IN THE RESIDENT MAGISTRATES COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Criminal Case No: CF 1929 of 2016

STATE

-v-

MEENA KUMAR

Appearances : **Sergeant F. Mohammed** for the State
Present with **Mr. A. Patel,** *of counsel* of the Legal Aid Commission

RULING

The Law

1. Section 116 (1) **Criminal Procedure Act 2009** is broad in its terms. It provides that *at any stage of trial* or other proceeding under this Act, any Court may summon or call any person as a witness; or examine any person in attendance though not examined as a witness; or recall and re-examine any person already examined.

2. More than that, the Court *shall* summon and examine, or recall and examine any such person if the evidence appears to the court to be essential to the just decision of the case.

3. A plain reading of this section indicates that, **at any stage of trial**,:
   (1) a Magistrate has the discretion to:

   (a) summon or call any person as a witness;
   (b) or examine any person in attendance though not examined as a witness; or
   (c) re-call and re-examine any person already examined.

   (2) And more than that, a Magistrate has a positive duty to:

   (a) summon or call any person as a witness;
   (b) or examine any person in attendance though not examined as a witness; or
   (c) re-call and re-examine any person already examined.

if their evidence appears to the court to be essential to the just decision of the case.

4. The Shorter Oxford English Dictionary: 1933 at p. 2242 defines the word "trial" to mean "b. the determination of a person's guilt or innocence."

5. Absent a statutory provision indicating that a trial begins at arraignment, a trial does not. It starts when a jury is sworn and the defendant is put into the charge of the jury: *R v. Tonner*, 80 Cr.App.R. 170, CA. The entering of a plea of "not guilty" does not mark the commencement of a trial; it merely establishes the need for a trial: *Quazi v. DPP*, 152, J.P., 414, DC.[1]

6. A Magistrate is both judge and jury. It is trite that a trial in the Magistrates' Court begins when the first witness for the prosecution is called. Everyone understands that to be the case and it would be disingenuous to try to formulate an interpretation contrary to both common law and the common practice. The question for me to decide is when does the trial end? In answer, I say that obviously the trial ends at judgment *i.e.* at the point when guilt or innocence is determined.

7. In *Phelan v. Back*, 56 Cr.App.R 257, DC, a recorder recalled and questioned a prosecution witness at the conclusion all the evidence and after the speech of counsel for the appellant in order to refresh his memory of a witnesses evidence because no shorthand note was available and without the witness being recalled the recorder would not have found the case proved. The Court held that when sitting alone, a judge has discretion to allow evidence to be called after the normal point at which such evidence would be excluded, if the interests of justice require it and if, in the exercise of his discretion, he thinks it proper to do so.[2]

8. In the result, I interpret section 116 of the **Criminal Procedure Act 2009** to mean that I may, at any stage before judgment is reached, summon or call any person as a witness, examine any person in attendance though not examined as a witness; or re-call and re-examine any person already examined, if I deem it necessary in the interests of justice or, in the exercise of my discretion I think it is proper to do so. And if their evidence is essential to the just decision of the case, I **must** call that witness.

Analysis

9. The State adduced evidence that the Police had conducted a raid on your residence and there they had discovered substances believed to be cannabis sativa in an outlet in the house. The substances were taken for chemical testing to ascertain its nature but the Government Analyst who tested the substances was not called and the Certificate of Analysis not tendered in trial.

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[1] Archbold 2005 Edition, 4.93.
[2] Archbold 2005 Edition, 8.253

10. Counsel for the Defendant draws my attention to the following salient counterveiling principles:

> ***"Our criminal courts operate within what is called the "adverserial system", where we have a party to prosecute, to allege, that is to say the State, and a party to answer or defend: the defence. The task is not to find out the truth about everything. It is to ascertain whether the charge has been proven and proven beyond reasonable doubt….***
>
> ***A trial is not an inquiry into the truth of an issue, but is concerned simply with the narrower question whether the prosecution has proven its case against the accused beyond reasonable doubt."***
>
> *see* **Silatolu v. State** [2006] FJCA 13; AAU0024 of 2003 (10 March 2006)

11. Counsel for the Defendant makes the point that"the evidence that your Honourable Court intends to call, that is the Drug Analyst, was never disclosed to the Accused and neither had it ever been brought to the Accused's attention."

12. In the circumstances, I am persuaded that it would be an impermissible breach of the Defendant's right to a fair trial to exercise my power pursuant to section 116 of the **Criminal Procedure Act 2009** in the circumstances here and now. I must act in the interests of justice and it would be contrary to the interests of justice to direct the call of evidence that had not been disclosed to the Defendant.

13. I am grateful to counsel for his assistance.

14. I will now adjourn for judgment to 3 pm on 13 September 2019.

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Seini K Puamau
Resident Magistrate

Dated at Suva this 12th day of September 2019.