

IN THE HIGH COURT OF FIJI
CRIMINAL JURISDICTION
AT LAUTOKA

CRIMINAL CASE: HAC 01 OF 2015

BETWEEN : STATE

AND : ETHAN KAI

Counsel : Ms. S. Kiran with Ms. Fatiaki for Prosecution
Mr. J. Peluso with Mr. A. Ravindra-Singh & Ms. Subeska
for 2nd Accused

Date of Hearing : 01st – 07th August 2015; 10th August 2015; 12th – 13th August
2015; 17th – 21st August 2015; 24th – 27th August 2015; 31st
August 2015.

Date of Legal Submissions : 01st September 2015

Date of Closing Submissions : 04th September 2015

Date of Summing Up : 09th September 2015

Date of Judgment : 10th September 2015

Date of Sentence : 16th of September 2015

SENTENCE

1. You, Mr. Ethan Kai stands convicted for one count of Unlawful Importation of Illicit Drugs, contrary to section 5 (b) of the Illicit Drugs Control Act, 2004 (hereinafter referred as The Act), which carries a maximum penalty of life imprisonment or fine not exceeding \$ 1,000,000 or both.

2. Having considered the evidence presented during the course of the hearing and the unanimous verdict of guilty of the four assessors, the court found you guilty for this offence of Unlawful Importation of Illicit Drug and convicted accordingly.
3. It was proved during the course of the hearing, that you, while engaged in dealings with Mr. Mohammed Shaheed Khan has imported 29.9 kilograms of illicit drugs namely "Heroin". The drugs were concealed inside the four tyres of a quad bike. The said quad bike was shipped together with two more quad bikes and 28 tyres with wheels to Fiji from Lao via Bangkok, Thailand. You arrived into Fiji on the 12th of December 2014 from Hong Kong. Upon your arrival, you started to communicate with Mr. Mohammed Shaheed Khan via telephone and also met him physically on several occasions. The evidence revealed that you bought a set of knives which can cut tyres, two sand and dry bags. You then kept them with seven plastic containers and some other items in a black bag and left it beside the yard of Mr. Mohammed Shaheed Khan in the night of 19th of December 2014. The Analysis Certificate of the Principle Scientific Officer confirmed the substance found inside the four tyres of the said quad bike contain 29.9 kilograms of "Heroin".
4. Heroin is an illegal and highly addictive drug processed from morphine, a naturally occurring substance extracted from the seed pod of certain varieties of poppy plants. The use of heroin consists myriad of adverse and negative effects, both personally and socially, short and long term and also physically and psychologically. This is a case of importation of 29.9 kilograms of Heroin into Fiji from Lao via Bangkok, Thailand. The United Nations Office of Drugs and Crimes (UNODC) in its Annual Report of 2014 has discussed the social stigma of Drug trafficking, where it states that;

"Drug trafficking continues to be the most lucrative form of business for criminals. This pernicious threat fuels violence and instability – threatening hard-won progress on peace, development, respect for human rights and the rule of law. Drug-producing and drug-consuming countries alike have a stake in fighting this".

5. Having considered the adverse social and personal ignominies associated with such illegal and highly addictive drugs, most of the Nations in the world vigilantly and jealously protect their borders and shores from the intrusion of such illicit drugs. The provisions of the Illicit Drugs Control Act 2004 of Fiji, reflects Fiji's intention of protecting and preventing the intrusion of the menace of illicit drugs into the country.

6. Justice Gounder in State v Balaggan (2012) FJHC 1147;HAC049.11 (14 June 2012) has expressed his concern on the vulnerability of Fiji becoming a hub for the international drug smugglers, where his lordship observed that;

"When sentencing drug smugglers, regard must be made to the circumstances that exist in Fiji. Fiji does not have a sophisticated intelligence service to detect drug-smuggling. Our boarder security measures are not apt to deal with sophisticated drug smuggling. Unless there is a tip off, it is easy to sneak in and out, hard drugs.Any punishment for dealing in hard drugs must therefore reflect the vulnerability of Fiji becoming a hub for the international drug smugglers".

7. Having considered the weight of the Heroin, and the manner it was imported into Fiji, it appears that the drugs was mainly imported for commercial purpose than personal use. Fiji has not been contaminated or polluted with the presence of illicit heard drugs such as Heroin, Cocaine etc. In the absence of sophisticated detection mechanisms as Justice Gounder emphasised in Balaggan (supra), it is the duty of the Judiciary in sentencing process to contribute constructively and effectively to prevent offenders of this nature in repeating such crimes or

detering offenders and other persons from committing offences in this nature in Fiji before it becomes a complicated social disarray.

8. According to Benjamin Franklin *"an ounce of prevention is worth a pound of cure"*. Therefore, it is a judicial responsibility in sentencing offenders of this nature to demonstrate that the importation of such illicit drugs are unwelcome and unwanted, and the society denounces and condemns it without any reservation.
9. Having considered the reasons discussed above, and the Section 4(1) of the Sentencing and Penalties Decree, the main purpose of sentencing of this offender is founded on 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.
10. Justice Temo in Kini Sulua and Michael Ashley Chandra v The State (2012) FJCA 33; AAU0093.2008 (31 May 2012) has set down guideline for tariff for the offences under section 5(a) and 5 (b) of the Illicit Drugs Control Act in respect of cannabis sativa, where his lordship held 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.

11. Having articulated four sets of categories of tariff for the possession of cannabis sativa based on the weigh, Justice Temo has then extended it application to other categories of offending actions as stipulated under Section 5 (a) and (b) of the Act, where His Lordship held that;

"Section 5(a) of the Illicit Drugs Control Act 2004 treated the verbs "acquires, supplies, possesses, produces, manufactures, cultivates, uses or administers an illicit drug" equally. All the verbs are treated equally. In other words, all the offending verbs or offending actions are treated equally. "Supplies, possesses, manufactures and cultivates" are treated equally, and none of the offending actions are given any higher or lower standing, as far as section 5(a) of the Illicit Drugs Control Act 2004 was concerned. It follows that the penalties applicable to possession, must also apply to the offending verbs of "acquire, supplies, produces, manufactures, cultivates, uses or administers". That is the will of Parliament, as expressed in the words of section 5(a) of the Illicit Drugs Control Act 2004. Consequently, the four categories mentioned above, apply to each of the verbs mentioned in section 5(a) of the 2004 Act mentioned above. The weight of the particular illicit drug will determine which category the case falls under, and the applicable penalty that will apply. It is also suggested that, the application of the four categories mentioned in paragraph 115 hereof to section 5(a) of the Illicit Drugs Control Act 2004, be extended to the offending verbs or offending actions in section 5(b) of the Illicit Drugs Control Act 2004. This will introduce some measure of consistency in how sentences are passed for offendings against section 5(a) and 5(b) of the Illicit Drugs

Control Act 2004. This will enhance the objective and purpose of the 2004 Act, as highlighted in paragraph 111 hereof"


12. However, it appears that above passage of Justice Temo in Kini Sulua (supra) has not specifically extended its application to other forms of illicit drugs as stipulated in the schedule 1 of the Act.
13. The Sentencing Guideline of the Sentencing Council of United Kingdom in respect of the drug offences, has set down a tariff limit of 3 years 6 months to 16 years of imprisonment for the offences of importation and exportation of Class A controlled drugs. The maximum penalty for the importation and exportation of class A controlled drugs is life imprisonment. Heroin has been listed as Class A controlled drugs under the Schedule 2 of the Misuse of Drugs Act 1971.
14. Class A controlled drugs has been further divided into four categories based on the quantity of drug concerned. Five kilograms of Heroin has been listed under category one. If the accused has played a leading role in the offending and the quantity is five kilograms or above, the starting point should be 14 years and tariff range is 12 to 16 years of imprisonment. If the accused has played a significant role but not a leading role, then the starting point should be 10 years and the tariff range is 9 to 12 years of imprisonment. If the accused has played a lesser role, the starting point should be 8 years and the tariff range is 6 to 9 years of imprisonment. The Sentencing Guideline has further stated that a sentence of 20 years and above may be appropriate, if the offence is in most serious nature and commercial scale, involving a quantity of drugs significantly higher than the category one.
15. Having considered the Sentencing Guideline of the United Kingdom and the sentencing principles enunciated in Kini Sulua (supra), I find the quantity of drug involved in this instant case is significantly higher than the category one of

the Sentencing Guideline and also the category four as stipulated in Kini Sulua (Supra). It was revealed during the course of hearing, that the accused has played a significant role in this offending. I accordingly select 14 years as a starting point.

16. This is a case of importation of illicit drugs with sophisticated maneuvering. The evidence revealed that it was a calculatedly planned act of concealment in order to avoid detection. I consider these factors as aggravating factors in this case.
17. Having considered the aggravating factors, I now turn onto the mitigating factors of this case.
18. The learned counsel for the accused person submitted the family back ground of the accused in his mitigation submission. The accused is 34 years old and have a young family. His eldest son is 15 years old and youngest is 1 1/2 years old. The learned counsel further submitted that the accused is the main breadwinner of the family. The eldest son has a medical condition which he sustained by an accident in 2009. The learned counsel of the accused person tendered character evidence of the accused person from his close family friends during the course of his mitigation. He further tendered a letter of the accused person's wife. The learned counsel further submitted that the accused person's elderly mother is sick and was looked after by the accused person.
19. Hon Chief Justice Gao in Raj v State [2014] FJSC 12; CAV0003.2014 (20 August 2014) held that the accused person's responsibility towards his family has little mitigatory value.
20. The learned counsel further submitted that the accused had been engaged in many religious and charitable activities in South Asia, which shows his character and also possibilities of rehabilitation.

21. The accused has been in remand since 29th of December 2014, totalling 8 months and 17 days.
22. Having considered the aggravating factors as discussed above, I increase three years to reach 17 years of interim imprisonment period. In view of the mitigating factors as discussed above and the time the accused spent prior to the sentencing, I reduce 2 years to reach the final sentence of 15 years of imprisonment period.
23. Mr. Ethan Kai, I sentence you for a period of 15 years of imprisonment for the offence of Unlawful Importation of Illicit Drugs contrary to Section 5(b) of the Illicit Drugs Control Act 2004. You are not eligible for parole for a period of 14 years pursuant to Section 18 (1) of the Sentencing and Penalties Decree 2009.
24. 30 days to appeal to the Fiji Court of Appeal.




R. D. R. Thushara Rajasinghe
Judge

At Lautoka

16th of September 2015

Solicitors : Office of the Director of Public Prosecutions
Aman Ravindra Singh Lawyers for the Second Accused person