

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 247 OF 2016S

STATE

vs

SERA VAKULA

Counsels : Mr. T. Qalinauci for State
Ms. L. David for Accused
Hearing : 9 September, 2016
Judgment : 11 August, 2017

JUDGMENT

1. On 9 September 2016, in the presence of her counsel, the following information was put to the accused:

Statement of Offence

UNLAWFUL IMPORTATION OF ILLICIT DRUGS: Contrary to section 4(1) of the Illicit Drugs Control Act 2004.

Particulars of Offence

SERA VAKULA on the 16th day of December 2015 at Suva in the Central Division, without lawful authority imported an illicit drug namely Methamphetamine, weighing 27.4 grams.

2. The information was read and explained to the accused. She said, she understood the same. She pleaded not guilty to the same. A preliminary question arose to be decided, that is, where should the case be tried? Should it be tried in the Magistrate Court or should it be tried in the High Court? Offences in the Illicit Drugs Control Act 2004 are neither indictable nor summary, thus are triable in either courts, by virtue of section 5 (1) and (2) of the Criminal Procedure Act

2009. The Court invited counsels for the parties to make submissions on the same. They have submitted very helpful submissions which had assisted the court in making its decision.

3. Methamphetamine as an illicit drug, is new to Fiji. Cannabis sativa drugs is common in Fiji. Cocaine and heroine had also made its appearance in Fiji. Fiji is part of the world, and the drug problems in the other parts of the world will come to Fiji, and our criminal justice system must respond accordingly. In Kini Sulua, Michael Ashley Chandra v State [2012], Fiji Law Report, Volume 2, pages 111 to 147, the majority in the Court of Appeal devised a way of resolving the cannabis sativa drug problem in Fiji by devising four categories. Categories 1 to 3 involved cannabis sativa drugs from 0 grams to 4 kilograms, and these were triable in the Magistrate Courts. Category 4 involved cannabis sativa drugs over 4 kilograms, and these were triable in the High Courts. In terms of jurisdiction, the above enabled the courts to deal with the cannabis sativa drugs problems in a manageable way in the courts. The above must also be applied to methamphetamine.
4. Mr. T. Qalinauci had referred the court to the New Zealand Court of Appeal decision in R v Fatu [2006] 2 NZLR, 72 to 86. The headnotes to the case were as follows:

"...Fatu appealed against sentences imposed by the High Court following guilty pleas to charges of manufacturing and supplying methamphetamine, conspiring to manufacture methamphetamine, wilful neglect of children and receiving stolen property. Fatu's offending occurred both before and after the May 2003 reclassification of methamphetamine from a class B to a class A controlled drug. Police search Fatu's residence and located precursor chemicals, equipment and manufacturing materials, together with stolen property worth over \$20,000. Fatu was charged in connection with the substances and stolen property, and was released on bail. While he was on bail, Fatu's premises were again searched and further evidence of the manufacture of methamphetamine was gathered. Fatu's offending extended over more than seven months. The High Court imposed concurrent sentences, the lengthiest of which was nine years for manufacturing methamphetamine after it was reclassified as a class A drug, discounting from a starting point of eleven years..."

The New Zealand Court of Appeal dismissed Fatu's appeal.

5. In R v Fatu (supra), the menace of methamphetamine to New Zealand Society and how the Courts had approached sentencing was thoroughly discussed. The State's concerns were recorded as follows:

"Methamphetamine abuse can fairly be characterised as the most serious drug problem the country faces at present. The various ways in which the drug threatens the community are well-known. Methamphetamine is a particularly destructive drug for users; it is highly addictive with profound mental and physical side-effects. It induces aggressive and irrational behaviour, and is regularly responsible for other offending involving extreme violence, a phenomenon not commonly associated with other drugs. It has created a thriving industry, in which organised crime is heavily involved at all levels. The manufacturing process is particularly dangerous. It is submitted, with respect, that if it is appropriate to draw any distinction between Class A drugs, methamphetamine can fairly lay claim to a place in the most serious category."

6. The New Zealand Court of Appeal came up with the following sentence guidelines after much discussion on previous New Zealand sentencing guidelines. For cases involving the sale or supply of methamphetamine, the sentence guideline were as follows:

- "...(a) Band one – low-level supply (less than 5 g) – two years' to four years' imprisonment.
- (b) Band two – supplying commercial quantities (5 g to 250 g) – three years' to nine years' imprisonment.
- (c) Band three – supplying large commercial quantities (250 g to 500 g) – eight years' to 11 years' imprisonment.
- (d) Band four – supplying very large commercial quantities (500 g or more) – ten years' to life imprisonment.

We emphasise that these are starting points, before taking into account aggravating and mitigating factors relating to the offender (as opposed to the offending). We also note that supply in small quantities where there is no commerciality and no other aggravating features may call for starting points less than those indicated as appropriate for band one..." (page 80)

7. In cases involving the importation of methamphetamine, the sentence guidelines were as follows:

- "...(a) Band one – low level importing (less than 5 g) – two years six months' to four years six months' imprisonment.
- (b) Band two – importing commercial quantities (5 g to 250 g) – three

years six months' to ten years' imprisonment.

- (c) Band three – importing large commercial quantities (250 g to 500 g)
– nine years' to 13 years' imprisonment.
- (d) Band four – importing very large commercial quantities (500 g or more)
– 12 years' to life imprisonment.

As indicated, in cases where small quantities of methamphetamine have been imported for personal consumption, it is open to sentencing Judges to treat band one as not applicable. We emphasise that these bands are otherwise applicable to all who import methamphetamine, including those whose roles are as "mules". Obviously the more significant the role of the offender in any importation, the closer the appropriate sentence will be to the top end of the relevant sentencing band..." (page 81)

8. In cases involving the manufacturing of methamphetamine, the sentence guidelines were as follows:

- "...(a) Band one – not applicable for reasons given in para [42].
- (b) Band two – manufacturing up to 250 g – four years' to 11 years' imprisonment.
- (c) Band three – manufacturing large commercial quantities (250 g to 500 g) – ten years' to 15 years' imprisonment.
- (d) Band four – manufacturing very large commercial quantities (500 g or more) – 13 years' to life imprisonment.

The sentence imposed must reflect not only the quantity of the drug involved, but also the role of the particular offender in the manufacturing ring in question..." (page 82)

9. In this case, the accused was charged with "unlawful importation of illicit drugs", contrary to Section 4 (1) of the Illicit Drugs Control Act 2004. Section 4 of the 2004 Act reads as follows:

- "(1) Any person who without lawful authority (proof of which lies upon that person) imports or exports an illicit drug commits an offence and is liable upon conviction to a fine not exceeding \$1 million or to imprisonment for life or both.
- (2) In any proceedings under this Part, proof of lawful authority lies upon the accused person."

10. In Fiji, most illicit drug offences, are often charged under section 5 (a) or 5 (b) of the Illicit Drugs Control Act 2004. Section 5 of the 2004 Act reads as follows:

"Any person who, without lawful authority –

- (a) Acquires, supplies, possesses, produces, manufactures, cultivates, uses or administers an illicit drug; or
- (b) Engages in any dealings with any other person for the transfer, transport, supply, use, manufacture, offer, sale, import or export of an illicit drug

commits an offence and is liable on conviction to a fine not exceeding \$1 million or imprisonment for life or both."

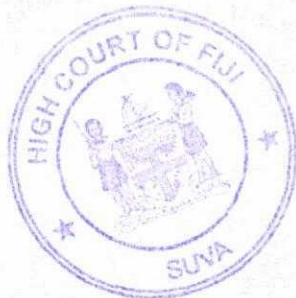
11. In interpreting Section 5 (a) of the Illicit Drugs Control Act 2004, the majority in Kini Sulua, Michael Ashley Chandra v State (supra), said the following:

Section 5(a) of the Illicit Drugs Control Act 2004 treated the verbs "*acquires, supplies, possesses, produces, manufactures, cultivates, uses or administers an illicit drug*" equally. All the verbs are treated equally. In other words, all the offending verbs or offending actions are treated equally. "*Supplies, possesses, manufactures and cultivates*" are treated equally, and none of the offending actions are given any higher or lower standing, as far as s 5(a) of the Illicit Drugs Control Act 2004 was concerned. It follows that the penalties applicable to possession, must also apply to the offending verbs of "acquire, supplies, produces, manufactures, cultivates, uses or administers". That is the will of Parliament, as expressed in the words of s 5(a) of the Illicit Drugs Control Act 2004. Consequently, the four categories mentioned above, apply to each of the verbs mentioned in s 5(a) of the 2004 Act mentioned above. The weight of the particular illicit drug will determine which category the case falls under, and the applicable penalty that will apply. It is also suggested that, the application of the four categories mentioned in paragraph 115 hereof to s 5(a) of the Illicit Drugs Control Act 2004, be extended to the offending verbs or offending actions in s 5(b) of the Illicit Drugs Control Act 2004. This will introduce some measure of consistency in how sentences are passed for offending against s 5(a) and 5(b) of the Illicit Drugs Control Act 2004. This will

enhance the objective and purpose of the 2004 Act, as highlighted in paragraph 111 hereof.”

12. In R v Fatu (supra), the New Zealand Court of Appeal said the guidelines mentioned in paragraphs 6, 7 and 8 hereof, apply only to offending involving methamphetamine. Both counsel for the State and the accused in this case appear to be submitting that, we follow the sentencing guidelines laid down in R v Fatu (supra), pending a review of the same by the Fiji Court of Appeal and/or the Supreme Court of Fiji in the future. I agree with both counsels. In State v Ainars Kreimanis, Criminal Case No. HAC 225 of 2011L, High Court, Lautoka, His Lordship Mr. Justice S. De Silva, on 15 October 2013, said, there was no tariff for possession of methamphetamines in Fiji. In that case, His Lordship sentenced the accused to 13 years imprisonment, with a non-parole period of 12 years, for possessing 5.6 kilogrammes of methamphetamine.
13. In my view, given the above, as an interim measure, we need to adopt the sentencing guidelines expounded in R v Fatu (supra) above. Methamphetamine, as an illicit drug, is new to Fiji. However, the New Zealand courts had been dealing with this problem for a while, and it was only fair in the public interest, that we learn from their experience and adopt their sentencing guidelines in Fiji, pending a review in the future by our Superior Courts.
14. In terms of the allocation of work between the Magistrate Courts and High Courts, all Band One, Band Two and Band Three cases in paragraphs 6, 7 and 8 hereof are to be tried in the Magistrate Court, with liberty to send the cases to the High Court for sentencing if a sentence of more than 10 years imprisonment is required. Band One, Band Two and Band Three cases are subject to appeals and reviews in the High Court. All Band Four cases in paragraphs 6, 7 and 8 hereof are triable in the High Courts. For offendings in methamphetamines that are covered in the verbs or offending actions in sections 4, 5 and 6 of the Illicit Drugs Control Act 2004, but are not covered in the guidelines mentioned in R v Fatu (supra), the courts in Fiji are at liberty to use a guideline from R v Fatu (supra) that meets the justice of the case.
15. Given the above, the methamphetamine in this case being 27.4 grams, it falls in Band Two of the guidelines mentioned in paragraphs 6, 7 and 8 hereof. The case therefore ought to be tried in the Magistrate Court. I therefore remit this matter to the Suva Magistrate Court before the Chief Magistrate to decide which court to try the matter.

16. Adjourned to the Suva Magistrate Court for mention on 22 August 2017 at 9.30 am. The accused's bail is extended.



Salesi Temo
JUDGE

Solicitor for State : Office of the Director of Public Prosecution, Suva
Solicitor for Accused : Legal Aid Commission, Suva.