

IN THE HIGH COURT OF FIJI
CRIMINAL JURISDICTION
AT LAUTOKA

CRIMINAL CASE: HAC 01 OF 2015

BETWEEN : STATE

AND : MOHAMMED SHAHEED KHAN
ETHAN KAI

Counsel : Ms. S. Kiran for State
Mr. Iqbal Khan for the First Accused
Mr. Aman Singh for the Second Accused

Date of Hearing : 12th of June 2015

Date of Ruling : 23rd of June 2015

RULING

1. The Applicant, (hereinafter referred as "the second accused") files this notice of motion seeking following orders *inter alia*;
 - i. *The second accused to be tried separately in the High Curt,*
 - ii. *Severance be granted in Criminal Case No 01 of 2015; and that*
 - iii. *Any other orders that the court may deem just in the circumstances of this case to facilitate the aforementioned orders sought,*
2. The Notice of Motion is being supported by an affidavit of the second accused, stating his grounds for this application. Meanwhile, the learned counsel for the first accused informed the court that the first accused has already raised his objections for the consolidation of charges before Justice De Silva and it has not been heard so far. I accordingly directed both the accused persons and the

prosecution to file their respective objections and submissions on the issue of consolidation of charges. The prosecution filed their written submissions. The learned counsel for the first accused informed the court that he will rely on the submissions filed on 2nd of March 2015. The learned counsel for the second accused made his oral submissions during the course of the hearing and tendered a bundle of case authorities for my consideration. Having carefully considered the respective affidavits and submissions of the parties, I now proceed to pronounce my ruling as follows.

Background

3. The first accused was charged in the High Court Criminal Case HAC 01 of 2015 for one count of Unlawful Importation of Illicit Drugs contrary to section 4(1) of the Illicit Drugs Control Act, while the second accused was charged in another High Court Action HAC 10 of 2015 for one count of Unlawful Importation of Illicit Drugs contrary to section 5 (b) of the Illicit Drugs Control Act. Subsequently the prosecution sought to consolidate these two charges in the information, for which both the accused persons objected. The consolidated information reads as follows;

COUNT 1

Statement of Offence

UNLAWFUL IMPORTANT OF ILLICIT DRUG: Contrary to section 4(1) of the ILLICIT DRUGS CONTROL ACT, 2004.

Particulars of Offence

MOHAMMED SHAHEED KHAN between the 1st day of December 2014 and 21st day of December 2014 at Lautoka in the Western Division, imported 29.9 kilograms of illicit drugs namely HEROIN without lawful authority.

COUNT 2

Statement of Offence

UNLAWFUL IMPORT OF ILLICIT DRUGS: *Contrary to section 5(b) of the ILLICIT DRUGS CONTROL ACT, 2004.*

Particulars of Offence

ETHAN KAI between the 1st day of December 2014 and 21st day of December 2014 at Lautoka in the Western Division, without lawful authority engaged in dealings with MOHAMMED SHAHEED KHAN for the import of 29.9 kilograms of illicit drugs namely HEROIN.

4. According to the written submissions filed by the learned counsel for the first accused, it appears that the objections of the first accused for this consolidation of charges are founded on the following grounds inter alia;
 - i. *The accused will not have a fair trial,*
 - ii. *There are incriminating factors against the second accused person and if both of them are tried together it would embarrass and prejudice the first accused,*
 - iii. *It would be dangerous to let the assessors know the incriminating evidence against the second accused, which can by inference be drawn by the assessors against the first accused as well.*
5. The first accused did not specify any of those grounds with factual information and stated them only in the written submissions tendered by his counsel.
6. However, the second accused in his affidavit in support of this Notice Motion deposed the grounds for this application. I do not wish to reiterate them, but would summarise them as follows;
 - i. *Prejudice and Embarrassment,*
 - ii. *Strength and weakness of Prosecution's evidence against both the accused,*
 - iii. *Right to remain in silent,*

7. In view of the consolidated information filed by the prosecution, it appears that the prosecution has charged the first and the second accused persons on two separate counts. The first accused is being charged for one count of unlawful importation of illicit drugs contrary to Section 4(1) of the Illicit Drugs Control Act. The Second accused is charged for one count of Unlawful importation of Illicit Drugs contrary to Section 5(b) of the Illicit Drugs Control Act.
8. In respect of the first count, the Prosecution is required to satisfy that;
 - i. The first accused between 1st of December and 21st of December 2014,
 - ii. Without lawful authority,
 - iii. Imported 29.9 kilograms of illicit drugs namely Heroin.

In respect of the second count, the main elements that the prosecution is required to prove are that,

- i. The second accused person between 1st of December and 21st of December 2014,
- ii. Without lawful authority,
- iii. In dealing with the first accused,
- iv. Imported 29.9 kilograms of illicit drugs namely Heroin.

Accordingly, it appears that the two counts against these two accused persons are founded on the same facts or transaction.

9. Having considered the nature and the particulars of the two counts, I find that the Prosecution has filed this consolidated information pursuant to Section 60

(c) and (e) of the Criminal Procedure Decree, where it states that;

“the following persons may be joined in one charge or information and may be tried together;

(a).....

(b).....

(c) *persons accused of different offences provided that all offences are founded on the same facts, or form or are part of a series of offences of the same or a similar character; and*

(e) *persons accused of different offences committed in the course of the same transaction."*

10. It should be noted that Section 60 has not stipulated that the court could order for a separate trial on the ground of prejudice or any other reasons as stated under Section 59 (3) of the Criminal Procedure Decree. However, Justice Shameem in The State v Ashneel Prasad & others (HAM 127 of 2008) held that both the common law and the statues have allowed the prosecution to charge the principle offenders and secondary offenders in one charge or information provided there is sufficient evidential and factual nexus in relation to each accused, and provided there is no prejudice to the accused.
11. Accordingly, the court could disallow the joinder of accused persons in information if it is satisfied that the joinder will prejudice the accused persons. The objections of the first accused against the consolidation of charges are mainly founded on the ground that there are incriminating factors against the second accused in evidence and if he tried together with the second accused, he would be embarrassed and prejudiced. Moreover, it is dangerous to let the assessors to know the incriminating evidence against the second accused as they will draw adverse inference against the first accused on those incriminating evidence.
12. Meanwhile, the objection of the second accused is founded on the ground that the evidence against the first accused will be prejudicial to him if they are tried

together and which will affect the finding of the assessors, which could not be remedied even with a strong direction by the judge.

13. Lord Morris of Borth-y-Gest in Director of Public Prosecution v Merriman (1972) 56 Cr. App. R,766.) has defined the “joint charge”, where his lordship observed that;

“it is important to consider what is meant by a joint charge. In my view, it only means that more than one person is being charged and that within certain rules of practice or convenience it is permissible for the two persons to be named in one count. Each person, however, being charged with having himself committed an offence. All crime is personal and individual, though there may be some crimes (of which conspiracy is an example) which can only be committed in co-operation with others. The offences charged in the present case were individual charges against each of the brothers. Each is a separate individual who cannot be found guilty unless he personally is shown to have been guilty”.

14. The founding principles of joinder of offences or accused persons have been discussed in Robert William Lack (1977) 64 Cr.App. R. 172) ,where the Lord Chief Justice held that;

“it has been accepted for a very long time in English practice that there are powerful public reasons why join offences should be tried jointly. The importance is not merely one saving time and money. It also affects the desirability that the same verdict and the same treatment shall be returned against all those concerned in the same offence. If joint offences were widely to be tried as separate offences, all sorts of inconsistencies might arise. Accordingly, it is accepted practice, from which we certainly should not depart in this court today, that a joint offence can properly be tried jointly, even though this will involve inadmissible evidence being given before the jury and the possible prejudice

which may result from that. Of course the practice requires that the judge in such a case should warn the jury that the evidence is not admissible”.

15. The **Robert William Lack (supra)** is founded on the same factual grounds as of this instant case. The appellant has requested for a separate trial as the statements of two co-accused persons would go before the jury alleging that the appellant had set up the burglary. He contended that whatever the direction the judge gave to the jury about the inadmissibility of that evidence, in fact it was bound to be prejudicial to the appellant. The judge has declined to order a separate trial. The Lord Chief Justice in his findings held that;

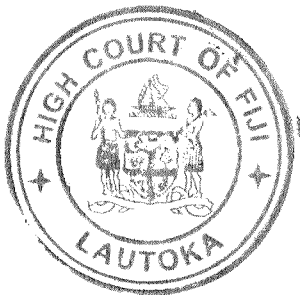
“However the question of severance is primarily one for the trial judge. The discretion was properly exercised in the present instance, and notwithstanding the fact there must have some risk of prejudice the decision of the judge, we think, was right. Of course if a case is strong enough, if the prejudice is dangerous enough, if the circumstances are particular enough, all rules of this kind must go in the interest of justice, but this is not the sort of case in which the ordinary rule of practice in our judgment will operate unduly to the detriment of the accused and therefore it is a case in which we should apply ordinary rule”.

16. Justice Gounder in **Fiji Independent Commission against Corruption v Laisenia Qarase and Sitiveni Weleilakeba (HAM 68 of 2009) (3 September 2010)** has discussed and accepted the principles enunciated in **Robert William Lack (supra)**.
17. In this instant case, the first accused claims that the evidence tendered against the second accused would prejudice him. According to the nature of the second count, the prosecution is required to adduce evidence that the Second accused

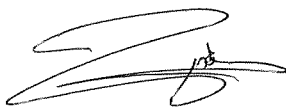
had engaged in dealing with the first accused in importation of this illicit drugs. In the meantime, the prosecution is required to adduce evidence separately to prove that the first accused without lawful authority has imported these illicit drugs as charged in the information. The learned counsel for the prosecution stated in her submissions that they will adduce evidence to prove the interaction of the second accused person with the first accused and also with the person who allegedly sent this consignment to Fiji. She further submitted that the prosecution will present evidence in the forms of records of phone conversations, CCTV footages and other documents in order to prove the guilt of these two accused persons.

18. Accordingly, the admissible evidence in respect of the first count is that the first accused has unlawfully imported the illicit drugs as mentioned in the information. The admissible evidence for the second count is that the second accused has unlawfully imported the illicit drugs and in doing so, he has engaged in dealing with the first accused.
19. Having considered the reasons discussed above and the judicial precedents mentioned above, it is my opinion that no prejudice will cause to the two accused persons in a joint trial that cannot be cured by clear direction to the assessors to consider the evidence against each accused separately. Specially in the event that the involvement of the dealings of the first accused constitutes one of the main components of the second count, it is my opinion that a joint trial will necessitate more as it allows to determine the entire allegation at once.
20. I now turn onto the issue of right to remain in silence. It is an autonomous and self-directed decision of a person to exercise the right to remain in silence. No person is allowed to force a person to answer any allegation if he chose to exercise his right to remain in silence.

21. The second accused contended that if he is tried together with the first accused, he would have to compromise his right to remain in silent. He urged that if the first accused gave evidence which requires his explanation, his right to remain in silence then would be violated. This might be a dilemma of an unrepresented accused person who perceives that the incriminatory statement of the co-accused person would adversely contribute his defence. However, an accused who obtains legal assistance of a Solicitor would be able to properly understand admissible and inadmissible evidence adduced in the course of a joint trial.
22. As I discussed above, the dealing with the first accused person is an important component in the second count and it is important to hear the second count together with the first accused. I find the interest of justice to hear this trial jointly is overwhelmingly greater than the right to remain in silence.
23. In my conclusion, having considered the reasons discussed above, I dismiss and refuse the applications for a separate trial by the first and second accused persons. I accordingly allow the consolidated information filed by the prosecution.



At Lautoka
23rd of June 2015



R. D. R. Thushara Rajasinghe
Judge

Solicitors : Office of the Director of Public Prosecutions
Messrs Iqbal Khan & Associates for the first accused person
Aman Ravindre-Singh Lawyers for the second accused person