

IN THE HIGH COURT OF FIJI
AT LABASA
CRIMINAL JURISDICTION

Criminal Case No: HAC 33 of 2008

BETWEEN:

THE STATE

AND:

ABDUL AIYAZ
s/o Abdul Gafoor

Counsel: Mr. T Muloilagi & Mr. M Kaisamy for the State
Mr. A Kholi for the Accused

Date of Hearing: 28 August 2009

Date of Ruling: 31 August 2009

RULING

[1] The accused applies for no case to answer. He is charged as follows:

Statement of Offence

UNLAWFUL POSSESSION OF ILLICIT DRUG: Contrary to section 5[a] of the Illicit Drugs Control Act No 9 of 2004.

Particulars of Offence

ABDUL AIYAZ s/o ABDUL GAFOOR on the 6th day of June 2008, at Natua, Seaqaqa in the Northern Division without lawful authority possessed 4,833.7 grams of Cannabis Sativa, an Illicit Drug.

[2] The evidence of the witnesses for the prosecution has been concluded. The prosecution relies on direct and circumstantial evidence to prove the charge. Further, the prosecution relies on the agreed facts.

[3] A no case to answer application in the High Court is governed by section 293(1) of the Criminal Procedure Code. Section 293(1) provides:

“When the evidence of the witnesses for the prosecution has been concluded, and the statement or evidence (if any) of the accused person before the committing court has been given in evidence, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence, shall, after hearing if necessary any arguments which the legal practitioner for the prosecution or the defence may desire to submit, ... record a finding ... of not guilty.”

[4] The test under section 293(1) is settled and is more stringent than the test under section 210 of the Criminal Procedure Code, which governs an application for no case to answer in the Magistrates’ Court.

[5] The test for no case to answer in the Magistrates’ Court under section 210 is adopted from the Practice Direction, issued by the Queen’s Bench Division in England and reported in [1962] 1 All E.R 448 (*Moiden v R* (1976) 27 FLR 206). There are two limbs to the test under section 210:

- [i] Whether there is no evidence to prove an essential element of the charged offence;
- [ii] Whether the prosecution evidence has been so discredited or is so manifestly unreliable that no reasonable tribunal could convict.

[6] An accused can rely on either limb of the test under section 210 to make an application for no case to answer in the Magistrates’ Court.

[7] The test under section 210 has no application in the High Court. Nor is the English test for no case to answer stated in the case of *Galbraith* (1981) 2 All ER 1060 has any application to a case in the High Court. The *Galbraith* test was stated by Lord Lane C.J. at 1062:

“How then should the Judge approach a submission of ‘no case’? (1) If there is no evidence that the crime alleged had been committed by the defendant there is no difficulty. The Judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence – (a) where the Judge comes to the conclusion that the Crown’s evidence taken at its highest is such that a jury properly directed could not convict on it, it is his duty, on a submission being made, to stop the case. (b) Where, however, the Crown’s evidence is such that its strength or weakness depends on the view to be taken of a witness’s reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which a jury could properly come to the conclusion that the defendant is guilty, then the Judge should allow the matter to be tried by the jury.....”

[8] The *Galbraith* guidelines were expressly rejected by the Court of Appeal in *Sisa Kalisoqo v R Criminal Appeal No. 52 of 1984*, because in England, the matter is not governed by any statute. In *Sisa Kalisoqo*, the Court of Appeal took the view that if there is some direct or circumstantial evidence on the charged offence, then a judge cannot say there is no evidence on the proper construction of section 293(1). This view was later confirmed by the Court of Appeal in *State v Mosese Tuisawau Cr. App. 14/90*.

[9] In *State v Woo Chin Chae [2000] HAC 023/99S* Shameem J summarized test under section 293(1):

“In order to come to the conclusion that there was some evidence direct or circumstantial, and irrespective of its weight, credibility or its tenuous nature it must be shown that the evidence in question is relevant, admissible and is in totality inculpatory of the accused. That means that the evidence in its totality must at least touch on all the essential ingredients of the offence.”

[10] More recently the Court of Appeal in *State v George Shiu Raj & Shashi Shalendra Pal [2006] AAU0081/05* and *State v Brijan Singh [2007] AAU00/05* confirmed that the correct approach under section 293(1) is to ask whether there is some relevant and admissible evidence on each element of the charged offence, and not whether the evidence is inherently vague or incredible.

[11] Thus the question is whether there is some direct or circumstantial evidence implicating the accused to the charged offence.

[12] The offence of “found in possession of illicit drug” has the following elements:

1. The accused was in possession
2. Of an illicit drug
3. Without lawful exercise

[13] The prosecution has led evidence that on 6 June 2008 the accused drove a truck from Suva to come to Labsasa via the Natovi/Nabouwalu route. A police officer, PC Hari Chand, stood at the highway in Seaqaqa to stop the truck. When the police officer saw the truck approaching him, he waved his hand to stop the truck. According to the police officer’s evidence, the accused slowed down, looked at him and accelerated the speed. The accused did not stop. The police officer returned to the station and with the assistance of other officers gave a chase. By the time the police caught up with the truck, the accused had driven about 10km. The truck was stopped. The accused was informed to drive the truck back to Seaqaqa station for a search. The accused appeared calm when he was stopped by the police officers. He cooperated with the police and drove the truck to the station.

[14] At the station, the accused was interviewed under caution. He said he did not stop the truck because he thought the police officer wanted a ride and he was rushing back to Labasa to sell his vehicle to one Razim. The statement of Razim is in evidence which confirms that there was an arrangement with the accused regarding the sale of his vehicle to him. On 10 June 2008 the truck was searched in the presence of the accused. The police seized parcels of dried leaves packed in plastic bags and stacked in a channel fitted between the tray and the chassis of the truck. The leaves were tested by a Government Analyst and found to be Cannabis. The contents of the Government Analyst Report is not disputed.

[15] There is no suggestion that the Cannabis was for a lawful excuse.

- [16] The issue is whether the accused was in possession. Possession is proved if the accused intentionally has custody or control of the substance and he did so with the knowledge or belief that the substance was an illicit drug.
- [17] Mr. Kohli submits that there is no evidence to show the accused knew of the existence of an illicit drug in the truck. According to the statement of the accused he drove the truck upon a request from Sheik Mohammed, who he had previously done some mechanical work, and knowing that the truck had mattresses only.
- [18] The defence further submits that there is an alternative explanation for not stopping the truck when the police officer waived at the accused, which is consistent with innocence. The defence says that the accused thought the police officer was asking for a ride to Labasa but he did not want to stop because he was rushing to sell his vehicle.
- [19] Mr. Muloilagi accepts that there is no direct evidence to show that the accused knew of the existence of an illicit drug in the truck. The evidence relied by the prosecution to prove guilty knowledge is the fact that the accused did not stop the truck when the police officer tried to stop him. Mr. Muloilagi further submits that the alternative explanation provided by the accused for not stopping the truck is not credible because there was no transfer of the vehicle he said he was selling until 30 October 2008. The prosecution submits that the reason the accused did not stop the truck upon seeing the police officer is because he knew he was carrying an illicit drug in the truck.
- [20] There is no direct evidence of knowledge of the illicit drug. However, knowledge does not have to be proved by direct evidence only. Knowledge can be proved by circumstantial evidence. The conduct of the accused is relevant to infer knowledge.
- [21] In this case there is circumstantial evidence of the conduct of the accused from which a reasonable inference could be drawn that he knew of the existence of an illicit drug in the

truck. Whether guilty knowledge is the only reasonable inference based on the circumstantial evidence is a question for the assessors.

[22] When there is some relevant and admissible evidence of knowledge, I cannot say there is no evidence and sustain a no case to answer application under section 293(1) of the Criminal Procedure Code.

[23] What inferences are to be drawn from the relevant and admissible evidence is a matter for the assessors after proper directions to them on the law of possession and circumstantial evidence.

[24] I find the accused has a case to answer.

Daniel Goundar
Judge

At Labasa
Monday 31 August 2009

Solicitors:

Office of the Director of Public Prosecutions for State
Messrs. Kohli & Singh for Accused