

IN THE COURT OF APPEAL, FIJI
[ON APPEAL FROM THE HIGH COURT]

Criminal Appeal No. AAU 111 of 2015
(High Court Case No. HAC 015 of 2015)

BETWEEN : **JITEN PRASAD**

Appellant

AND : **THE STATE**

Respondent

Coram : **Bandara, JA**

Counsel : **Mr. A. Sen for the Appellant**
Mr. A. Jack for the Respondent

Date of Hearing : **16 May 2019**

Date of Judgment : **7 June 2019**

RULING

- [1] The Appellant was indicted before the High Court of Labasa for having without lawful authority in his possession 5.18 kilograms of Indian hemp or Cannabis Sativa, an Illicit Drug, contrary to Section 5 (a) of the Illicit Drugs Control Act 2004. He had pleaded guilty to the charge against him on the 27th August 2015.
- [2] Upon his guilty plea, on the 28th August 2015, the Appellant had been sentenced to 7 years imprisonment with a non-parole period of 6 years.

[3] On the 16th September 2015, the appellant had filed a timely application for leave to appeal against sentence advancing three ground of appeal which are as follows:-

1. *That the learned Judge erred in law in holding that the appellant had 5.18 kg of dried leaves when most of the material contained were also stems and dried roots and therefore applied the wrong sentencing guidelines when holding the appellant had more than 4 kg of cannabis sativa when in fact, the dried leaves being the material of any value or use was less than one kilogram.*
2. *That the learned Judge erred in law in failing correctly to apply the principles of sentencing before setting a minimum term to be served before pardon may be considered.*
3. *That the sentence imposed by the learned Judge was harsh and excessive and wrong in principle and took into consideration irrelevant matters and failed to take into consideration relevant matters.*

[4] Whilst the matter was in progress on the 20 January 2017 the Appellant indicated to Court that he intended to appeal against the conviction. The court had directed the Appellant to file an application for enlargement of time.

[5] On the 19th December 2018, the amended grounds of appeal had been filed advancing 4 grounds, both against the conviction and the sentence which are as follows:-

Amended Grounds of Appeal

1. *THAT the Learned Judge erred in law in convicting the appellant for being in possession of 5.18 kilograms of Illicit Drugs when there was no Government Analyst Report tendered in Court which was a prerequisite under Section 36 of Illicit Drugs Control Act 2004 and no certificate from a Government Analyst was served to the accused or to his defence counsel at least 42 days before hearing at which the certificate was to be tendered as evidence and further the*

accused was not informed in writing that the Prosecution did not intend to call the person who made the analysis as a witness.

2. *THAT the Learned Judge erred in law in holding that the appellant had 5.18 kilogram of dried leaves when most of the materials contained were also stems and dried roots and therefore applied the wrong sentencing guidelines when holding the appellant had more than 4 kg of Cannabis Sativa when in fact, the dried leaves being the material of any value or use was less than one kilogram.*
3. *THAT the Learned Judge erred in law in failing to correctly apply the principles of sentencing before setting a minimum term to be served before pardon may be considered.*
4. *THAT the sentence imposed by the Learned Judge was harsh and excessive and wrong in principle and took into consideration irrelevant matters and failed to take into consideration relevant matters.*

[6] Law pertaining to appeal is governed by Section 21(1) of the Court of Appeal Act Cap.12. The appellant has a right to appeal on any question of law alone where leave is not required. Leave is required to appeal on any question of mixed law and fact, or fact alone, and to appeal against sentence.

[7] The test for leave to appeal against conviction is whether the appeal is arguable.

[8] Upon perusal of the original court record I find the summary of facts submitted to the High Court by the prosecution which reveals the following:-

“The accused in this matter is Jiten Prasad, aged 42 years old. He is charged with one count of possession of illicit drugs contrary to Section 5(a) of the Illicit Drugs Control Act 2004”.

On the 9th of July 2004 at Nasasa, a team of Police Officers led by Sgt 2022 Epli Lagi executed a search warrant at the house of the accused, Jiten Prasad. Upon search of his house, on the above mentioned date, 6 plastics of dried marijuana leaves were found and 3 plastics of dried leaves, 1 blue tarpaulin containing dried leaves, 1 white flour bag containing dried leaves,

1 red container containing seeds and 1 black plastic container containing dried leaves, 2 stems and dried roots.

The plants materials were sent to the Fiji Police Force Forensic team for analysis and it was confirmed that all the plant materials were marijuana or cannabis sativa. They had a total weight of 5.18 kilograms. The Accused kept these illicit drugs or cannabis sativa plants materials without lawful authority.

In his caution interview, the Accused also admitted that he brings the marijuana plant materials so that he can sell the same and he stated that he sells them for \$700.00”.

- [9] The original court record contains the Judge’s sentencing order where most importantly, I find the following remarks recorded by the learned High Court Judge:

“The court checked with the defence counsel to see that the accused is admitting all the elements of the offence of “unlawful possession of illicit drugs”. Through the Defence counsel the accused admitted the prosecutions summary of facts. In particular he admitted possessing of 5.18 kg of cannabis sativa unlawfully on 9th July 2014. As a result of the above submissions, the Court found the accused guilty as charged and convicted him accordingly.”

- [10] In passing the sentence, the learned High Court Judge had rightly taken into consideration new sentencing guidelines set by Kini Sulua, Michael Ashley, Chandra v The State; CAV No. AAU 0093 and 0074 of 2008, where the tariff for instant offence is set between 7 to 14 years.

- [11] I further take into consideration the following factors on the four grounds of appeal both against the conviction and sentence.

1. Requirements set out under Section 36 of the Illicit Drugs Control Act 2004, in relation to the Government Analyst's evidence, comes into effect at a trial hearing, and not in a situation where an accused pleads guilty to the charges preferred, without facing a trial.
2. In the instant case the tendering of a Government Analyst Report to court does not become necessary, since the Fiji Police Force Forensic team had confirmed that all the plant materials were marijuana or cannabis sativa and they had a total weight of 5.18 kilograms.
3. There is no error in the sentence passed by the learned High Court Judge and the sentence is appropriate in the circumstances of the case.

[12] In the circumstances, I find that the grounds of appeal have no merit and are not arguable.

Order

[13] Leave to appeal is refused on conviction and sentence.



A handwritten signature in blue ink, appearing to be 'N. Bandara', is written over a dotted line.

Hon. Mr. Justice N. Bandara
JUSTICE OF APPEAL