

**IN THE HIGH COURT OF FIJI**  
**AT LABASA**

**CRIMINAL JURISDICTION**

**CRIMINAL CASE NO. HAC 33 of 2008**

**BETWEEN:**

**THE STATE**

**AND:           ABDUL AIYAZ**

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

**Date of Summing Up: Wednesday 2<sup>nd</sup> September, 2009**

**SUMMING UP**

Madam Assessor and Gentleman Assessors

[1] It is now my duty to sum up to you. In doing so, I will direct you on matters of law which you must accept and act upon. You must accept whatever I say on the law. On the facts of this case however, which evidence to accept and which evidence you think is reliable, these are matters for you to decide for yourselves. In other words, you are the masters of fact. If I express any opinion on the facts, or if I appear to do so, you may disregard my opinion and form your own.

- [2] In the course of this hearing, the counsel for the defence and the counsel for the prosecution have made strong submissions as a matter of right to you about the facts of this case. But it is a matter for you to decide which version of the facts to accept, or reject.
- [3] You will not be asked to give reasons for your opinions, and your opinions need not be unanimous although it would be desirable if you could agree on them. Your opinions are not binding on me, but they will carry great weight with me when I deliver my judgment.
- [4] On the question of proof, I must direct you as a matter of law that the onus or burden of proof lies on the prosecution to prove the case against the accused. This burden remains throughout the trial upon the prosecution and never shifts. There is no obligation on the accused to prove his innocence. Under our system of criminal justice an accused person is presumed to be innocent until he or she is proved guilty.
- [5] The standard of proof in a criminal case is one of proof beyond reasonable doubt. This means that you must be satisfied so that you feel sure of the guilt of the accused before you express an opinion that he is guilty. If you have any reasonable doubt as to whether the accused committed the offence charged, then it is your duty to express opinions that he is not guilty. It is only if you are satisfied so that you feel sure of his guilt that you must express opinions that he is guilty.
- [6] You heard submissions from the prosecution about the problem of illicit drugs in this country and the social problems associated with the use of drugs. You are not to take any moral position on the problem of illicit drugs in this country when considering the evidence. Your decisions must be based only on the evidence which you have heard in this court and upon nothing else. Your duty is to apply the law to the facts adduced in evidence in the course of this trial.

- [7] In this case the prosecution and the defence have agreed on certain facts. The agreed facts are part of evidence. You should accept those agreed facts as accurate and the truth. They are of course an important part of the case. The agreement of these facts has avoided the calling of a number of witnesses and thereby saved a lot of Court time.
- [8] The accused is charged with the offence of “Found in possession of Illicit Drug”.
- [9] The charge alleges that the accused “on the 6<sup>th</sup> 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”.
- [10] In order to prove the offence of “Found in possession of Illicit Drug”, the prosecution must lead evidence, which satisfies you beyond reasonable doubt several elements. The elements are:
1. That the Accused was in possession;
  2. Of an illicit drug;
  3. Without lawful excuse.
- [11] The first element is in dispute. Possession is proved if the accused intentionally had the substance in his physical custody or control to the exclusion of others, except anyone who was acting in concert with him in the alleged offence.
- [12] Possession is also proved if the accused intentionally had the substance in some place to which he either alone or jointly with some other person acting in concert with him had access and might go to get physically or control it.
- [13] The prosecution must also prove beyond reasonable doubt that in intentionally having such custody or control, the accused did so with the knowledge or belief

that the substance was an illicit drug – not necessarily, the illicit drug charged here, but a drug the possession of which is prohibited.

- [14] The second and the third elements are not in dispute. You will see from the agreed facts that the dried leaves seized by the police on the 6<sup>th</sup> of June 2008 from the truck driven by the accused, were Cannabis Sativa commonly known as Marijuana. As matter of law I direct you that Cannabis Sativa is an illicit drug. You may accept that the second element is proven.
- [15] The accused does not suggest that he had the drug for a lawful excuse, so the third element is also proven.
- [16] So the issue is whether the accused was in possession? In other words, the only real question for you is whether the accused intentionally had custody or control of the dried leaves and he did so with the knowledge or belief that the leaves were an illicit drug.
- [17] The prosecution relies on circumstantial evidence to prove possession. An accused's state of mind is as much a question of fact for you to determine as any other question of fact. It is not possible to have direct evidence of this. No witness can look into the accused's mind and describe what he was thinking at any particular time. However, it is something that can often be inferred from all the proved facts and circumstances.
- [18] You should consider all the proved facts and circumstances, and from them you are entitled to draw proper inferences as to the accused's knowledge and intentions.
- [19] That is what the prosecution is asking you to do in this case. The prosecutor has directed your attention to a number of facts and circumstances which he submits have been proved by the witnesses. You are asked to draw from those facts and

circumstances, the inference that the accused knew of the existence of an illicit drug in the truck he drove on 6 June 2008 and is guilty of the charge.

- [20] You must first consider all the evidence and decide what facts have been proved. They include, for instance, what the accused himself actually did. That will often be a very important matter. A person's actions, in themselves, may clearly show his purpose or intention. Other matters that may be relevant are what the accused said and did before the alleged offence. What the accused said at the time of the alleged offence. What the accused said and did after the alleged offence, including his statement to the police, and what the accused said in evidence.
- [21] You should consider all the proved facts and circumstances, including those I have just mentioned, and from them you are entitled to draw proper inferences as to the accused's beliefs, knowledge, purposes and intentions.
- [22] An inference is a logical deduction from facts that have been proved. It must not be mere speculation or guesswork. It is not sufficient that the proved circumstances are merely consistent with the accused having committed the crime. To find him guilty you must be satisfied so as to feel sure that an inference of guilt is the only rational conclusion to be drawn from the combined effect of all the facts proved. It must be an inference that satisfies you beyond reasonable doubt that the accused committed the crime. If the inference to be drawn from the circumstantial evidence falls short of that standard then your opinion must not be guilty.
- [23] Finally, there is the evidence given by the accused himself which is consistent with his police statements.
- [24] I must remind you that when an accused person has given evidence he assumes no onus of proof. That remains on the prosecution throughout. His evidence must be

considered along with all the other evidence and you can attach such weight to it as you think appropriate.

[25] You will generally find that an accused gives an innocent explanation and one of three situations then arises:

1. You may believe him and, if you believe him, then your opinion must be Not Guilty. He did not commit the offence.
2. Alternatively without necessarily believing him you may say 'well that might be true'. If that is so, it means there is a reasonable doubt in your minds and so again your opinion must be not guilty.
3. The third possibility is that you reject his evidence as being untrue. That does not mean that he is automatically guilty of the offence. The situation would then be the same as if he had not given any evidence at all. He would not have discredited the evidence of the prosecution witnesses in any way. If prosecution evidence proves that he committed the offence then the proper opinion would be guilty.

[26] So it is for you to consider the accused's evidence and decide what reliance you can place on it. You should weigh it up and evaluate it against the evidence of the other witnesses and facts that have been proved.

[27] I will now remind you of the prosecution case and the defence case. In doing this it would be tedious and impractical for me to go through the evidence of every witness in detail and repeat every submission made by counsel. I will summarize the salient features. If I do not mention a particular witness, or a particular piece of evidence or a particular submission of counsel that does not mean it is unimportant. You should consider and evaluate all the evidence and all the submissions in coming to your decision in this case.

## **The Prosecution Case**

[28] The prosecution case is that on 6 June 2008 the accused drove a truck registration number CU899 from Suva to come to Labasa. The truck was delivered to him at a Mobil Service Station in Nasinu by one Mohammed. The accused knew Mohammed from Labasa. Mohammed's full name is Sheik Mohammed. Mohammed stayed and worked for Nazim Ali aka Jim from Labasa. The accused had previously done mechanical work for Jim. The accused drove the truck CU899 to Natovi, crossed the sea passage and arrived at Nabouwalu. He took the Nabouwalu highway to come to Labasa. As he approached Seaqaqa, a police officer, PC Hari Chand tried to stop the truck by waiving his hand. PC Chand was in uniform and was standing on the side of the highway. PC Chand waived (and he demonstrated in court how he had waived) when he saw the truck was 20 meters away. The speed of the truck was about 30-40 km/hr. The speed limit of that zone is 50 km/hr. PC Chand said the truck slowed down and the accused looked at him. The accused did not stop the truck but accelerated the speed. The incident was witnessed by Sgt Daniele but he was not in uniform. Both officers returned to the station, got a vehicle and chased the truck. By the time they caught up with the truck, the accused had driven for about 8 or 10 km. The truck was stopped. The accused said the reason he did not stop the truck was because he was rushing. The accused and truck were taken to the police station. The police searched the truck and found a channel underneath the tray. The channel had an opening which showed parcels were stacked inside it. The channel was later cut opened. The channel according to Rakesh Jattan, a vehicle examiner at the Lands Transport Authority, who examined the truck, was an additional fitting and was not part of the original make up of the truck. The parcels seized from the truck contained dried leaves. The leaves were tested by a government analyst and found to be Cannabis Sativa.

### **The Defence Case**

[29] The defence case is that the accused drove the truck with no knowledge of the existence of an illicit drug. When the truck was delivered to him in Suva he was told that the truck had mattresses. Before driving the truck he checked the load on the tray and saw mattresses. The mattresses were covered with tarpaulin. As he approached Seaqaqa he saw a police officer waiving at him. At first the accused thought the police officer was asking him to reduce his speed because he was driving at a high speed. He also thought the police officer was trying to stop him to take a ride. The accused said he did not stop because he was rushing home to sell his vehicle to one Razim Ali. The vehicle registration number DA736 was under the name of Asmin Bi. Asmin Bi is married to the accused. Razim Ali said he had made arrangement before 6 June 2008 with the accused to buy his vehicle. On 7 June 2008, at around 9 am, the accused took the vehicle to Razim Ali. Razim Ali agreed to buy the vehicle after test driving it. They went to Sun Insurance and got the Third Party Policy transferred under Fozia Begum's name. Fozia Begum is Razim Ali's wife. Razim Ali paid \$5500.00 cash to the accused as payment for DA 736. The accused gave Razim Ali a signed motor vehicle transfer form. Razim Ali did not register the transfer until 30 October 2008 when he took the vehicle for fitness, to avoid paying an extra \$35.00 if the transfer was to be done before the fitness expiring date of the vehicle.

[30] The accused said he is a mechanic and runs his own garage. He also buys and sells vehicle for profit. On 6 June 2008 he did not stop the truck when he saw a police officer waiving at him, because he had a potential buyer for his vehicle, waiting for him, and he did not want to lose the buyer. That is why he was rushing. He denies any knowledge of the existence of an illicit drug in the truck.

## Summary

- [31] The prosecution says when the accused drove the truck he knew the owner of the truck was a known drug dealer. The evidence is that the accused heard from people about the owner being a drug dealer but he had not personally seen any drug dealings by the owner. I direct you that there is no evidence that the owner of the truck is a drug dealer. Rumors about a person being a drug dealer may give rise to suspicion, but suspicion is not enough to impute knowledge that a person is a drug dealer.
- [32] The defence says that the accused has in past done mechanical work on the owner's vehicles in his professional capacity as a mechanic. The mechanical works were carried out at the accused's home. In early June 2008, the accused was in Suva, for his own personal visit to buy vehicle and spare parts. When he learnt of an opportunity to return to Labasa free of any expenses, he took the offer to drive the truck. He did not know that the truck had an illicit drug.
- [33] The prosecution says that the accused knew of the existence of an illicit drug in the truck and that is why he did stop when the police tried to stop the truck at Seaqaqa. The prosecution says the excuse that the accused was rushing to sell his vehicle for not stopping the truck, is a cover up for his guilty knowledge.
- [34] If you accept the evidence that the accused said he was rushing to sell his vehicle then you may think that the accused realized that the police officer was stopping his truck. The question for you is whether the only rational conclusion that can be drawn from the fact that the accused did not stop the truck is knowledge of the existence of an illicit drug in the truck. If you are sure that the only rationale conclusion inferred from the fact of not stopping the truck is knowledge of existence of an illicit drug then you may find the accused guilty. If you are not sure that the only rational conclusion inferred from the fact of not stopping the

truck is knowledge of existence of an illicit drug then you must find the accused not guilty.

**Conclusion**

[35] What version of the facts you accept is a matter for you. What weight you put on the witnesses' evidence is a matter for you. Remember the accused do not carry any burden of proof. You may find the accused person guilty of the charge if you are satisfied of his guilt beyond reasonable doubt. If you have any reasonable doubt about his guilt you must find him not guilty. Your opinion is either guilty, or not guilty.

[36] That concludes my summing up of the law and the evidence in this particular trial.

[37] We have now reached the stage where you must retire to your room to deliberate together and form your individual opinions on the charge. Take as much time as you wish.

[38] On your return you will each be asked separately to state in Court your opinion as to whether the accused is guilty or not guilty of the charge.

[39] Would you please now retire to consider your opinions? When you have made your decisions, would you please advise the court Clerk and the Court will reconvene to receive your opinion?

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**Daniel Goundar**

**JUDGE**

**At Labasa**

**Wednesday 2<sup>nd</sup> September, 2009**

