

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL MISC. NO. HAM 297 of 2023

BETWEEN : **RAVIN LAL**
APPLICANT

A N D : **THE STATE**
RESPONDENT

Counsel : Mr. W. Pillay for the Applicant.
: Mr. J. Nasa for the Respondent.

Date of Hearing : 25 April, 2024

Date of Submissions : 03 May, 2024

Date of Ruling : 16 May, 2024

R U L I N G

BACKGROUND INFORMATION

1. The applicant faces a count of unlawful cultivation of illicit drugs and a count of unlawful possession of illicit drugs both contrary to section 5 (a) of the Illicit Drugs Control Act.
2. It is alleged that on the 28th day of December, 2021 the applicant without lawful authority cultivated 119 plants weighing 36,040 grams of cannabis

sativa or Indian hemp and also had in his possession 348 grams of cannabis sativa or Indian hemp an illicit drug respectively.

3. On 3rd June, 2022 the applicant pleaded guilty to the charge and also admitted the summary of facts read and explained to the applicant in his preferred language in the presence of his counsel. On 25th September, 2023 the learned Magistrate found the applicant guilty and convicted him as charged.
4. After the filing of the submissions and mitigation by the defence counsel the learned Magistrate proceeded to sentence the applicant, however, the sentence was not delivered after the learned Magistrate realized that the sentence may be beyond the powers of the Magistrate's Court.
5. Pursuant to section 190 of the Criminal Procedure Act the file was transferred to the High Court for sentence, before the matter could progress any further the applicant filed a notice of motion and his supporting affidavit sworn on 4th December, 2023.

APPLICATION TO THE HIGH COURT

6. In the notice of motion dated 4th December, 2023 the applicant seeks the following orders:
 - a) *The plea of guilty entered by the applicant on 24th June, 2022 be allowed to be withdrawn by the applicant or set aside by this Honourable Court;*
 - b) **ALTERNATIVELY** *the applicant be allowed to withdraw his equivocal plea of guilty to the charges.*

7. The application is not opposed by the state. The state counsel Mr. Nasa on instructions from the officer in carriage of the file informed the court of the above.
8. The applicant's counsel made oral submissions and also filed written submissions for which this court is grateful.

SUBMISSIONS BY THE APPLICANT

9. The applicant's counsel argued that this court had the jurisdiction to set aside the guilty plea of the applicant under its inherent powers and the principles of common law. During the hearing counsel did not rely on any case authority so he was given 7 days to do so which he did.
10. The primary argument raised by the applicant is that he pleaded guilty upon the wrong advice of his counsel in the Magistrate's Court. His former counsel had failed and/or neglected to give him proper and competent advice from the disclosures served by the prosecution. There is a valid defence available which goes to the core of the charges, the applicant would never have pleaded guilty had he been properly and correctly advised.

DETERMINATION

11. It is important to consider the provision of the law that governs transfer of cases to the High Court for sentencing. Section 190 of the Criminal Procedure Act states:

Transfer to High Court for sentence

190.-(1) Where-

(a) a person over the age of 18 years is convicted by a magistrate for an offence;

and

(b) the magistrate is of the opinion (whether by reason of the nature of the offence, the circumstances surrounding its commission or the previous history of the accused person) that the circumstances of the case are such that greater punishment should be imposed in respect of the offence than the magistrate has power to impose- the magistrate may, by order, transfer the person to the High Court for sentencing.

(2) If the person is transferred under sub-section (1) to the High Court, a copy of the order for transfer and of the charge in respect of which the person was convicted shall be sent to the Chief Registrar of the High Court.

(3) The High Court shall enquire into the circumstances of the case and may deal with the person in any manner in which the person could be dealt with if the person had been convicted by the High Court.

(4) A person transferred to the High Court under this section has the same right of appeal to the Court of Appeal as if the person had been convicted and sentenced by the High Court.

(5) The High Court, after hearing submissions by the prosecutor, may remit the person transferred for sentence in custody or on bail to the Magistrates Court which originally transferred the person to the High Court and the person shall then be dealt with by the Magistrates Court, and the person has the same right of appeal as if no transfer to the High Court had occurred.

12. The purpose of section 190 above is to sentence an offender in the High Court after the offender has been convicted in the Magistrate's Court where the learned Magistrate is of the view that a greater punishment is to be imposed. When a file is transferred to the High Court for sentencing the power given to the High Court is limited to *"enquire into the circumstances of the case and*

deal with the person in any manner in which the person could be dealt with if the person had been convicted by the High Court.”

13. In view of the above, this court has the power to sentence the applicant with the appropriate punishment but not to review the lawfulness or correctness of the conviction. The applicant has a recourse under section 190 (4) of the Criminal Procedure Act to appeal against the correctness or otherwise of the conviction to the Court of Appeal.

14. The Supreme Court in *Vishwa Nadan vs. The State, criminal petition no. CAV 0007 of 2019 (31 October, 2019)* at paragraph 28 made an important observation in respect of the powers of the High Court under section 190 (3) of the Criminal Procedure Act at paragraph 28 as follows:

...The language of section 190(3) takes colour from its purpose. That purpose is to invest the High Court with the power in certain circumstances to sentence a defendant convicted in the magistrates' court. Although broad language is used, it is necessary to link the circumstances to be enquired into with the particular function which the High Court has to perform. Since that function is to determine the appropriate sentence, the circumstances to be enquired into are those which enable the High Court to do that. And as for Nawana JA's concern that it is unseemly for judges to pass sentence in a case in which the conviction might have been vitiated by some unlawful process, the answer is that the Act provides the route for that defect to be remedied, namely by an appeal under section 190(4).”

15. This court has to consider the intent and purpose of section 190 of the Criminal Procedure Act, amongst other matters the applicant is asking this court to go behind the copy record and consider matters supposedly between a solicitor and client and/or appellate court issues. The issues raised by the


applicant are clearly beyond the scope envisaged by section 190 (3) of the Criminal Procedure.

CONCLUSION

16. For the above reasons, this court has no jurisdiction to hear the application filed by the applicant.

ORDERS

1. The application to withdraw the guilty plea of the applicant is dismissed due to lack of jurisdiction.



**Sunil Sharma
Judge**



At Lautoka
16 May, 2024

Solicitors

Messrs Gordon and Company for the Applicant.

Office of the Director of Public Prosecutions for the Respondent.