

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 286 of 2019

STATE

vs.

KIALA MARCELLINO PENAKOY HENRI LUSAKA

Counsel: Ms. E. Rice with Ms. J. Fatiaki for the State
Ms. L. Vaurasi for the Accused

Date of Hearing: 16th June 2022
Date of Ruling: 16th June 2022

RULING

In Re: Application under Section 116 of the Criminal Procedure Act

1. The learned defence counsel Ms. L. Vaurasi at the outset of this case as well as upon the conclusion of the evidence of the second prosecution witness made an application under Section 116 of the Criminal Procedure Act that Ms. Angela

Bamblett a psychologist who had met and seen the accused be summoned as a witness of Court and offer her for cross examination to the defence,. In support of her application she brought to the notice of this court the case of Timoci Kurivora v. State [Criminal Appeal No. AAU 043 of 2016 (3rd March 2022)] and especially drew the attention to paragraphs 19 onwards and also paragraphs 35 of the said judgement. Their Lordships of Court of Appeal have approved the calling of a witness on the application made by the prosecution as a witness of court. The court held thus, *“it clearly appears that the Learned High Court Judge using his powers conferred under section 116 to call any person at any stage of trial had, proceeded to call Amelia as a witness and examined her since the latter’s evidence appeared to him, to be essential in achieving a just decision of the case. The judge had not fallen into error by resorting to the impugned procedure, and hence I find that the first ground of appeal is unmeritorious.”* The learned counsel for the State Ms. Rice was heard and she submitted that the prosecution does not intend to call Ms. Angela Bamblett and submitted that if the defence intends to take up diminished responsibility as a defence the burden of proof lies with them and thus the prosecution is not required to summon this witness.

2. In response to this Ms. Vaurasi submitted that Ms. Bamblett has indicated her unwillingness to come as a defence witness in this case. This fact had been stated in the supporting affidavit submitted along with the notice of motion. In these circumstances the defence moves that this witness be called by court and be tendered for cross examination by both parties. Section 116 of CPA as read as follows:

“116 (1) At any stage of trial or other proceeding under this Decree any Court may

- (a) Summon or call any person as a witness; or*
- (b) Examined any person in attendance though not summoned as a witness; or*
- (c) Recall and re-examine any person already examined*


And the court shall summon and examine, or recall and re-examine any such person if the evidence appears to the court to be essential to the just decision of the case.

(2) The prosecution or the defence shall have the right to cross-examine any person giving evidence in accordance with sub-section (1) and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of any person as a witness."

3. This provision of Law confers a discretion to a trial Judge to summon, to recall, or allow the recall of, any witness at any stage of trial. The language of which section is such, it certainly confer upon a trial judge a very wide discretion to call any witness at any stage of a trial if it appears to court that the evidence of such witness is essential to the just decision of the case.
4. Considering the evidence led by the witnesses PW1 Mr. Christopher Downes and PW2 Mr. Charles Hanlon and the line of cross examination it appears to this court that Ms. Angela Bamblett will certainly be able to provide this court by way of evidence various aspects of the accused Lusaka's conduct and behavior including her views, observations and conclusions as regards the mental state of the accused as perceived by her, if she could be considered an expert witness. It is this aspect that the learned defence counsel requires to be elicited in this court from her. As the mental state and/or condition of the accused may be a relevant consideration to come to a just decision in the circumstances of this case I am inclined to consider the application made by the defence favorably. Accordingly considering on the sole basis that Ms. Angela Bamblett's evidence may be necessary and essential to the just decision of this case the said witness will be called by this court and offered for cross examination to both parties.

5. As to the stage at which this witness should be called to my mind is upon the close of the prosecution case and that too if this court at that stage decides to call for the defence. The rational for this decision is that the evidence of Ms. Angela Bamblett would most likely be required to establish a defence position most probably that of diminished responsibility or some state of mind of the accused leading to a defence.
6. Accordingly this court has decided to call the witness Ms. Angela Bamblett and direct that summons be issued on her. The learned counsel for both parties did inform this court that Ms. Bamblett is not residing in Fiji and is in Australia as at present. Both learned counsel agree and consent that if she is unable to be present in Fiji her evidence could be led via Skype. Accordingly I direct that necessary steps be taken for her evidence to be led via Skype if she is unable to travel to Fiji without a delay or otherwise is unable to be in Fiji to give evidence.
7. Application of the defence is accordingly allowed.




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Justice K.M.G.H. Kulatunga

At Suva

16th June 2022

Solicitors

Office of the Director of Public Prosecutions for the State.
Shekinah Law for the Accused