

IN THE MAGISTRATES' COURT
AT BA
CRIMINAL JURISDICTION

Criminal Case No. 409/2019

BETWEEN: **STATE**

PROSECUTION

AND: **NIRBAY CHAND**

ACCUSED

Counsel: Sergeant 4897 Veni Vunaki for Police Prosecution
 Mr. R. Filipe for the Accused

Date of Hearing: 23 & 26 July 2023
Date of NCTA Ruling: 13 November 2024
Date of Judgment: 28 April 2025

JUDGMENT

Introduction

1. Mr. Nirbhay Chand ("the Accused") was charged and produced in Court on 4 October 2019 for 1 count of Unlawful Cultivation of an Illicit Drug contrary to section 5(a) of the Illicit Drug Control Act 2004. On 27 February 2020, the Accused pleaded Not Guilty to the charge.
2. After various adjournments, on 1 November 2023, the date of Trial Prosecution filed an Amalgamated Charge charging the Accused for 1 count of Unlawful Possession of Illicit Drugs contrary to section 5(a) of the Illicit Drug Control Act 2004 and 1 count of Destroying Evidence contrary to section 189(a) of the Crimes Act 2009. The Accused pleaded Not Guilty to these charges on the same date.
3. Trial proceeded on 1 and 2 November 2023 where Prosecution called 2 witnesses and thereafter, the counsel for the Accused made an application stating that a Senior Scientific Officer is not authorized by statute to submit evidence in Court. The matter was then adjourned for Ruling on this issue.
4. It is imperative to highlight that the recording of Prosecution evidence on 1 and 2 November 2023 was conducted by this Court's predecessor. Upon commencing these proceedings, on 8 May 2024, the Court informed the Accused of his right under section 139(2) of the Criminal Procedure Act 2009, which allowed the Accused to demand that all the witnesses or any of them in this matter be re-summoned and re-heard. After informing the Accused of this right, the Accused informed the Court that he would exercise his right under section 139(2) of the Criminal Procedure Act and the witnesses who had already given evidence be re-summoned and re-heard by the Court.
5. Trial was then set for 23 and 26 July 2024. On 23 July 2024, Prosecution then filed an Amended Charge for 1 count of Unlawful Cultivation of an Illicit Drug contrary to section 5(a) of the Illicit Drug Control Act 2004. The particulars of the offence are:

Statement of Offence

Unlawful Cultivation of Illicit Drugs: *Contrary to Section 5(a) of the Illicit Drugs Act 2004.*

Particulars of Offence

Nirbhay Chand on the 30th day of September 2019 at Raviravi, Ba in the Western Division, without lawful authority had cultivated 80 plants of Marijuana, an illicit drug namely *cannabis sativa* or Indian hemp weighed 5.0 grams.

6. The Accused pleaded Not Guilty to the above charge and the matter proceeded to Trial. Prosecution called 8 witnesses and thereafter concluded its case. The counsel for the Accused then made an application pursuant to section 178 of the Criminal Procedure Act stating that a case was not sufficiently made out against the Accused to require him to make a defence. Submissions were then filed by the counsel of the Accused on 19 August 2024 whilst Prosecution informed that they would rely on the Court record.
7. On 13 November 2024, this Court found that there was a case sufficiently made out against the Accused to require him to make a defence. Counsel for the Accused informed the Court that the Accused would give evidence but not call any witnesses. As such a date for defence's case was fixed.
8. On 17 December 2024, counsel for the Accused informed the Court that the Accused now wished to remain silent and sought time to file closing submissions. Counsel for the Accused filed closing submissions on 15 January 2025 whilst Prosecution filed their submissions on 23 January 2025.
9. Having read the submissions and considered the evidence presented by Prosecution, I now pronounce my Judgment.

Burden of Proof

10. It is imperative to highlight that as a matter of law, the onus or burden of proof rests on the prosecution throughout the trial and it never shifts to the accused. There is no burden on an accused to prove his or her innocence as an accused is presumed to be innocent until proven guilty.
11. It is for the prosecution to prove the accused's guilt beyond a reasonable doubt. If there is doubt, so that the court is not sure of the accused's guilt, or if there be any hesitation in the court's mind on any of the ingredients or on the evidence led by prosecution, the accused must be found not guilty of the charges and accordingly acquitted.

Summary of Evidence

12. It is expected that to arrive at a proper conclusion, the matter ought to be considered in its logical progression with formulated reasons for the ultimate conclusion with the general rule being that a judgment should set out the relevant events and the material evidence in the correct sequence in narrative form with the identifying number of each pertinent witness being incorporated at the appropriate places – vide *Pal v R* [1974] 20 FLR 1 (17 January 1974) as referred to in *Wang v State* Criminal Petition No. CAV 0013 of 2021 (26 October 2023) and *State v Wang* Criminal Appeal No. HAA 30 of 2019 (19 February 2021).
13. Penaia Drauna, Sergeant 3231 Timoci and PC 7240 Kelepi all testified that they were part of the team that uplifted plants believed to be marijuana from the farmhouse which Rajesh Mani Gounder testified that the Accused had been living in when the Police found the plants on 30 September 2019.
14. Sunil Krishna testified that he had been hired by the Accused and had resided with the Accused at the farmhouse. He testified that on 30 September 2019, he had been near the river planting vegetables when one of the officers had gone under a tree that had fallen and pulled out big containers which had small plants and that when the officers searched the house, they found more containers.
15. Penaia Drauna, Sergeant 3231 Timoci and PC 7240 Kelepi further testified that the plants were taken to Ba Police Station where it was handed over. DC 5400 Gustino Shaw

testified that on 30 September 2019, he had received 4 pot plants from PC Kelepi with 80 plants and that it was then handed over to WPC Radhika. He testified that the search list was also handed over.

16. Corporal 3896 Azad testified that the Investigating Officer - WPC Radhika had sought his assistance in uprooting and packaging. He testified that WPC Radhika took photos, he then uprooted and measured the plants, packed it in an envelope and then handed it over to WPC Radhika, who then took it over to the Exhibit writer namely WPC Iliseva.
17. Constable 3766 Iliseva testified that on 30 September 2019, she was the Exhibit Writer for Ba Police Station and on that date, she had received marijuana plants from WPC Radhika and that on 2 October 2019, she dispatched the 80 marijuana plants to WPC Radhika to be taken to Suva for analysis. WPC Iliseva stated that she did not receive the marijuana plants after it was analysed.
18. By consent, the counsel for the Accused agreed to have a copy of the Drug Analysis Report tendered. This was tendered and marked as 'PEX1'.

Analysis of Evidence

19. It is important to note that once this Court found that there was a case made out against the Accused sufficiently requiring him to make a defence, the Accused chose to remain silent and not call any witnesses, this Court is mindful that no adverse inference can be made against the Accused in this regard.
20. The Court will now need to evaluate the evidence by Prosecution. The evidence presented will be evaluated to determine the testimonial trustworthiness of the evidence which will be done by evaluating the credibility – the correctness or veracity of the evidence and the reliability of evidence – the accuracy of the evidence - vide State v Prasad Criminal Case No. HAC 72 of 2021 (20 June 2024). In doing this, the Court should consider the promptness/spontaneity, probability/improbability, consistency/inconsistency, contradictions/omissions, interestedness/disinterestedness/bias, the demeanour and deportment in Court and the evidence of corroboration where it is relevant. (vide State v Moroci Criminal Case No. HAC 161 of 2023 (26 April 2024)).
21. For a proper analysis of the evidence, it is imperative for the Court to turn its mind to the elements for the offence, which are:
 - i. the accused
 - ii. cultivated cannabis sativa or Indian Hemp
 - iii. without lawful authority.
22. The Court is also mindful of the definition of cultivate as defined in section 2 of the Illicit Drugs Control Act 2004, which states:

cultivate includes planting, sowing, scattering the seed, growing, nurturing, tending or harvesting and also includes the separating of opium, coca leaves, cannabis and its extracts from the plants for which they are obtained; and cultivation has a corresponding meaning;
23. Turning to the evidence led by Prosecution, Prosecution's first witness, Rajesh Mani Gounder ('Rajnesh') testified that some illegal drug had been found on his land which was roughly 1-2 miles from where he usually resides. He testified that prior to the Accused moving in, an itaukei man had been living there. Prosecution's last witness, Sunil Krishna ('Mr. Krishna') testified that on 30 September 2019 he had been at Raviravi, Ba to cut cane as the Accused had hired him. He stated that he had been at the river when the officers came and surrounded them. It was around this time that one of the officers had gone under a tree that had fallen and pulled out big containers which had small plants. Mr. Krishna also testified that the officers searched the house and on top of the house they had found some more containers.

24. Penaia Drauna ('Penaia'), Prosecution's second witness testified that on 30 September 2019, they had received information about the cultivation of marijuana. He prepared the search warrant, had it signed by the Resident Magistrate and proceeded straight to Raviravi Police Post. They then went to the farmhouse and met Horace Petueli. Penaia testified that he had been informed that the Accused had gone to look for his horse.
25. Penaia testified that they waited for a while and when the Accused didn't show up, Penaia stated that they showed the search warrant to Mr. Petueli, who then allowed them to search the area. Corporal Timoci and Constable Kelepi started to search the area and whilst searching they managed to find some pot plants with plants believed to be marijuana which was taken to Ba Police Station where it was handed over to the Police Officer in charge for that shift.
26. Sergeant 3231 Timoci ('Sgt Timoci') who was Prosecution's third witness testified that they searched the area and found 5 containers, 1 bucket and 1 yellow 20 litre drum with plants believed to be marijuana. Sgt Timoci went on to testify that they then seized the container and the plants and escorted it to Ba Police Station. There was a total of 80 plants which were then handed over to Constable Gibson.
27. In his evidence, PC 7240 Kelepi ('PC Kelepi') testified that he had been instructed to look around and that 10 meters away from the farmhouse he found 4 pot plants consisting of 80 plants of marijuana. He then seized these 4 pot plants and escorted the 2 men present and the 80 plants to Ba Police Station where they handed over the 2 men and the 80 plants to PC Gibson.
28. Prosecution's fifth witness was DC 5400 Gustino Shaw ('DC Shaw') who testified that on 30 September 2019, he had received 4 pot plants from PC Kelepi with 80 plants and that it was then handed over to WPC Radhika. He testified that the search list was also handed over.
29. Corporal 3896 Azad ('Cpl Azad') Prosecution's sixth witness testified that the Investigating Officer was WPC Radhika, who had sought Cpl Azad's assistance in uprooting and packaging. He testified that WPC Radhika took photos, he then uprooted and measured the plants, packed it in an envelope and then handed it over to WPC Radhika, who then took it over to the Exhibit writer namely WPC Iliseva.
30. Constable 3766 Iliseva ('WPC Iliseva') testified that on 30 September 2019, she was the Exhibit Writer for Ba Police Station and on that date, she had received marijuana plants from WPC Radhika. She testified that they had counted the number of plants and she then exhibited the marijuana plants vide RCE 1117/19 and took it to the Exhibit room for safe keeping. Thereafter, on 2 October 2019, WPC Iliseva dispatched the 80 marijuana plants to WPC Radhika to be taken to Suva for analysis. WPC Iliseva then testified that she did not receive the marijuana plants after it was analysed.
31. The Drug Analysis Report tendered by Prosecution as 'PEX1' shows that a total of 59 samples were provided for analysis with 58 samples being green plants with a height range between 4cm-11cm and weight of 1.2 grams and 1 sample of green plant material with a weight of 3.8 grams. The total 59 samples had a total weight of 5.0 grams.
32. The evidence of Sgt Timoci and PC Kelepi was that they had uplifted a total of 80 plants which DC 5400 Gustino Shaw ('DC Shaw') stated he received and then handed over to WPC Radhika with a search list. The evidence of WPC Iliseva also confirms that she received 80 plants on 30 September 2019 which she then exhibited and thereafter released to WPC Radhika on 2 October 2019 for analysis. However, the Drug Analysis Report states that only 59 samples were received on 2 October 2019. The Court notes that Prosecution failed to adduce evidence to explain the discrepancy in the number of samples that had been uplifted from Raviravi, Ba and then taken for analysis.
33. Further, neither the drugs in the matter was introduced into evidence nor were the photographs that Cpl Azad testified that WPC Radhika had taken. Aside from the Drug Analysis Report that had been tendered, no other evidence of the drugs was tendered to

substantiate where the drugs had been found at Raviravi, Ba or in what form the drugs had been found. Additionally, no evidence was adduced by Prosecution to highlight that the drugs in this matter had been destroyed by virtue of a Court order which would explain why the drugs were not produced during Trial. This has raised a reasonable doubt with respect to the quantity of plants found at Raviravi, Ba on 30 September 2019 in conjunction with the quantity that was actually analysed on 2 October 2019.

34. Moreover, during cross-examination, Mr. Krishna testified that the creek was used by plenty people such as the neighbouring cane cutters, hunters and people who bathed there. Prosecution failed to clarify with Rajnesh, the owner of the land whether the creek where the plants were found was a private creek which was on his land or whether it was a creek that was adjacent to his land used by everyone within the area. Given this failure, there is a reasonable doubt as to whether it was the Accused who could have cultivated the plants found especially if the creek was a public area used by many people.
35. Thus, considering the circumstances, the Court finds that Prosecution failed to satisfy beyond a reasonable doubt that the Accused had without lawful authority cultivated 80 plants of marijuana with a total weight of 5.0 grams.

Determination

36. I find that Prosecution has not discharged its burden in proving all the elements for Unlawful Cultivation of Illicit Drugs beyond reasonable doubt.
37. I, therefore, find the Accused, Nirbhay Chand, not guilty as charged for Unlawful Cultivation of Illicit Drugs and hereby acquit him forthwith.
38. Any party aggrieved with the Court's decision has 28 days to appeal to the High Court.



N. Mishra
Resident Magistrate

