

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

MISCELLANEOUS CASE NO: HAM 210 of 2017

JEMESA VOLITIVITI

V

STATE

Counsel : Ms. Vani Filipe for the Applicant
Ms. Saif Shah for the Respondent

Hearing : 18 April 2018

Ruling : 11 May 2018

RULING

- [1] This is an application seeking leave of Court to file Notice of Alibi.
- [2] On 12 July 2017, the Applicant was produced in the Magistrate's Court of Suva (Criminal Case No. 988 of 2017), charged with the offence of Aggravated Robbery, contrary to Section 311 of the Crimes Act No. 44 of 2009 ("Crimes Act"). On the same day, the Learned Magistrate transferred the matter to the High Court.
- [3] When the substantive matter (HAC 202 of 2017) was called before me on 6 September 2017, the Director of Public Prosecutions ("DPP") filed Consolidated Information and Disclosures in the case.
- [4] As per the Information filed in the substantive matter, the Applicant, along with Jone Cama (the Applicant in Miscellaneous case No. HAM 192/2017), are charged with one

count of Aggravated Robbery, contrary to Section 311 (1) (a) of the Crimes Act. The full details of the Information reads as follows:

Statement of Offence

AGGRAVATED ROBBERY: Contrary to Section 311 (1) (a) of the Crimes Act No. 44 of 2009.

Particulars of Offence

JONE CAMA and JEMESA VOLITIVITI on the 16th day of June 2017 at Suva in the Central Division, in the company with others stole 1 x Samsung Notebook valued at \$2,000.00, 1 x iPhone 7 valued at \$1,000.00, 1 x Wi-Fi device valued at \$95.00 and cash \$12,500.00 (FJD) all to the total value of \$15,595.00, the property of JAE IN LUM, and immediately before committing theft used force on JAE IN LUM.

- [5] When the matter was mentioned before me on 12 October 2017, the Applicant pleaded not guilty to the charge of Aggravated Robbery filed against him. On the same day, the Counsel appearing on behalf of the Applicant submitted to Court that the Applicant is taking up the defence of alibi and wishes to file a Notice of Alibi. However, State Counsel objected to this application, since the notice of alibi has not been made within the time period stipulated in terms of the provisions of Section 125 of the Criminal Procedure Act No. 43 of 2009 ("Criminal Procedure Act"). As such, the Counsel for the Applicant submitted that she would be seeking the leave of Court to file the Alibi Notice.
- [6] This application was instituted by way of a Notice of Motion Seeking Leave to File Notice of Alibi, which was filed on 15 November 2017. The application is supported by an Affidavit of the Applicant.
- [7] In his Affidavit the Applicant deposes that the reason as to why he was not able to file the Notice of Alibi within time was because after the matter had been transferred to the High Court, from around 22 August 2017, the State had been seeking time to file Information and Disclosures and also to consolidate the charges against him. That was finally done on 6 September 2017. Thereafter, the State had taken further time in serving all the Disclosures, including the typed version, which was then filed on 11 October 2017.

- [8] The Applicant submits that since the matter is still at pre-trial conference stage and also since no trial date has yet been fixed it does not cause any prejudice to the State.
- [9] The Applicant deposes that in the event of leave been granted to file the Alibi Notice his intended alibis would be:
1. Ms. Victorina Mananuku, Cunningham Road, Stage 1 (Aunt)
 2. Mr. Nacanieli, Cunningham Road, Stage 1 (Uncle)
- [10] On 5 February 2018, Woman/Sergeant Melania Saukuru, Police Liaison Officer based at the Office of the DPP, filed an Affidavit in Opposition to this application. The Officer is an Investigator based at the Criminal Investigation Department, and is said to be familiar with the matters pertaining to these proceedings.
- [11] On 22 February 2018, the Applicant filed an Additional Affidavit in Reply to the Affidavit in Opposition filed by the State.
- [12] This application was taken up for hearing on 18 April 2018. Both Counsel for the Applicant and the State have filed written submissions, and referred to case authorities, which I have had the benefit of perusing.

Legal Provisions and Analysis

- [13] Section 125 of the Criminal Procedure Act No 43 of 2009 ("Criminal Procedure Act") sets out the "Rules as to Alibi". For ease of reference, the Section is re-produced below:

"125. — (1) On a trial before any court the accused person shall not, without the leave of the court, adduce evidence in support of an alibi unless the accused person has given notice in accordance with this section.

(2) A notice under this section shall be given —

(a) within 21 days of an order being made for transfer of the matter to the High Court (if such an order is made); or

(b) in writing to the prosecution, complainant and the court at least 21 days before the date set for the trial of the matter, in any other case.

(3) The notice given under this section, and the subsequent actions of the accused person in relation to the notice must comply with the following requirements —

(a) the notice must include the name and address of the witness, or, if the name or address is not known to the accused person at the time of giving notice, any information in the possession of the accused person which might be of material assistance in finding the witness;

(b) if the name or the address is not included in the notice, the Court must be satisfied that the offender, before giving the notice, took and then continued to take all reasonable steps to ascertain the name or address;

(c) if the name or the address is not included in that notice and the accused person subsequently discovers the name or address or receives other information which might be of material assistance in finding the witness, the accused person must promptly give notice of the name, address or other information, as the case may be; and

(d) if the accused person is notified by or on behalf of the prosecutor that the witness has not been traced by the name or at the address given, the accused person must promptly give notice of any information which is then in the possession of the accused person or, if he or she subsequently receives any such information, the accused person must promptly give notice of it; and

(e) the notice must also provide a summary of the material facts that any alibi witness might be expected to give as evidence during the trial.

(4) Any evidence tendered to disprove an alibi may, subject to any directions by the court as to the time it is to be given, be given before or after evidence is given in support of the alibi.

(5) Any notice purporting to be given under this section on behalf of the accused person or by the lawyer of the accused person shall, unless the contrary is proved, be deemed to be given with the authority of the offender.

(6) A magistrate making an order for transfer to the High Court whether for trial or for sentence shall inform the accused person of the provisions of subsection (1)."

- [14] Therefore, it is clear, in criminal proceedings the accused person shall not without the leave of the Court, be permitted to adduce evidence in support of an alibi, unless the accused person has given notice in accordance with this Section.
- [15] In terms of Section 125 (2) (a), for proceedings in the High Court, this notice must be given within 21 days of an order being made by the Magistrate for transfer of the matter to the High Court. Section 125 (2) (b) is applicable for proceedings in the Magistrate's Court, whereby the said notice must be given in writing to the prosecution, complainant and the Court at least 21 days before the date set for the trial of the matter.
- [16] Therefore, in the instant proceedings, the Notice of Alibi should have been given within 21 days of the Transfer Order being made by the Magistrate. As per the record the said Transfer Order was made by the Learned Resident Magistrate Suva, on 12 July 2017. However, Notice of Alibi was only given on 12 October 2017. Therefore, the Applicant is seeking the leave of this Court to file the Notice of Alibi.
- [17] The reasons attributed by the Applicant for the delay in giving the Notice of Alibi is that there was a delay on the part of the State in filing the Information and Disclosures, and also to consolidate the charges against him.
- [18] In the case of *State v. Peniasi Tirikula* [2009] FJHC 41; HAC 105D of 2006 (13 February 2009); Her Ladyship Madam Shameem held:

"The defence seeks to call three alibi witnesses. They are Iliesa Sousou Cava, Epi Batirerega, and Solo Raura. They are all serving prisoners. No alibi notice was given to the prosecution by the defence until the 26th of January 2009....."

The Accused was charged in May 2006. Transfer was delayed, but upon transfer the Accused applied, through counsel from the Legal Aid Commission for a permanent stay. It was refused but legal representation was confirmed by the Director of Legal Aid, on the 13th of March 2008. The accused then advised the judge then handling the case that he wished to call

*Iliesa Sousou Cava, Epi Batirerega, Savenaca Ragaraga and Silo Ravou as alibi witnesses but the application was not followed by a formal notice of alibi although Director Legal Aid was present when this was said, and although legal aid was confirmed on the 19th of March 2008. No formal notice of alibi was ever given for these witnesses. Nevertheless, the State obtained the statement of Sousou Cava and served it on the defence. **State counsel points to the inconsistency in the defence position, the changing nature of the alibi evidence and the unfairness to the prosecution.** Indeed only Sousou Cava's name reappears in the letter of the 26th of January, and no formal notice of alibi was ever filed and served on the prosecution.*

***I find the late alibi notice given by the defence to be incomprehensible.** If the Accused was represented in March 2008 and the issue of an alibi already raised at that time, why was an alibi letter not given until the 26th of January 2009? Indeed, the form of the letter of the 26th of January does not fulfil the requirements of section 229 of the Criminal Procedure Code which requires disclosure of the "particulars of the alibi." Why was the alibi notice not given last year in March when, according to Mr. Rayawa, Sousou Cava's name was disclosed by the defence? The court might be prepared to exercise a discretion in favour of an unrepresented accused, but in this case the Accused has been represented in the High Court since the 13th of March 2008. **The late notice of alibi witnesses, the changing identity of the witnesses and the lack of any adequate explanation for the failure to give notice lead me to a conclusion that the Accused should not be permitted to call alibi witnesses of whom the prosecution has had no notice, or whose identity has now changed.** I do grant leave to the defence to call Iliesa Sousou Cava, whose statement has been recorded by the prosecution. No other alibi witnesses may be called."*

[Emphasis is mine].

- [19] In the case of *State v. Anesh Ram & 6 others* [2010] FJHC 451; HAC 124 of 2008S (1 September 2010) His Lordship Justice Temo held as follows:

"Accused No. 1, 2, 3, 4, 5 and 6 have not complied with the alibi notice

requirement, required by section 125(2)(a) or (b) of the Criminal Procedure Decree 2009. The trial proper is a few days away, and as a result, they have verbally applied to court for leave to adduce evidence in support of an alibi, during the trial. The power to grant leave is a judicial discretion which must be exercised judiciously. The overall interest of justice must be served when a judicial discretion is exercised. In this case, if leave is not granted, the accuseds will not be able to call alibi evidence. The prosecution strongly objected to leave been granted, because the alibi notices as required, were not given.

I have carefully considered the defence and prosecution's position on the matter. As a matter of practice, the defence should strictly comply with the alibi notice required. The case was transferred to the High Court on 17th July 2008, and there was ample time for the defence to comply with the alibi notice requirement. At the same time, the prosecution was well aware of the defence alibi evidence, because the same were contained in the accuseds' caution interview statements, taken by the police shortly after the alleged murder. As a result, I will grant leave to accused No. 1, 2, 3, 4, 5 and 6 to adduce evidence in support an alibi, so long as the same were the ones mentioned in their caution interview statements. They are not allowed to adduce evidence in support of an alibi outside those mentioned in the caution interview statement."

- [20] The Fiji Court of Appeal in the case of **Pauliasi Delaibatiki & another v. The State** [2011] FJCA 44; AAU 18 of 2007 (16 September 2011); stated that:

"The reason for Magistrates giving alibi warnings to accused persons and requiring them to file notice of alibi in advance is to give the prosecution time before trial to take whatever steps they wish to check the alibi. There is certainly no legal compulsion on the prosecution to rebut any alibi raised. When the alibi is a very general one, such as it is here ("I was at the village") it will not usually be possible to adduce evidence in rebuttal. It becomes yet another piece of evidence for the assessors to make a finding of credibility."

- [21] As per the record it is clear that on 12 July 2017, the Learned Magistrate had informed the Applicant of his right to file Notice of Alibi within 21 days from that date.
- [22] The power to grant leave is a judicial discretion. In exercising its judicial discretion, what Court has to consider at this stage is whether any prejudice would be caused to the Prosecution if leave were to be granted to the Applicant to file the Notice of Alibi belatedly. The substantive matter is still at the pre-trial stage and has still not been fixed for hearing. In the circumstances, I am of the opinion that no prejudice will be caused to the Prosecution if this application is allowed. The prosecution would have adequate time before trial to check the alibis.
- [23] In any event, as has been held by the Court of Appeal in *Netani Nute & another v. The State* [2013] FJCA 134; AAU 110 of 2008; AAU 19 of 2009 (6 December 2013); “*The non-compliance of the statutory period for notice is a matter that goes to the weight of the alibi*”.
- [24] This position was affirmed by the Supreme Court in the case of *Netani Nute v. The State* [2014] FJSC 10; CAV 0004 of 2014 (19 August 2014).
- [25] Therefore, taking into consideration all the facts and circumstances of this case, I am of the opinion that this application should be allowed.
- [26] Accordingly, the Notice of Motion Seeking Leave to File Notice of Alibi is allowed.



Riyaz Hamza

JUDGE

HIGH COURT OF FIJI



AT SUVA
Dated this 11th Day of May 2018

Solicitors for the Applicant : Office of the Legal Aid Commission, Suva.
Solicitors for the Respondent : Office of the Director of Public Prosecutions, Suva.