

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION
CRIMINAL CASE NO. HAC 310 OF 2015S

STATE

vs

SENITIKI NABULU

Counsels : Ms. J. Prasad and Ms. S. Sharma for State
Ms. B. Malimali and Ms. M. Savou for Accused
Hearings : 2, 3, 4 and 5 August, 2016
Ruling : 5 August, 2016
Written Reasons : 29 August, 2016

WRITTEN REASONS FOR VOIR DIRE RULING

1. The accused was charged with "unlawful cultivation of illicit drugs", contrary to section 5(a) of the Illicit Drugs Control Act 2004. It was alleged that on or about 6 January 2012, at Gasele Village in Kadavu, in the Eastern Division, he cultivated 59.5 kilograms of cannabis sativa (marijuana), an illicit drug.
2. During the police investigation, the accused was caution interviewed by Detective Inspector Simione Tuivanuvou (PW6) at Kadavu Police Station on 7 and 8 January 2012. He allegedly confessed to the crime during the caution interview. On 8 January 2012, Sergeant 1785 Sakaraia Tuberi (PW4) formally charged the accused. He also allegedly confessed to the crime when formally charged. On 2, 3, 4 and 5 August 2016, the accused challenged admissibility of his alleged confessions in the caution interview and charge statements, in a voir dire hearing.

3. The prosecution called six witnesses, all police officers:
- (i) SC 895, Timoci Tokaiqali (PW1),
 - (ii) SC 2177, Sebasitiyano Lilicava (PW2),
 - (iii) PC 4650, Eroni Seruvatu (PW3),
 - (iv) Sgt 1785, Sakaraia Tuberi (PW4),
 - (v) DC 4206, Akuila Waibuta (PW5), and
 - (vi) D/Inspector Simione Tuivanuavou (PW6)
4. The defence called 10 witnesses:
- (i) Senitiki Nabulu (DW1),
 - (ii) Josefa Nabulu (DW2),
 - (iii) Mayale Ravutimabula (DW3),
 - (iv) Meli Niumataiwalu (DW4),
 - (v) Vakacegu Drivatione (DW5),
 - (vi) Aca Vitukawalu (DW6),
 - (vii) Laisani Davetawalu (DW7),
 - (viii) Sisilia Naivota (DW8),
 - (ix) Senior Superintendent of Police Selesitino Babakoro (DW9), and
 - (x) Gene Bogitini (DW10)
5. I had carefully listened to and considered the evidence of all the prosecution's and defence's witnesses. I had also carefully assessed their demeanours. I had carefully listened to their closing verbal submissions on 5 August 2016. I ruled the accused's caution interview and charge statements as admissible evidence, and said that their acceptance or otherwise will be a matter for the assessors. I said, I would give my written reasons later. Below are my reasons.
6. The law in this area is well settled. On 13th July 1984, the Fiji Court of Appeal in Ganga Ram & Shiu Charan v Reginam, Criminal Appeal No. 46 of 1983, said the following, "...it will be remembered that there are two matters each of which requires consideration in this area. First, it must be established affirmatively by the crown beyond reasonable doubt that the statements were voluntary in the sense that they were not procured by improper practices such as the use of force, threats of prejudice or inducement by offer of some

advantage – what has been picturesquely described as the “flattery of hope or the tyranny of fear” Ibrahim v R (1941) AC 599, DPP v Ping Lin (1976) AC 574. Secondly even if such voluntariness is established there is also need to consider whether the more general ground of unfairness exists in the way in which the police behaved, perhaps by breach of the Judges Rules falling short of overbearing the will, by trickery or by unfair treatment. Regina v Sang (1980) AC 402, 436 @ C – E. This is a matter of overriding discretion and one cannot specifically categorize the matters which might be taken into account”

7. PW1 said, on 5 January 2015, he accompanied police officers PW2 and PW5 to Nasele village from Kadavu Police Station. PW1 said he was the police boat captain. They went to the accused’s home at Nasele village, and later to a nearby Nursing Station. PW2 said, he went to identify the accused at his home in Nasele. PW2 said, he accompanied a group of police officers, which included PW1 and PW5. PW3 said, he escorted the accused from Vunisea to Kadavu Police Station on 5 January 2012 between 7.30 pm and 8 pm. PW3 said PW2 and PW5 were with him at the time.
8. PW4 was the police investigation officer. He said, he was not involved in the arrest of the accused on 5 January 2012. PW4 said, he formally charged the accused on 8 January 2012. He tendered the charge statements as evidence and they were marked Prosecution Exhibit No. 1(A) – itaukei version, and 1(B) – the English version. PW4 said the accused signed his charge statements, and he was normal and had no injuries. PW5 said, he arrested the accused on 5 January 2012. PW5 said he was with PW1 and PW2. PW5 said, the accused co-operated with police during his arrest. PW5 said he saw no injuries on the accused, and he made no complaints to him.
9. PW6 said he caution interviewed the accused on 7 and 8 January 2012 at Kadavu Police Station. He said, he caution interviewed him in the itaukei language, and recorded the same with his hand writing. PW6 said, the interview notes were later translated into English. PW6 said, the English translation was a correct interpretation of the i-taukei version, and he submitted the same as evidence, marked Prosecution Exhibit No. 2(A) – I-taukei version, and 2(B) – English translation. PW6 said, the accused was given all his legal rights and his right to counsel. PW6 said, he was given the standard caution and the standard rest and meal breaks during the interview. PW6 said, he saw no injuries on him and he was walking around

normally. PW6 said, the accused signed on all pages of the interview notes, and he counter-signed them. PW6 said, there was no witnessing officer, because most police officers were involved in the drug operations that were happening at the time. PW6 said, the accused was co-operative and he gave his answers voluntarily. All the prosecution's witnesses said, they did not assault, threaten or made promises to the accused while he was in their custody.

10. As for the defence, the story was completely different. The accused (DW1) said, he was building his home on 4 January 2012. DW1 said, the police arrived at about 12 pm to 1 pm. He identified the police officers as PW1, PW2 and PW5. DW1 said, the police took him to a beach near the Nursing Station. They repeatedly hit him with a stick at the beach. Later, they took him to Vuravu. At Vuravu, DW1 said, he was again repeatedly beaten with a stick. When cross-examined, he said he was beaten 80 times. DW1 said, the police repeatedly swore at him, and threaten to take him to the military camp to be tortured. DW1 said, the police left after a while. They went to a Nursing Station and were treated by DW8. DW1 said the police returned on 5 January 2012 and took him to Kadavu Police Station. DW1 said, on 6 January 2012, the police again repeatedly tortured him in the police station. DW1 said, the police delivered a total of 50 hard "rugby kicks" to his ribs and body. DW1 said, he was also forced to do multiple press-ups. He said, he felt weak and was scared.
11. On 7 January 2012, DW1 said he decided to co-operated with police. DW1 said, PW6, the caution – interview officer, threatened him to co-operated and admit the offence, or he will take him to the army camp to be tortured. DW1 said, he was not taken for medical examination. DW1 said he was frightened. He admitted the offence to police to avoid further assaults and threats. DW1 said, he did not admit the offence voluntarily and they were not out of his own free will. DW2, DW1's brother, confirmed in his evidence that, police assaulted DW1 and him repeatedly on 4 January 2012. DW3 said he saw the police repeatedly beating DW1 and DW2 on the beach on 4 January 2012. DW3 was DW1's lay Methodist preacher. DW4, DW1's uncle, said he saw the police repeatedly assaulted DW1 on the beach in January 2012.
12. DW5, DW1's cousin brother said, he saw the police repeatedly assault DW1, as mentioned above. DW6, DW1's grandfather, said he saw the police repeatedly assault DW1 at Vuravu. DW7, DW1's cousin brother, said he saw the police repeatedly assault DW1 at Vuravu. DW8, the Nasele Nursing Station nurse, said she saw the accused on 3 January 2012. DW8 said, the accused complained of body pains. She said, she treated him with ice packs and told him

to see a doctor. DW10 is a doctor. DW10 said, he medically examined the accused on 20 January 2012. He tendered in evidence his medical report as Defence Exhibit No. 1. I have carefully read and considered the medical report. In D(10) of the report, the accused only complained to the doctor of the alleged police assaults on 4 January 2012. The accused never complained to the doctor of the alleged assaults by police on 5, 6, 7 and 8 January 2012. In D(12) of the report, he listed the injuries he saw on the accused, that is, "tenderness over left upper back and shoulder blade...tenderness over left calf". In D(16) of the report, DW10 wrote his summary and conclusion. He said, he saw no visible signs of any injury.

13. After looking at all the evidence and after carefully comparing them, and mindful of the demeanours of all witnesses, I have come to the conclusion that all the prosecution's witnesses' evidence were credible, and I accept their evidence. I accept the prosecution's witnesses' evidence that they did not assault, threaten or made false promises to the accused while he was in their custody. Had the accused being assaulted by police, as he said in his evidence, he would have asked the Magistrate Court of a medical examination at CWM Hospital on 10 January 2012, when he first appeared in court. He was then represented by experienced counsel Ms. Lagilevu. He did not ask for a medical examination on his second appearance on 16 January 2012, and third appearance on 19 January 2012. On 20 January 2012, when he went to DW10, he only complained of the 4 January 2012 alleged incident, not the alleged police assaults on 5, 6, 7 and 8 January 2012. As for his other witnesses, most of them were related to the accused, and their objectivity may be compromised.
14. The above are my reasons for my ruling on 5 August 2016. However, my mind is not closed. Subject to the performance of the witnesses at the trial proper, and the opinions of the assessors, and the whole evidence presented at the trial proper, the accused is still presumed innocent until proven guilty beyond a reasonable doubt, in a court of law.



Salesi Temo
JUDGE

Solicitor for State : Office of the Director of Public Prosecution, Suva.
Solicitor for Accused : Pacific Chambers, Barristers and Solicitors, Suva.