

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Criminal Miscellaneous No: HAM 182 OF 2024

BETWEEN

VINOD KUMAR

Appellant

-v-

AND

THE STATE

Respondent

Counsel : Mr. Khan, I and Mr. Heritage, S for the Appellant
Ms. Mishra, P, (State Counsel of ODPP) for the Respondent

Date of Submissions : 20 June 2024

Date of Ruling : 23 July 2024

RULING

1. The Applicant filed a Motion and Affidavit in Support to have the Prosecution Witnesses recalled for Cross Examination.
2. Their application is made pursuant to Section 116(1)(c) of the Criminal Procedure Act 2009.
3. The Applicant alleges as follows:-
 - i. That this matter was set down for hearing on 20th and 21st of April, 2024.
 - ii. That he had engaged Sunil Kumar Esquire to defend himself in this matter after giving him his full instructions including the names of my witnesses who would be giving evidence in his favour and that he would have expected him to question and cross examine the Prosecution witnesses based on his instructions.
 - iii. That after the close of Prosecution case his counsel made a submission of No Case to Answer which was rejected by the Honourable Judge.
 - iv. That upon this ruling Case to Answer he questioned his pervious counsel as to why he did not follow his instructions by not cross examining the Prosecution witnesses according to his instructions. He was unable to give him a satisfactory answer.

- v. That the incompetency of his previous counsel by not cross examining the prosecution witnesses according to his instructions has persuaded this Honourable Court to rule Case to Answer against him.
 - vi. That he believed that due to the incompetency of my previous counsel for not questioning the Prosecution witnesses according to my instructions let to the Honourable Judge to find there was a case to answer.
 - vii. That if his previous counsel had acted according to his instructions all the Prosecution witnesses evidence would have been discredited and manifestly unreliable and this would have assisted the Honourable Judge when she considered the laws on submissions for No Case to Answer.
4. The State filed their submission on 20 June 2024. They objected to the Applicant's application and state as follows;
- (i) That the applicant alleges in a nutshell that due to the incompetence of the previous counsel in not cross examining the prosecution witnesses according to his instruction resulted in the Court ruling that there is a case to answer.
 - (ii) They responded by stating that the Applicant was present during the entire proceedings and had the chance to intervene and inform the court that his former counsel did not follow his instructions.
 - (iii) That the State's that the grounds submitted by the Applicant does not hold any merits.
 - (iv). That the previous counsel had failed to cross examine vigorously the prosecution witnesses

Law

5. **Section 116(1)(c) of the Criminal Procedure Act 2009** states;

“116.-(1) At any stage of trial or other proceeding under this [Act], any court may-

- (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.

Case Laws

6. **In State v Naureure** [2020] FJHC 1036; HAC 331.2018 (4 November, 20202), His Lordship Rajasinghe, J in paragraph 8 states as follows:-

“Accordingly, the main consideration that the Court is required to take into consideration is whether the recalling of this particular witness is essential to the

just decision of the case. Just decision does denote not only a fair and just outcome but also an outcome reached through procedural fairness. Hence, the Court needs to consider two main issues. The first is whether the recalling of this particular witness would prejudice the Defence. If not, the second consideration is whether the proposed evidence of recalling witness is essential to the just decision of the dispute.”

Analysis

7. The Court note that the gist of the Defence application is based on the cross examination of the Prosecution witnesses by the former Defence Counsel. The allegation was that the former Defence Counsel, did not vigorously cross examine the Prosecution witnesses in accordance with the Accused instructions. The current Defence Counsel further submitted that as a result of above, the Court ruled that there is a case to answer.

8. However, the Court in re-visiting it’s Ruling on No Case to Answer delivered on 12 April, 2024 which highlights the following points;

(i) That the law pertaining to No Case to Answer in the High Court is section 231 of the Criminal Procedure Act, 2009 which states;

“When the evidence of the witnesses for the Prosecution has been concluded, and after hearing (if necessary) any arguments which the prosecution or the defence may desire to submit, the court shall record a finding of not guilty if it considers that there is no evidence that the accused person (or any one of the several accused) committed the offence.” **(Underlining mine)**

(ii) It is well settled that the test at this stage of the trial is whether or not there is some relevant and admissible evidence, direct or circumstantial, touching on all elements of the charge, the weight and credibility of such evidence not being matters for assessment: **The State v Shiu Raj & Another**, Criminal Appeal No. AAU 0081 of 2005, Fiji Court of Appeal; **The State v Brian Singh**, Criminal Appeal, Criminal Appeal No. AAU97 of 2005, Fiji Court of Fiji, Sisa Kalisoqo v Reginam, Criminal Appeal No. 52 of 1984, Fiji Court of Appeal and **State v Anesh Ram**. Criminal Case No. HAC 124 of 2008S, High Court, Suva.

(Underlining mine)

9. Regardless as to how the former Defence Counsel had conducted the cross examination of the Prosecution witnesses, the Court still ruled that there is some relevant and admissible evidence touching on all elements of the charge. The weight and credibility is not an issue at that stage of the trial.

Conclusion

10. Based on the above reasons, the Defence application for recalling the Prosecution witnesses is refused.

11. The Defence is to proceed with their case.




Waleen George
Acting Puisne Judge

Dated this 23rd day of July, 2024

Solicitors for the State : Office of the Director of Public Prosecutions, Suva

Solicitors for Accused : Messrs Iqbal Khan & Associates, Barristers & Solicitors, 3Tukani
Street, Lautoka