

green plant materials and green leaves weighing 639.3grams, an illicit drugs, botanically known as cannabis sativa.

2. Consequence upon the plea of not guilty of the Appellant, the matter had proceeded to hearing. The hearing had commenced on the 15th of March 2018 and concluded on the same day. The prosecution had presented the evidence of four witnesses. The Appellant and a witness had given evidence for the defence. In her judgment dated 14th of February 2019 the learned Magistrate found the Appellant guilty of this offence and convicted to the same accordingly. The learned Magistrate then sentenced the Appellant for a period of 26 months and 3 days imprisonment with a non-parole period of 20 months on the 13th of May 2019. Aggrieved with the said conviction and the sentence, the Appellant files this appeal on the following grounds of appeal.

Grounds of Appeal

- i) *The Learned Magistrate erred in law and in fact in convicting the accused for possession of illicit drugs when there was no evidence that the material alleged by police was either cannabis sativa or had the weight.*
- ii) *The Learned Magistrate erred in law and in fact in convicting the accused when there was no government analyst certificate under the Illicit Drugs Act.*
- iii) *The Learned Magistrate erred in law and in fact in convicting the accused when the alleged drugs were not in his actual possession.*
- iv) *The Learned Magistrate did not properly analyse the evidence as to how the law was applicable to the facts in determining the guilt or innocence of the appellant.*

- v) *That the Learned Magistrate failed to correctly apply the principles of sentencing.*
- vi) *That the Appellant reserves the right to alter or add further grounds of appeal on availability of the copy record.*
3. For the purpose of convenience, I first draw my attention to the third ground of appeal against the conviction, which is formed on the contention that the learned Magistrate erred in law and in fact in convicting the Appellant when the alleged drugs were not in his actual possession.
4. Every offence has two components. The physical elements and the fault elements (*vide Section 13 (1) of the Crimes Act*). The physical element of the offence of unlawful possession of illicit drugs is the possession of drugs. The fault element of the offence of unlawful possession of illicit drugs is recklessness. (*vide para 83 to 92 of Abourizk v State [2019] FJCA 98; AAU0054.2016 (7 June 2019)*). According to Section 21 (4) of the Crimes Act, proof of intention, knowledge or recklessness will satisfy the fault elements of recklessness.
5. Premathilaka JA in **Abourizk v State** (*supra*) has defined the physical element of possession as stipulated under Section 5 (a) of the Illicit Drugs Control Act, where his Lordship found that:

(75) *In **Koroivuki v State** AAU0018 of 2010: 5 March 2013 [2013] FJCA 15 the Court of Appeal said of possession as follow.*

'The Illicit Drugs Control Act 2004 does not define the word "possession". In absence of a statutory definition, the Court can be guided by the English common law definition of the word "possession". Possession is proven if the accused intentionally had the drugs in his physical custody or control to the exclusion

of others, except anyone who was acting in concert with him in the alleged offence (Lambert [2002] 2 AC 545). Possession is also proven if the accused intentionally had the substance in some place to which he either alone or jointly with some other person acting in concert with him had access and might go to get physically or control it (Lambert, supra).'

(76) *However, section 4 of the Crimes Act, though not exhaustive, interprets what the words "possession", "be in possession of" or "have in possession" include and in my view, any English common law definition of possession should be adopted keeping section 4 also in mind and in a way not inconsistent with section 4. Section 4 of the Crimes Act also defines what joint possession is. In that context, it is my humble view that the additional element of 'extra beneficial factors' recognized in English common law as part of joint possession is not found in section 4 of the Crimes Act and therefore should not be regarded as part of the concept of joint possession in Fiji as stated in Mohammed v State AAU0092 of 2011: 12 December 2014 [2014] FJCA 216.....*

(87) *For the purpose this appeal, I shall mainly focus on the act of possession. Is possession a mere conduct, a result of conduct or a circumstance? It is my considered view that possession constituting the physical act of the offence denotes not merely a conduct or a result of conduct but a circumstance as set out in section 15(1)(c) inasmuch as possession is concerned with a relationship between a person and property which gives the person control over it. Possession could be of two types: 'actual'/'de facto' or 'constructive'/'legal'. Section 4 of the Crimes Act seems to recognise both types of possession.*

(88) *Section 4 of the Crimes Act states that "possession", "be in possession of" or "have in possession" includes —*

- a) *not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person;*
- b) *if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them.*

6. Section 32 of the Illicit Drugs Control Act has provided a factual presumption in relation to possession of illicit drugs, which states that:

"Where in any prosecution under this Act it is proved that any illicit drug, controlled chemical or controlled equipment was on or in any premises, craft, vehicle or animal under the control of the accused, it shall be presumed, until the contrary is proved, that the accused was in possession of such illicit drug, controlled chemical or controlled equipment."

7. Accordingly, if the prosecution proved the illicit drugs were in a vehicle which was under the control of the accused, it is allowed to presume that the accused was in possession of those illicit drugs, until the contrary is proved by the defence. The burden of proving the contrary is a legal burden and it must be discharged on balance of probability (*vide Sections 60 and 61 of the Crimes Act*).
8. According to the record of the proceedings in the Magistrate's Court, the police had found the Appellant and four others near the BSP in Savusavu, in the early morning of 10th August 2016, while they were in a car bearing the registration IH 057. The Appellant was the driver

of the car. The police had then searched the car and found the illicit drugs, which was the subject matter of this case, in the booth of the car. The illicit drugs were packed in a white sack.


9. The Appellant in his defence had denied his knowledge about this drugs claiming that he was not aware of the sack and the illicit drugs. According to the defence, the Appellant had been using the car during the day to do shopping for the rugby team which he was coaching. The rugby team was camping at his place. He off loaded the groceries when he returned home after doing shopping. According to the Appellant the booth of the car was cleaned and no such sack was in it when he off loaded the groceries. He had then gone to the training with the rugby team. Upon his return from the training, he had gone straight to bed as he was tired. He was awoken up by few boys of his team around 2.00 am as they wanted to go to the town. He then opened the car from his room using the remote key. When he came to the car, the boys had already got into the car. He had then driven the car to the town. The car had made several stops over on their way to the town. Once in the town, they went near the BSP as one of the boys wanted to meet someone to get money for the fuel. At that point of time, the police came and searched the car.
10. The Appellant had adduced evidence to rebut the factual presumption of possession, claiming that the sack which contained the illicit drugs was not in his possession though it was found in the car which was under his control.
11. According to the evidence given by PC Micheal Chang (first witness of the prosecution) the Appellant was in the car with four other passengers. PC Chang was not able to recall most of the things pertaining to the search and arrest of the Appellant. Specially he was not able to recall whether the Appellant was searched by the police. Moreover, he cannot recall who had searched the passengers. However, PC Chang had testified that the Appellant denied the possession of the illicit drugs when it was found in the booth of the car. The Appellant looked shocked at that time. According to PC Chang, other passengers were smelt of liquor but not the Appellant.

12. According to the evidence of the Appellant and Mr. Savou, who was the witness of the defence, the Appellant was sleeping when the boys came and asked him to take them to the town. The evidence of PC Chang where he said the Appellant did not smelt of liquor, has the potential of corroborating the above claim of the Appellant. Interestingly, the prosecution has not provided any evidence explaining the make or the shape of the car driven by the Appellant. However, the Appellant in his evidence said the passengers who were seated in the back passenger seat could access the booth of the car from their seat.
13. The learned Magistrate in her judgment has not taken into consideration the above discussed evidence. The learned Magistrate had refused to accept the evidence of the defence on the basis of inconsistency of evidence between the Appellant and the defence witness. Actually the evidence of the Appellant and Mr. Savou were consistent with each other in relation to the incidents that took place at around 2 a.m. in the morning. Mr. Savou said the Appellant went to sleep after the training and awoken up by the sounds of the boys as they wanted to go to the town. He had heard the sound of the opening of the doors of the car using the remote key.
14. In view of the consistent nature of the evidence of the Appellant and Mr. Savou, it appears that there was a possibility that one of the passengers had got into the car with the alleged sack before the Appellant boarded into it. This proposition is further strengthened by the evidence of PC Chang, where he said the Appellant was shocked and denied the possession when the police found the sack in the booth.
15. In consequence of the above discussed reasons, I find the conclusion of the learned Magistrate that the accused was in possession of this illicit drug on the basis that he was in control of the vehicle is not safe as the evidence presented during the course of the hearing has suggested otherwise. Having carefully taken into consideration the evidence presented in the hearing, it is my considered opinion that the defence has proven the contrary on the basis of balance of probability, thus rebutting the factual presumption in relation to the possession of illicit drugs. Hence, the prosecution has failed to prove beyond reasonable

doubt the physical elements and the faults elements of this offence of unlawful possession of illicit drugs as charged.

16. Hence, I find merits in the third ground of appeal against the conviction. Accordingly, I allow the third ground of appeal.
17. On the basis of the above conclusion, I do not wish to discuss the remaining grounds of appeal against the conviction and the sentence.
18. Having taken into consideration the strength of the prosecution case, the time spent in prison by the Appellant, I find an order of re-trial would prejudice the interest of the Appellant. Hence, I do not wish to contemplate to order a re-trial.
19. The orders of the court,
 - i) The Appeal is allowed,
 - ii) The convictions for the offences of Unlawful Possession of Illicit Drugs is set aside and the sentence is quashed.
20. Thirty (30) days to appeal to the Fiji Court of Appeal.




R.D.R.T. Rajasinghe
Judge

At Suva
06th January 2020

Solicitors
Maqbool & Company for the Appellant.
Office of the Director of Public Prosecutions for the Respondent.