IN THE HIGH COURT OF FIJI
AT LABASA
APPELLATE JURISDICTION

Criminal Appeal No. HAA 02 of 2016

EMORI DRALOMANI

Appellant

V

STATE

Respondent

Counsels : Mr. A. Paka (L.A.C.) for the Appellant
Ms. W. Elo for the State.

Dates of Hearing : 27 April, 5 and 24 May 2016
Date of Judgment : 26 May 2016

JUDGMENT

[1] On the 24th February 2016 in the Magistrates' Court at Savusavu the Appellant was convicted of the offence of unlawfully cultivating illicit drugs and sentenced to a term of imprisonment of 3 years and 10 months with a minimum term to be served of three years.

[2] The accused was unrepresented at trial and now appeals his conviction and sentence.

[3] The Appellant filed homemade grounds of appeal in time but now being represented, his counsel has filed amended grounds of appeal and filed written submissions in support of those grounds.

[4] The State has filed submissions in reply.

[5] The brief facts of the case are that on the 12th January 2016, the Police, acting on information, raided the Appellant's farm in Natewa, Cakaudrove. He voluntarily took the Police to where he was cultivating 9 plants in an isolated area on that farm. The plants were uprooted and taken as exhibits to Savusavu Police Station. The appellant admitted in interview that he had planted 9 plants of marijuana and admitted that he knew it was an offence to cultivate illicit drugs.

[6] In the Magistrates Court the Appellant admitted a plea of guilty to the following charge:

Statement of Offence

Unlawful Cultivation of Illicit Drugs: Contrary to section 5 (a) of the Illicit Drug Control Act 2004.

Particulars of Offence

Emori Dralomani, on the 12th day of January 2016 at Drekeniwai, Cakaudrove in the Northern Division, cultivated 9 plants of Indian hemp weighing 1.29kg an illicit drug without lawful authority.

[7] The amended grounds of appeal filed by counsel are as follows:

Against Conviction

1. That the learned Magistrate erred in law when he accepted the unrepresented appellant's plea on a defective charge and admission of (sic) Summary of Facts that made no reference to the Illicit Drugs Control Act 2004.

2. That the learned Magistrate erred in law and in fact when he convicted the Appellant on the ambiguous Summary of Facts with no evidence before him as to whether the plants seized was (sic) prohibited under the Illicit Drugs Control Act 2004, a crucial element of the offence.

Against Sentence

1. That the Magistrate erred in law and in fact when he sentenced the accused on Category 3 as per ***Sulua v State*** [2012] FJCA 33; AAU 0093.2008, when the Summary of Facts did not evidentially support the charge as to the weight of the substance.

The Trial

[8] At trial the charge was put to the unrepresented accused who confirmed he understood it and he entered a plea of guilty. He confirmed that his plea was voluntary. The Summary of Facts was read to him and he admitted them. He was thereupon convicted and sentenced in accordance with the tariff (Category 3) laid down by the Court of Appeal in ***Sulua*** *(supra).*

First ground of appeal against conviction

[9] In his written submissions Mr. Paka submits that the plant "Indian Hemp" is not listed as an Illicit Drug in the Schedule to the Illicit Drugs Control Act (2004) ("the Act") and that the charge is therefore deficient because it lacks an essential ingredient of the offence.

Second ground of appeal against conviction

[10] In respect of the second ground of appeal Mr. Paka submits that there was no evidence before the Magistrate to prove that the material seized was in fact an illicit drug. The caution interview was not called for, in which the appellant admitted to be cultivating "9 plants of green leaves". The Summary of Facts stated that the Police Officers **believed** the plants to be marijuana (emphasis added) and they were taken to Savusavu Police Station. Counsel adds that there was no chemist's evidence as to the nature of the plants and that as a result the summary of facts disclose no crime.

Appeal against Sentence

[11] By way of extension to his submissions on Ground 2, Counsel argues that the learned Magistrate had no proven evidence to show that the weight of the marijuana (if indeed it was such) was of the weight specified in the charge and he therefore had no reason to cast his sentence in accordance with the third category referenced in ***Sulua*** *(supra).*

[12] Counsel for the State defends the appellant's first ground of appeal against conviction, but concedes the second ground against conviction and the ground against sentence.

Discussion

[13] It has long been accepted that India Hemp, Cannabis and marijuana are one and the same thing. The various versions of the Oxford English Dictionary define them as such and the Appellate Courts of this country have abided by that definition. (***Skipper*** [1979] FJCA 6 CA 70 of 78: ***Sulua*** *(supra)*: ***Prasad*** [2002] FJCA85).

[14] In any event the substances Cannabis fruit, cannabis plant, cannabis seed and cannabis oil are all illicit drugs mentioned in Part 8 of the Schedule to the Act.

[14] The first ground of Appeal has no merit.

[15] A scrutiny of the record of proceedings below does not show that any evidence was adduced before the Court of analysis of the material seized from the accused. He admitted in his caution interview that they were green plants and the Summary of Facts states that the Police **believed** then to be marijuana. It would appear that they, or samples from them were not sent to the Government Chemist. It would appear therefore that the appellant may well have had a defence to the charge and his plea of guilty should not have been accepted.

[16] When an accused person is unrepresented whether by his own wish or not, a tribunal must take careful steps to see that he is not penalized by his lack of representation.

[17] As long ago as 1916 Lord Reading LCJ said this in ***Li Kuen v R*** (1916)11 Crim App R 29;

".....the trial of a person for a Criminal offence is not a contest of private interests in which the rights of the parties can be waived at pleasure. The prosecution of criminals and the administration of the criminal law are matters which concern the State. Every citizen has an interest in seeing that persons are not convicted of crimes and do not forfeit life or liberty except when tried under the safe guards so carefully provided by the law"

[18] And in Fiji in ***Iro v R*** 1966 FJCA 6 it was said:

"in our view there is a duty cast on the trial Judge in cases where the accused person is unrepresented to exercise the greatest vigilance with the object of ensuring that before a plea of guilty is accepted the accused person should fully comprehend exactly what the plea of guilty involves."

[19] In the present case then, there is no proof before the Court that the green plants were in fact an illicit drug and there was no proof that they did indeed weigh 1.29 kg. Without the Government Chemist's involvement the plants must have been weighed by the Savusavu Police.

[20] This second ground of appeal must succeed. The lassitude on the part of the Savusavu Police and the lapse of the Magistrate in not adequately protecting an unrepresented accused has lead to an injustice.

[21] The appeal against sentence must similarly succeed. There is no basis for the Magistrate to sentence the appellant on an uncertified weight of an uncertified nature of material seized. It cannot be certain that the weight of green leaves (whatever they are) is correct.

[22] The appeal against sentence succeeds.

[23] It is axiomatic that any case involving possession cultivation or any dealing in illicit drugs must be predicated on a Chemist's certificate detailing the nature of the drug and the weight of the drug and any case without such certification will inevitably result in injustice. This of course applies to both pleas of guilty as well as trials.

[24] Judicial Officers are once more reminded of the need to protect unrepresented accused persons and to call for and examine all relevant documents on their behalf to determine that they are not being deprived of an available defence. And what better defence to an illicit drug charge than that the nature and quantity of the material in question has not been certified?

[25] In the premises the conviction cannot stand. There has been a clear miscarriage of justice and an unrepresented accused who was eager to surrender to what he perceived to be inevitable has been denied an indomitable defence.

[26] This conviction is quashed and the sentence set aside.

[27] Given the 4 months since the plants were seized and the uncertainty as to their whereabouts and security in that time, it would be unfair to order a retrial. No such order is made.

P.K. Madigan

Judge

At Labasa

26 May 2016