

IN THE COURT OF APPEAL FIJISLANDS

AT SUVA

[Criminal Appeal No.AAU 0042 of 2008]

BEFORE:

The Hon. Acting President of Court of Appeal, Mr. Justice John Byrne

The Hon. Mr. Justice Temo, J.A

The Hon. Mr. Justice Fernando, J.A

**BETWEEN : OSEA TUI
(APPELLANT)**

**AND : THE STATE
(RESPONDENT)**

**COUNSEL : Appellant in Person
: Ms N. Ratakele (For the Respondent)**

DATE OF HEARING : 1st April 2010

DATE OF JUDGMENT : 16th April 2010

JUDGMENT OF THE COURT

- [1] The Appellant was convicted after a full trial in the Magistrate's Court at Nasinu on the 16th of August 2007 of the offence of "being in unlawful possession of 1,338.3 grams of *cannabis sativa* an illicit drug on 30th of March, 2006 contrary to Section 5(a) of the Illicit Drug Control Act 2004". He was sentenced to imprisonment for 4 years and 4 months.
- [2] On the 28th of May 2008, Goundar, J.A heard an application by the appellant for leave to appeal out of time. He dismissed the application on the 30th of June 2008.
- [3] At the time of the hearing in the Magistrates' Court the appellant was informed by the Magistrate in his sentence remarks that he had 28 days to appeal to the High Court.
- [4] The application for leave to appeal was filed on the 22nd of April 2008 by which date the appeal was out of time by 8 months. Appeals to the Court of Appeal must be filed within 30 days from the date of the decision appealed from. (Section 26 of the Court of Appeal Act). Further, leave is required to appeal against sentence (Section 21(1)(c) of the Court of Appeal Act).
- [5] Goundar, J.A held that the appellant had shown no ground for the delay in bringing his application to the Court.
- [6] He held that to succeed in the application, the appellant had to demonstrate good cause for the late filing of the appeal, the merits of the appeal and the absence of prejudice to the State.
- [7] The reason advanced by the appellant for the delay in seeking leave of this Court was that he was not aware of the time limit for the filing of the appeal.
- [8] Goundar, J.A held, correctly, that there was no merit in the appellant's reason for the delay. He therefore rejected the application for leave to appeal out of time. However, the Judge also said he was satisfied that even if leave were to be given, there was no chance of success in the appeal.
- [9] Notwithstanding this, by Section 35(3) of the Court of Appeal Act the appellant is entitled to have his application determined by the Full Court.

- [10] Before this Court, the Appellant stated that his reason for not seeking leave at the Court earlier was the wrong advice of other inmates of the Prison in which he was confined. This, as Goundar, J.A properly held, is no ground for granting leave.
- [11] The Appellant then argued that Goundar, J.A was wrong in upholding the sentence imposed in the Magistrate's Court. He said, as he had said to Goundar, J.A, that he was a first offender and had a wife and two young children. Against this had to be set the amount of drugs involved, carrying with that as the Learned Magistrate properly pointed out, that this meant that the appellant was presumably exposing the drug to other people.
- [12] The Magistrate quoted with approval the statement of Shameem, J in State v. Lose Helu HAA 037 of 2003S that the use of drugs in Fiji had become a sickness and in many cases, was linked to violent crimes. Our experience leads us to believe that this situation has not improved in the intervening years.
- [13] In Mosese Nariva v. The state(2006) FJHC 6, Shameem J, said:
- "The courts must always make every effort to keep young first offenders out of prison.....Non-Custodial measures should be carefully explored first to assess whether the offender would acquire accountability and a sense of responsibility from such measures in preference to imprisonment".**
- [14] The Court endorses that statement but agrees also with the Learned Magistrate who held that the appellant could not be classified as a young offender. He was 23 at the time of his trial.
- [15] It has been said by Winter, J.A in Meli Bavesi v. State HAA 027/2004 and confirmed by Shameem J, in State v. George Pickering HCC No. 035 of 2006 that culpability depends not on the amount of drugs found but on the purpose of the possession.
- [16] With respect to both those Judges it seems to this Court that that may well be too general a view and that culpability must also depend on the amount of drugs found in

possession. Of course the amount of drugs found is very relevant to the question of sentence.

[17] In Tomasi Naudreudre v. State HAA 037 of 2003 Shameem, J. held that where the offender:

(i) was in possession of 920.7 grams of Indian hemp;

(ii) was 38 years old

(iii) a first offender

(iv) pleaded guilty.

a proper starting point for sentencing was 5 years imprisonment.

[18] In the circumstances of this case, we do not consider that the learned Magistrate or Goundar, J.A erred in imposing and confirming the sentence of 4 years 4 months imprisonment of the appellant. For this and the other reasons we have given, we consider there is no merit in the appeal against sentence which is accordingly dismissed.

Dated at Suva this 16th day of April, 2010.



John E. Byrne

John E. Byrne, AP

Salesi Temo

Salesi Temo, J.A

Priyantha Fernando

Priyantha Fernando, J.A