

IN THE HIGH COURT OF FIJI

AT LAUTOKA

APPELLATE JURISDICTION

Criminal Case No. HAA 008 of 2009

Between : **PENI KAKALICAVA** 1st Appellant
DINESHWAR PRASAD 2nd Appellant

And : **STATE** Respondent

Date of Hearing : 5th March 2009
Date of Judgment: 13th March 2009

Counsel : 1st Appellant in person
2nd Appellant in person
Mr. L. Sovau for the Respondent

JUDGMENT

1. Immediately after hearing the appeal on 5th March 2009 I had ordered the release from prison of the two appellants. I reserved my reasons till today which I now set out.
2. The appeal from Sigatoka Magistrates Court concerns possession of illicit drugs contrary to Section 5(a) of the Illicit Drugs Control Act.

3. Dineshwar Prasad is a van driver. On 25th October 2007 his van was stopped by police in Sigatoka Town at a road block. The time was 5.00am. There were three passengers inside the van. Peni Kakalicava the other appellant was sitting in front seat beside the driver. Two other persons known as Peni and Lee were sitting in the rear seat.
4. The police suspected the vehicle was carrying drugs so the police searched the vehicle. Prior to the vehicle came to a halt, someone threw a match box and a small parcel from inside the van.
5. Police searched the vehicle. They found four parcels stacked together in a yellow plastic on the rear seat. Three more parcels were found indicated the rear seat. Some loose leaves according to the evidence were found inside the first appellant's pocket at Sigatoka Police Station to where the police had escorted the van and the occupants. The loose leaves were the smallest of all the parcels.
6. The occupants were charged for possession. The two who were sitting in the rear seat skipped bail. The police have not been able to arrest them. The State severed charges against them and trial proceeded against the two appellants. At the conclusion of the prosecution case the two gave sworn evidence. The Magistrate found each of the appellants guilty of possession and sentenced them to 4 years imprisonment each. The total amount of drug was 1455.4 grms.
7. The first appellant gave sworn evidence saying nothing was found on him. This the Learned Magistrate did not believe in face of sworn

- testimony of one of the police officers that he found dried leaves in his pocket which upon analysis were found to be Indian Hemp. The Learned Magistrate was quite entitled to come to that conclusion. There is also evidence that these dried leaves were the smallest parcels. The weight of the smallest parcel on the basis of analyst report was 2 grams.
8. The first appellant's other evidence was that he came to Sigatoka to deliver fish for a funeral. In his interview notes which are more detailed he stated that he came in a taxi from Suva. He told in his interview that the taxi could not go to funeral place so he got off the taxi at Sigatoka and then got on the van driven by the second appellant which was also going to the funeral. He had nothing to do with the other two persons who were in the van.
 9. The Learned Magistrate posed this question – Were the parcels of drugs in the accused's person's control? His answer was, Yes. The reason was that the first appellant carried the parcels into the van and hid them. None of the witnesses stated this on oath in court. The only evidence of this came from the second appellant in his interview notes who stated at question 28 that the one who boarded from Sigatoka Market came with three parcels. He did not say parcels of what. He did not specify contents.
 10. It is a fundamental rule of evidence that statements made by an accused to the police are not evidence against a co-accused unless the co-accused expressly or by implication accepts them to be true. **R v Gunawardene** [1951] 2 KB 600 at 610.

11. There was no admission by the first appellant that he brought the three parcels into the van. The interviewing officer quite improperly had put the question to the first appellant that three parcels were found on front seat and sought his comment. His answer was he did not see any. The police had recovered the three parcels from under the back seat according to their own evidence.
12. I therefore conclude that as far as the first appellant was concerned, the only admissible evidence against him was that he had 2.00 grams of Indian hemp which was found in his pocket and not the entire 1455.4 gms.
13. The first appellant had already served about 4½ months imprisonment which I find adequate for his criminality. Four years is excessive sentence. I therefore allow this appeal against sentence and order his immediate release.
14. As far as the second appellant is concerned, he was the driver of the van, hired to bring people to a funeral. The evidence of police officers was that nothing was found on him or under the driver's seat or on this person.
15. The Learned Magistrate's reason that as the driver of the van that had the drugs, he had physical control of the parcels of drugs as well. I believe that the Learned Magistrate had section 32 of the Illicit Drug Control Act 9 of 2004 in mind when he stated the above Section 32 provides for this factual presumption. It reads:-

“Where in any prosecution under this Act it is proved that any illicit drug, controlled chemical or controlled equipment was on or in any premises, craft, vehicle or animal under the

control of the accused, it shall be presumed, until the contrary is proved, that the accused was in possession of such illicit drug, controlled chemical or controlled equipment”.

16. Section 32 is only a presumption. A presumption can be displaced by proof of facts to the contrary. This was not a case where the driver was the sole occupant of a vehicle. Further it appears from whatever evidence there was that the vehicle was on hire so strangers may sit in it. In a private family vehicle one has control over the members in a way which is not so in case of strangers in a hired vehicle.
17. In his interview note the second appellant told the police that Lee and the first appellant came with the parcels in their hands. He did not state what the contents were nor had they told him that they were going to get drugs. Before one can be convicted for possession one must knowingly possess. There is no evidence for the driver to know the contents of the parcels, and right through he had maintained that the parcels were not his. There was ample evidence to displace the presumption.
18. Accordingly I set aside the conviction and allow the appeal of the second appellant.

[**Jiten Singh**]
Judge

At Lautoka
13th March 2009.