

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 347 of 2017

STATE

vs.

KRITESH KUMAR

Counsel: Ms. J. Fatiaski for the State
Mr. A.K. Singh for the Accused

Date of Hearing: 23rd, 26th, 27th and 28th November 2018

Date of Summing Up: 06th December 2018

Date of Judgment: 12th December 2018

Date of Sentence: 18th December 2018

SENTENCE

1. You, Mr. Kritesh Kumar, stand convicted for two counts of Unlawful Possession of Illicit Drugs, contrary to Section 5 (a) of the Illicit Drugs Control Act, which carries a maximum penalty of life imprisonment or fine of \$1,000,000. The particulars of the offences are that:

COUNT 1

Statement of Offence

UNLAWFUL POSSESSION OF AN ILLICIT DRUG: *Contrary to Section 5 (a) of the Illicit Drugs Control Act No. 9 of 2004.*

Particulars of Offence

KRITESH KUMAR, on the 30th day of October 2017, at Nasinu in the Central Division without lawful authority possessed 1.4 kilograms of Methamphetamine, an illicit drug.

COUNT 2

Statement of Offence

UNLAWFUL POSSESSION OF AN ILLICIT DRUG: Contrary to Section 5 (a) of the Illicit Drugs Control Act No. 9 of 2004.

Particulars of Offence

KRITESH KUMAR, on the 30th day of October 2017, at Nasinu in the Central Division without lawful authority possessed 0.3 grams of Indian Hemp botanically known as *Cannabis Sativa*, an illicit drug.

2. It was proved at the conclusion of the hearing, that you were found in possession of 1.4 kg of Methamphetamine and 0.3 grams of Cannabis Sativa at your house on the 30th of October 2017.
3. Methamphetamine is one of the most serious drug problems that the country faces at present. Perhaps, it could be more dangerous and destructive than any other drugs in the local market. It is a destructive drug for users as it is highly addictive with myriad of adverse psychological and physical consequences. Hence, I find, offences involved with such destructive drugs as methamphetamine, are serious offences, which should be dealt with harsh and custodial punishment.
4. It is the duty of the Judiciary, in sentencing process, to contribute constructively and effectively to prevent offenders of this nature in committing such crimes or deterring offenders and other persons from committing offence in this nature, before it becomes a

complicated social disarray. Therefore, it is a judicial responsibility in sentencing offenders of this nature to demonstrate that the society denounces and condemns this type of offending without any reservation.

Purpose of the Sentence

5. Having considered the reasons discussed above, and Section 4 (1) of the Sentencing and Penalties Act, the main purpose of this sentence is founded on the principle of deterrence and protection of the community. I am mindful of the principle of rehabilitation; however, it is my opinion that the need of deterrence outweighs the principle of rehabilitation.

Tariff

6. Justice Temo in State v Vakula (Criminal Case No HAC 247 of 2016s) has found that the sentencing guidelines expounded by the Court of Appeal in New Zealand in R v Fatu (2006) NZLR 72 (CA) in respect of methamphetamine should be applied in Fiji as it provides much assistance. Accordingly, the applicable tariff for the possession of methamphetamine is:
 - i) Category one – (less than 5g) – two years’ to four years’ imprisonment,
 - ii) Category two – (5g to 250g) – three years’ to nine years’ imprisonment,
 - iii) Category three – (250g to 500g) – eight years’ to 11 years’ imprisonment,
 - iv) Category four – (500g or more) – ten years’ to life imprisonment, (State v Nand [2018] FJHC 499; HAR03.2017 (12 June 2018)).
7. The tariff for the possession of Cannabis Sativa is that:
 - i) Category 1: possession of 0 to 100 grams of cannabis sativa - a non-custodial sentence to be given, for example, fines, community service, counselling, discharge with a strong warning, etc. Only in the worst cases,

should a suspended prison sentence or a short sharp prison sentence be considered.

- ii) Category 2: possession of 100 to 1,000 gram of cannabis sativa. Tariff should be a sentence between 1 to 3 years imprisonment, with those possessing below 500 grams, being sentenced to less than 2 years, and those possessing more than 500 grams, be sentenced to more than 2 years imprisonment.
 - iii) Category 3: possessing 1,000 to 4,000 grams of cannabis sativa. Tariff should be a sentence between 3 to 7 years, with those possessing less than 2,500 grams, be sentenced to less than 4 years imprisonment, and those possessing more than 2,500 grams, be sentenced to more than 4 years.
 - iv) Category 4: possessing 4,000 grams and above of cannabis sativa. Tariff should be a sentence between 7 to 14 years imprisonment. **(Sulua v State [2012] FJCA 33; AAU0093.2008 (31 May 2012).**
8. In view of the above sentencing guidelines and the weight of the illicit drugs found in the possession of the accused, the applicable tariff limit for the possession of 1.4 kg of methamphetamine is ten (10) years to life imprisonment and for the possession of 0.3 g of Cannabis Sativa is non-custodial sentence to a short sharp prison sentence.

Level of Harm and Culpability

9. I now turn to discuss the level of culpability and harm of this offence in order to determine the starting point. As discussed above, methamphetamine is a very dangerous drugs which can cause myriads of adverse physical, psychological effect to an individual as well as to the society as large. Taking into consideration the large amount of drugs (1.4 kg) involved in this matter, it is obvious that they were not for your personal consumption. Therefore, the level of harm is substantially high.

10. The police found these methamphetamine while they were hidden inside a secret cabinet in your house. It is clear that you have tried to conceal the drugs when the police came to search your house on the 30th of October 2017. Accordingly, I find this is a premeditated crime. I am mindful of the fact that the purity level of this methamphetamine is less than 40%, which I consider in favour of you in determining the level of culpability. However, in view of other considerations, which I take into consideration in determining the level of culpability, I find that level of culpability in these offences is substantially high.

Starting Point

11. Having taken into consideration the seriousness of the offence, the purpose of the sentence and the level of harm and culpability, I select twelve (12) years as the starting point.

Mitigation Factors

12. The learned counsel for the defence submitted your personal and family background as mitigating factors, which I find has no significant mitigatory value, though I consider some discount for your young age and your young family, where you look after your two young offsprings after your wife passed away in 2013.
13. The learned counsel submitted that you are remorseful. However, it is the duty of the party, to demonstrate a true and genuine remorsefulness than merely stating the word of remorsefulness in the mitigation submissions. Therefore, I do not consider your remorsefulness as a genuine remorse in committing this serious crime.
14. You are not a first offender therefore, you are not entitled to any discount for your previous good character.
15. Having considered your young age and your young family, I reduce one (1) year, reaching the final sentence of eleven (11) years of imprisonment.

16. In respect of the second count of possession of 0.3 grams of cannabis sativa, I sentence you for a period of three (3) months imprisonment.
17. Having considered the purpose of this sentence that is founded on the principle of deterrence and protection of the community, I find nine (9) years of non-parole period would serve the said purpose, while preserving the opportunity for you to rehabilitate yourself as a law abiding individual. In view of the second count, I do not fix any parole period.

Head Sentence


18. Accordingly, I sentence you for a period of **eleven (11) years** of imprisonment for the first count of “Unlawful Possession of Illicit Drugs” contrary to Section 5 (a) of the Illicit Drugs Control Act 2004. Furthermore, you are not entitled for any parole for a period of **nine (9) years** pursuant to Section 18 (1) of the Sentencing and Penalties Act.
19. In respect of the second count of Unlawful Possession of Illicit Drugs, namely 0.3 grams of Cannabis Sativa, I sentence you for a period of **three (3) months** imprisonment.
20. Both sentences to be served concurrently.

Actual period of Sentence

21. You have been in remand custody for this case since the 2nd of November 2017 as you were not granted bail by the court. Accordingly, you have been in remand custody for this matter approximately for a period of one (1) year and one (1) month and sixteen (16) days. In pursuant of Section 24 of the Sentencing and Penalties Act, I consider the period of one (1) year and two (2) months as a period of imprisonment that have already been served by you.

22. Accordingly your actual sentencing period is **nine (9) years and ten (10) months** of imprisonment period, with **seven (7) years and ten (10) months** non-parole period.
23. Thirty (30) days to appeal to the Fiji Court of Appeal.




R.D.R.T. Rajasinghe
Judge

At Suva
18th December 2018

Solicitors
Office of the Director of Public Prosecutions for the State.
A.K. Singh Law for the Defence.