IN THE HIGH COURT OF FIJI

AT LABASA

CRIMINAL JURISIDICTION

CRIMINAL CASE NO. HAC 53 of 2022 and HAC 67 of 2022

BETWEEN: **STATE**

AND: **AMRIT SEN**

AND: **1. SHUMENDHA CHANDRA**

2. MUQTADEER SAIF KAIYUM

Counsel: **Ms. L Latu for the State**

Mr. W Pillay for Amrit Sen and Shumendha Chandra

Mr. Kumar for Muqtadeer Saif Kaiyum

Date of Hearing: **05 June 2023**

Date of Ruling: **09 June 2023**

RULING ON CONSOLIDATION

Introduction

1. This ruling arises from an application made by the prosecution to consolidate Case No. HAC 53 of 2022 filed against Ms. Shumendha Chandra and Mr. Muqtadeer Saif Kaiyum with case bearing No. HAC 67 of 2002 filed against Mr. Amrit Sen.

2. The information against the accused Mr. Amrit Sen was filed on the 1st of September 2022 with 11 counts of which Count No. 1 is for the Murder of Jone Dumikoro Rusiate committed on the 5th of June 2022; counts 2 to 8 are all of Attempted Murder; count No.9 of Criminal Intimidation; count No. 10 of Assault Causing Actual Bodily Harm; and the

last Count No. 11 of Interference with Witnesses. Counts 1 to 10 are in respect of acts committed during the course of the same incident on the 5th of June 2022.

3. In case No. HAC 53 of 2022 information filed against Ms. Shumendha Chandra and Mr. Muqtadeer Saif Kaiyum with 20 counts include Murder and Attempted Murder charges arising out of the same incident and in respect of the same deceased and victims as that of Case No. 67 of 2022.

4. On 26th September 2022 the State made an application and moved to '***consolidate'*** these two cases as they are on the same incident and the Murder as well as Attempted Murder charges are all identical and are offences jointly committed by all three accused persons.

5. When the application was made on the 5th of December 2022, as the learned defence counsel for the Accused in both cases objected, the Court did direct the prosecution to submit their application and the Defence to tender their response in the written form and time frames were assigned.

6. However, when this was mentioned on 7th of February 2023, as the written application and written objection were not ready the court granted further time and set the following time frames. Proposed application for *consolidation* scheduled to be heard on 22nd May 2023, DPP to file their application in the written form within 30 days and all three Accused to tender their objection within 30 days thereof. Parties were also directed to file written submissions.

7. When mentioned on the 22nd of May 2023, the written application, response or written submissions were not filed as directed and were not ready. The court re-scheduled the hearing of the application for consolidation for the 5th of June 2023 and the parties were specifically informed that the oral application for consolidation and the objections will be heard and considered on the next day.

8. On the 5th of June 2023 the State Counsel as well as defence counsel did make an application for further time to comply with the previous orders to have the application and response to be tendered in writing. However as both parties including the State have repeatedly failed to comply with the previous orders, despite several dates and time being granted the application for further time was refused and this was taken up for hearing as ordered and directed on 22nd of May 2023.

9. The State has made oral applications for *consolidation* on 26th September 2022, 5th of December 2022, and 22nd of May 2023 as well as on the 5th of June 2023. The defence certainly had sufficient notice of the same. Both the defence counsel made detailed submissions on their objection and the State counsel was also heard.

Application

10. The Application to consolidate these two matters is made on the basis that they are on the same transaction, same incident and same offences of which the witnesses, deceased and victims are the same. The State made the application to join and charge all the Accused in one consolidated information in case No. HAC 67 of 2022 based on the principles of joinder in sections 59 and 60 of the Criminal Procedure Act.

Objection

11. Both the defence counsel objected to this application. They do not dispute that all these offences are acts committed in the course of the same transaction and they are all charged with inter alia same offences. Their objection is that each of the accused intend to summon the other accused as their witness and that if they are jointly charged, they will be denied of the opportunity to compel the other accused as a witness in their respective cases and correspondingly each of them will be required to give evidence and compelled to abandon their right to silence.

12. Mr. Pillay the counsel for the accused Mr. Amrit Sen submitted further that his client intends to call a accused in the other trial as his witness if the defence is called for. If the two cases are so consolidated all of them will become accused in the same proceeding and as such other accused person will not be compellable. As this would cause serious prejudice, Mr Pillay vehemently objected to the application for consolidation. Mr Kumar on behalf of the two accused in HAC 53 of 2022 also objected on the same basis.

13. All the parties were heard and the ruling was set for 9th June 2023 and parties were permitted to tender any farther material or submissions in writing on or before 8th June 2023. Neither party availed of this opportunity. I received nothing further. The ruling is thus pronounced upon considering the respective submissions made on 5th June 2023.

The Legal basis of an application for consolidation

14. The learned defence counsel emphasised the fact that written application had not been filed by the State as directed by court and the tenor of his submission was that there should be an application in a particular form. On the 22nd of May this Court re-scheduled the hearing of the application for consolidation and the parties were specifically informed that the ***oral application*** for consolidation and the objections if any will be heard and considered and it was the oral application that was considered on 5th of June 2023. In this backdrop it is prudent and is now necessary to consider the legal basis, form and nature of an application for ***consolidation*** is.

15. There has been an inveterate practice of entertaining applications in the nature of '***consolidation'*** of information and charges in the High Court as well as the Magistrates Court in Fiji. On the perusal of the Criminal Procedure Act and decisions and rulings on consolidation, I find no specific provision of law providing for '***consolidation'***. It is apparent that there is a *cursus curia* or a practice of court to entertain such applications for '***consolidation'.***

16. This practice has been prevalent for well over two or three decades and has now been hardened into a rule. The maxim ***Cursus Curiae Est Lex Curiae*** which mean "the practice of the Court is the law of the Court" appears to be the basis of legitimacy in entertaining such applications. Broom's Legal Maxims – 10th Edition – at page 82 explains the basis of applying this maxim in England as follows;

> "*Every court is the guardian of its own records and master of its own practice" and where a practice has existed it is convenient, except in cases of extreme urgency and necessity, to adhere to it, because it is the practice, even though no reason can be assigned for it; for an inveterate practice in the law generally stands upon principles that are founded in justice and convenience*."

17. Then Halsbury's Laws of England 4th Edition Vol 10 at para 703, it is stated that;

> "*A court exercising judicial functions has an inherent power to regulate its own procedure, save in so far as its procedure has been laid down by the enacted law, and it cannot adopt a practice or procedure contrary to or inconsistent with rules laid down by statute or adopted by ancient usage*"

18. That being so this practice is certainly without any legal basis. Then what is the legal or rational basis of consolidation? This practice of court does have a statutory foundation. Criminal Action is always instituted in the Magistrates Court and is then transferred to the High Court by an order of the Magistrate. Upon the cases so being transferred the DPP or the Commissioner of FICAC as the case may be, is empowered to file

information. In so filing information the DPP is empowered to join charges against an accused person by virtue of Section 59 of the Criminal Procedure Act (CPA) and join persons accused of such offences by virtue of Section 60 of the CPA. Section 60 reads thus;

> *"The following persons may be joined in one charge or information and may be tried together —*
>
> a. *Persons accused of the same offence committed in the course of the same transaction;*
>
> b. *Persons accused of an offence and persons accused of –*
>
> *i. aiding or abetting the commission of the offence; or*
>
> *ii. attempting to commit the offence;*
>
> 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*
>
> d. *Persons accused of different offences committed in the course of the same transaction,*

19. When separate cases have been instituted and information has been filed in respect of different accused in respect of charges that may be joined and include all charges and or persons in one and the same information and if there be a legitimate basis within Section 59 and 60 of the CPA an application for consolidation may be entertained in accordance with the *cursus curiae* and may be allowed.

20. The nature of this application I would say is in the broader context akin to an application to amend the information or charge as provided for by section 214 of the CPA but in fact is an exercise of the inherent powers of this court. The difference and the distinguishing feature from an application to amend is that there is no defect in the charges or information but the existence of two or more separate cases and information.

21. Section 214 (8) clearly specify that the power to amend is in addition and not in derogation of any other powers of the court for same or similar purpose. This clearly serves the inherent powers of court on which the *cursus curiae* of consolidation has developed. Further Section 214 (9) of the CPA also empowers the court to grant leave to amend an information whether by way of substation or addition of charges or *otherwise.* This will mean and include amendment to the information to add accused persons if there is a basis to join such persons under section 60 of the CPA.

22. Thus applications for *consolidation* does not prescribe any form or fixed procedure and as observed the *cursus curiae* has been *inter alia* to entertain and to consider oral

applications. However, if such court so desires it may require parties to make such applications or objections in the written form too. In short, ***consolidation*** is the amalgamation of the otherwise lawful and valid information in two or more separate cases**.**

Consideration of the application and objection

23. That being the legal position let me now consider this specific application and objections made in this matter. The application is to consolidate the information in Case No. HAC 53 of 2022 with that of this case namely HAC 67 of 2022 by joining the accused persons and charges. The objection is that the accused in each of the cases intend and would require to call the accused in the other case as his/her witness and the consolidation will deprive each of them of this benefit as all of them will become accused in the same case who then will not be a compellable witnesses.

24. At common law where two or more persons are jointly tried one could not be called as a witness for his co-accused [R. v. Payne (1872) L.R. 1 C.C.R. 349]. As the law stand today a co-Accused cannot be compelled to testify on behalf of another co-Accused or as for that matter for the prosecution against his co-Accused except in a few well-defined circumstances. These are: (i) where a *nolle prosequi* has been entered; (ii) where the testifying accused has already pleaded guilty and convicted, either on arraignment or during trial. Then such person's status changes from accused to that of convict. (However, it is desirable that he/she should be sentenced before so testifying); (iii) Where such co-Accused has been acquitted; (iv) If there is a severance of the trials.

25. It is relevant to note that a co-accused is a competent witness. And has a right to voluntarily give evidence if such co-accused so opts. If the co-Accused goes into the witness-box on his own behalf and gives evidence in the course of a joint trial, then what he says becomes evidence for all the purposes of the case including the purpose of being evidence against or for the other co-Accused. [R. v. Rudd (1948) 32 Cr.App.R. 138 at p. 140].

26. The principles of joinder of offences or offenders are applicable and relevant in approaching and considering applications for consolidation and objections thereto. The principles of joinder of offences or accused persons was 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".*

27. Then in **R v. Moghal** 65 Cr. App. R. 56, the English Court of Appeal said that it is only in exceptional cases that two or more defendants who are jointly charged on one information should be separately tried.

28. A court considering an application for consolidation is required to consider two main factors. Firstly, if there is sufficient evidential and factual nexus in relation to each accused and secondly if there be any unlawful prejudice that may be caused to the accused person. [vide- **State v. Ashneel Prasad & Others** HAM 127 of 2008, and **Fiji Independent Commission against Corruption v Laisenia Qarase and Sitiveni Weleilakeba** (HAM 68 of 2009) (3 September 2010)].

29. **R v Richardson** (1967) 51 Cr App R 381 at pp 382 – 383) accepted that severance could be granted to enable an accused to call a co-accused as a defence witness. Thus, the requirement of a co-accused as witness is relevant in considering applications for consolidation. [vide-**Leweniqila v The State** (2004),FJHC 209,HAM0031D.2004S(2 June 2004) **R v Taylor** [2007] 2 NZLR 250 and **R v Savoury** [(2005) 200 CCC (3d) 94].

30. Now to consider what the guiding principles are in considering an application for the severance or opposing the consolidation on the basis to enable an accused to call a co-accused as a defence witness. The submissions of the counsel in this regard were not very informative nor helpful and some research led me to the decision of the Court of Appeal Wellington case of **R v Taylor** [2007] 2 NZLR 250; which considered a similar application and adopted with approval the decision of the Ontario Court of Appeal in **R v Savoury** [(2005) 200 CCC (3d) 94] and also to **Leweniqila v The State** (supra) on this issue.

31. In **R v Savoury** (supra) two appellants, Mr Savoury and Mr Shaw, were jointly tried on three counts. The first count involved a charge of attempted murder against Mr Savoury alone. The second and third counts charged Mr Savoury and Mr Shaw jointly with armed robbery and with aggravated assault. Mr Savoury's counsel then indicated that he wished to call Mr Shaw as a witness and sought severance to enable that. Mr Savoury's counsel advised the Court that he anticipated that, if called, Mr Shaw would state that Mr Savoury had not participated in the incident leading to the charges, and stated why he thought that that evidence would be given.

32. The trial Judge refused to order severance. Mr Shaw and Mr Savoury were convicted and each appealed. Mr Savoury's appeal was based, in part, on the trial Judge's refusal to order severance. In appeal it was argued that his right to make full answer and defence was prejudiced by a joint trial in that it rendered his co-accused Shaw a non-compellable witness. Savoury contended that Shaw had direct exculpatory evidence to give and that Savoury could make full answer and defence only if he could compel Shaw to give that evidence.

33. On a perusal of the judgement of Doherty JA., the following principles are identifiable that are relevant to applications of consolidation and severance of information;

    a. There is a "presumption" that persons accused of participating in a joint criminal enterprise will be tried together.

    b. Severance may be granted where an accused wishes to call a co-accused to give evidence for the defence.

    c. A bare assertion by an accused that he or she wishes to call a co-accused in his or her defence is not sufficient to justify severance.

    d. Where an accused person applies for severance on the basis that he or she wishes to call a co-accused, the applicant must:
        i. show that there is a reasonable possibility that the co-accused will give evidence if made compellable; and
        ii. indicate the nature of the evidence that the co-accused will give, so as to show that there is a reasonable possibility that the evidence could affect the verdict favourably to the applicant.

    e. Even then severance may not be granted if other interests are sufficient to outweigh those of the accused.

34. That being so let's consider the objection in the present matter. The three accused in both the cases and information *inter alia* are charged for the same offences based on the same

victim and for the same offending on the basis of joint enterprise. Theoretically, when there are separate information and cases each accused may be a compellable witness in the other case. However, since the accused in each of such separate case and information is charged with the same offence and the same offending of which they are joint offenders they will continue to be co-offenders, though they may not be co-defendants in the same case.

35. That being so, the fact that the joint offenders are separately charged does not deprive or relieve each other from their status and attribute of being *joint offenders* on the basis of *joint enterprise*. In these circumstances the right to silence and the right against self-incrimination should be available to each of the accused in respect of either proceeding.

36. The Constitution under by virtue of sections 13 and 14 guarantees and recognizes pre-trial right to silence as well as pending trial. The spirit of these provisions require and demand that the same guarantee and the right be extended when joint offenders are separately charged for such joint offence vis-à-vis both proceedings.

37. Further, if the severance enables a co-accused to be a compellable witness in the other case on the same the benefit of which will accrue to the prosecution as well. Does this mean that if the DPP so desires the prosecution will have the right to server cases and information of two or more joint offenders in order to compel them to give evidence against the other or against each other in such severed cases? To my mind this should not be so. It would in effect violate the right to silence and rules against self-incrimination and the now accepted prohibition of compelling one accused to testify against the other in a criminal trial where both are jointly charged. This virtually will enable to do indirectly that which is otherwise prohibited.

38. In the above circumstances, I accept that an application for severance or an objection for consolidation on the basis that one of the accused requires the other as his or her witness may be considered if the severance or the separate information is in respect of different offences against each of them and certainly not for the asking when it is in respect of the same offence of which their joint offenders on the basis of joint enterprise. The rule is that persons accused of participating in a joint criminal enterprise will be tried together and it is only in in the most exceptional and rare case that they may be tried separately.

39. In the course of this application there was no intimation or submission at least from the bar table that each of the accused is willing to give evidence for the other and as to the

nature of the evidence and matters that is intended to be elicited. There was no exceptional reason or ground that was brought to my notice except for the general requirement or desire to call such other accused as a witness.

40. In these circumstances, I am inclined to accept the view that persons who are jointly charged for same offending, be it on a joint information or separately, it is against the spirit and in principle against their right to silence to compel them to give evidence at any proceeding based on the same offence unless for apparent and declared reasons that which is exceptional and made known to court.

41. In the circumstances of the present case, even if they are jointly charged, if each of the accused so desires and is willing there is nothing to prevent each of them giving evidence voluntarily on behalf of himself/herself or any other accused. The defence had not placed any material to satisfy this court that the co-accused or the other accused may or may not voluntarily give evidence if requested by each of the other accused or of any circumstance that is compelling and exceptional so to say.

42. Considering an application to sever information Justice Shameem in **Leweniqila v The State** (2004),FJHC 209,HAM0031D.2004S (2 June 2004), held that;

> *"the only basis for the application for separate trial is that one accused wishes to call other accused as witness in his defense is not a sufficient reason to sever the trial. Firstly this will not be a short trial and the same witness would be required to give evidence at least twice. If all the accused were to make similar applications, the cost to the administration of justice would be immense. Secondly if one accused's trial precedes others, other accused could not be compelled to give any evidence which incriminated them especially with their own trial pending."*

43. In *R v McDonald* [1993] 3 NZLR 354 at p 358 J., dealing with an applications to sever to enable an accused to call a co-accused in his or her defence said:

> *"General principles in relation to matters of severance are dealt with in Adams on Criminal Law, Ch 4.2.03. There is no need for me to repeat those principles or the accompanying references in this judgment. Counsel accept first that an accused wishing to call a co-accused as a witness may be frustrated by joint trial and that that fact may be grounds for a separate trial. Secondly, that a Judge must consider the interests of justice, not merely the interests of an accused. Thirdly, that where persons are involved in a joint or common enterprise it is normally right and proper that they should be jointly indicted and tried even though there may be some risk of prejudice." (Emphasis added.)*

Conclusion

44. As evident from the above dicta and the authorities cited, severance is rarely granted and similarly objections to consolidation are rarely entertained and allowed in situations where Accused wished to call a co-accused as a witness. There might be cases where an accused could not make his or her defence fairly without calling a co-accused but there was no material placed before this court of that nature. The bare assertion that of the accused persons in this instance that they wish to call a co-accused is not sufficient. Neither of the Accused did demonstrate that there is a real possibility that the other would give evidence, nor did they indicate what the nature of the evidence that would be so elicited and if there is a reasonable possibility that such evidence may affect the verdict in their favour.

45. Considering the interests of justice, not merely that of the Accused, requires that those alleged to have committed offences together were tried together. Thus, to my mind it is right and proper that they should be joined in one and the same information and tried together even though there may be some risk of prejudice.

46. Accordingly, I see no reason in law or otherwise to accept the said objections and are thus rejected. The application for consolidation is hereby allowed. The prosecution is permitted to file the consolidated information as proposed.

47. Application for consolidation is allowed.

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Gihan Kulatunga

JUDGE

At Labasa

9th June 2023

Solicitors:

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