) months in remand custody since 13th of July 2015,
23. Mr. Josese Muriwaqa, I consider following factors for your mitigation, that you are;
 - i) 50 years old,
 - ii) Father of four children,
 - iii) First offender,
 - iv) Financially support your four children,

v) Ten (10) months in remand custody since 13th of July 2015,

24. The learned counsel of the both accused persons emphasised the ground of good character of the two accused persons. The learned counsel for the first accused person tendered two character references of Mr. Abourizk. Both learned counsel submitted that the family background and the good character of the two accused persons must be considered as a strong mitigatory factor in favour of them.

25. However, Justice Gounder in **State v Balaggan** found otherwise, where his lordship found that;

“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 of 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 element to sentences imposed in respect of drug-smuggling offences”

26. Hon Chief Justice Gate in Raj v State [2014] FJSC 12; CAV0003.2014 (20 August 2014) held that the accused person’s responsibility towards his family has little mitigatory value.

27. Having been guided by the above mentioned sentencing precedents, it is my opinion that the good character and family circumstances of the offenders in this nature carries less mitigatory value.

28. Having considered the aggravating factors as discussed above, I increase three years to reach 16 years of interim imprisonment period for each of you. I do not find significant difference between the mitigatory factors of the first accused person and the second accused person. Both of you have relied on the grounds of good character and family circumstances. I accordingly reduce two (2) year for the above mentioned mitigatory

factors and for the time that both of you spent in remand custody prior to this sentencing. I now reach to a final sentence of fourteen (14) years' imprisonment period for each of you.

29. Having considered the purpose of this sentencing, that is founded on the principle of deference and protection of the community from the offenders of this nature, I find that twelve (12) years of non-parole period would serve the said purpose while preserving the opportunity for the accused persons to rehabilitate themselves as law abiding individuals.
30. Mr. Joseph Abourizk, I now sentence you for a period of fourteen (14) years' of imprisonment for the offence of Unlawful Possession of Illicit Drugs contrary to Section 5(a) of the Illicit Drugs Control Act 2004. You are not eligible for parole for a period of twelve (12) years pursuant to Section 18 (1) of the Sentencing and Penalties Decree 2009.
31. Mr. Josese Muriwaqa, I now sentence you for a period of fourteen (14) years of imprisonment for the offence of Unlawful Possession of Illicit Drugs contrary to Section 5(a) of the Illicit Drugs Control Act 2004. You are not eligible for parole for a period of twelve (12) years pursuant to Section 18 (1) of the Sentencing and Penalties Decree 2009.
32. Thirty (30) days of appeal to the Fiji Court of Appeal.



At Lautoka

22nd April 2016

R. D. R. Thushara Rajasinghe

Judge

Solicitors : Office of the Director of Public Prosecutions
Messrs Iqbal Khan and Associates for the First Accused person
Messrs Tuifagalele Legal for the Second Accused person