

IN THE MAGISTRATES' COURT
AT BA
CRIMINAL JURISDICTION

Criminal Case No. 317/2020

BETWEEN: **STATE**

PROSECUTION

AND: **SUBEDAR KHAN**

ACCUSED

Counsel: Sergeant 4897 Veni Vunaki for Police Prosecution
 Mr. M. Yunus with Ms. S. Ali for the Accused


Date of Hearing: 7 September & 17 October 2024

Date of Ruling: 17 January 2025

RULING
[NO CASE TO ANSWER]

Introduction

1. Mr. Subedar Khan ("the Accused") was charged and produced in Court on 24 July 2020 for 1 count of Unlawful Possession of an Illicit Drug contrary to section 5(a) of the Illicit Drug Control Act 2004. The particulars of the offence are:


Statement of Offence
Unlawful Possession of Illicit Drugs: *Contrary to Section 5(a) of the Illicit Drugs Act 2004.*

Particulars of Offence

Subedar Khan on the 22nd day of July 2020 at Naloto St, Yalalevu, Ba in the Western Division, was found in possession of 0.0202g of Illicit Drugs namely methamphetamine.

2. On 2 September 2020, in the presence of his counsel from Legal Aid Commission, the Accused pleaded Guilty to the above charge. The matter was then adjourned for Summary of Facts.
3. On 16 September 2020, the Legal Aid Commission withdrew as counsel for the Accused and the Accused's current solicitors then entered appearance for the Accused. On 7 October 2020, a Notice of Motion and Affidavit was then filed to vacate the Accused's Guilty plea.
4. On 23 October 2020, Prosecution raised no objections to the application, thus, this Court's first predecessor vacated the Accused's Guilty plea and the Accused thereafter pleaded Not Guilty.
5. Various adjournments were then given to the counsel for the Accused to file Grounds of Voir Dire which was done on 18 April 2023. This Court's second predecessor then fixed the matter for Voir Dire Hearing on 2-3 July 2024.
6. On 2 July 2024, Prosecution appeared and informed this Court that they would not rely on the Accused's Caution Interview and Charge Statement as the consequences of not

remaining silent was not explained to the Accused. The matter was then fixed for Trial on 7 September 2024.

7. On 7 September 2024, Trial proceeded and Prosecution called 3 witnesses and thereafter closed its case. Counsel for the Accused then made an application pursuant to section 178 of the Criminal Procedure Act stating that a case was not sufficiently made out against the Accused to require him to make a defence.
8. It is important to highlight at the time of Prosecution's case on 7 September 2024 when Prosecution's second witness, Ms. Venti Chandra, the Senior Scientific Officer based at the Forensic Chemistry Lab gave evidence, Prosecution failed to provide her with gloves to allow her to open the Evidence Bag which was tendered as 'PEX2' during her evidence. Instead of seeking for the matter to be stood down to allow them to obtain the same, Prosecution stopped questioning Ms. Chandra.
9. After the Court adjourned the matter for the No Case to Answer submissions, after careful consideration, the Court then issued a Notice of Adjournment of Hearing on both Prosecution and the Accused counsel to avail themselves in Court on 13 September 2024.
10. On 13 September 2024, the Court informed the parties that pursuant to section 116(1)(c) of the Criminal Procedure Act 2009, the Court was going to recall Ms. Venti Chandra to be re-examined as it appeared to the Court that her evidence regarding the contents in the Evidence Bag was essential to the just decision of the case. The Court also informed Prosecution and the counsel for the Accused that pursuant to section 116(2) of the Criminal Procedure Act 2009, they would be given the opportunity to cross-examine Ms. Chandra.
11. Ms. Chandra was subsequently recalled on 17 October 2024 wherein she opened the Evidence Bag and through Prosecution gave evidence regarding the contents of the bag. Thereafter, Ms. Chandra was cross examined by the counsel for the Accused.
12. After Ms. Chandra's evidence, the counsel for the Accused informed the Court that he maintained his application for No Case to Answer. As such, time was given to counsel to file submissions. Submissions were filed on 4 November 2024 and on 5 November 2024, Prosecution informed that they would rely on Court records.
13. Having read the submissions and considered the evidence presented by Prosecution, I now pronounce my Ruling.

Law on No Case to Answer

14. Section 178 of the Criminal Procedure Act states:

Acquittal of accused person where no case to answer

178. If at the close of the evidence in support of the charge it appears to the court that a case is not made out against the accused person sufficiently to require him or her to make a defence, the court shall dismiss the case and shall acquit the accused.

15. In the recent case of ***Dirabici v State***; Criminal Appeal Case No. HAA 023 of 2023 (15 February 2024) His Lordship Justice Rajasinghe succinctly discussed the test for no case to answer in the Magistrates' Court where he referred to the case of ***R v Galbraith [1981] 2 All ER 1060*** which stipulated the two-fold test that should be adopted in respect to a no

case to answer submission which also discussed in the case of **Sahib v State** [2005] FJHC 95; HAA0022J.2005S (28 April 2005) where Her Ladyship Justice Shameem adopted and applied the test in the Magistrates' Court of Fiji. In doing so Her Ladyship held:

*"The test at no case stage in the Magistrates' Courts, is different from the test at no case stage in the High Court. The test in **R v. Galbraith** (1971) 73 Cr. App. R. 124 is two-pronged, first whether there is no evidence that the accused committed the offence, and second if there is evidence, whether it is so discredited that no reasonable tribunal could convict on it. In the High Court, only the first test applies because of the specific wording of section 293 of the Criminal Procedure Code (**Sisa Kalisogo v. R** Crim. App. 52 of 1984; **State v. Mosese Tuisawau** Cr. App. 14 of 1990). In the latter case, the Court of Appeal said that in assessing whether there was "no evidence", the court was entitled to ask whether the evidence was relevant, admissible and inculpatory of the accused.*

In the Magistrates' Courts, both tests apply. So the Magistrate must ask himself or herself firstly whether there is relevant and admissible evidence implicating the accused in respect of each element of the offence, and second whether on the prosecution case, taken at its highest, a reasonable tribunal could convict. In considering the prosecution case at its highest, there can be no doubt at all that where the evidence is entirely discredited, from no matter which angle one looks at it, a court can uphold a submission of no case. However, where a possible view of the evidence might lead the court to convict, the case should proceed to the defence case."

16. Thus, the Magistrates' Court ought to apply both limbs with respect to an application for no case to answer under section 178 of the Criminal Procedure Act:
 - i. whether there is evidence presented in respect of each element of the offence; and
 - ii. whether the evidence is so discredited that no reasonable tribunal could convict on it.
17. Moreover, the aforementioned limbs of the no case to answer test need to be tested objectively by the Court by analysing the evidence as a whole and not subjectively evaluating the testimonial trustworthiness of the witnesses based on credibility and reliability at this stage (vide **Dirabici** [supra]).

Analysis of Evidence

18. For a proper analysis of the evidence for the offence of Unlawful Possession of Illicit Drug, it is imperative for the Court to turn its mind to the elements of the offending, which are:
 - i. the accused
 - ii. without lawful authority
 - iii. possesses
 - iv. an illicit drug
19. Regarding the first limb of whether there is evidence implicating the accused in respect of each element of the offence, the court is only required to determine whether the prosecution has presented evidence to prove the elements of the offence and not that the evidence presented have proved the essential elements of the offence at this stage.
20. Prosecution's third witness, PC Sekove testified that on 22 July 2020, they had conducted a drug raid at Yalalevu, Ba. He testified that he had executed the search warrant being 'PEX3' and had explained it to Subedar Khan as well as cautioned him and then

conducted the raid. He further stated that he found 2 ziplock plastic containing crystal then he asked Subedar Khan regarding it and he – Subedar admitted that it belonged to him.

21. PC Sekove then testified that he seized the 2 ziplock plastic, arrested Subedar and produced him to the Ba Police Station where he handed over the drugs to Cpl Leslie, who was the Investigation Officer.
22. Cpl Leslie, Prosecution's first witness, testified that he was the Unit Supervisor and Investigating Officer in this matter. He stated that on 22 July 2020, they had received a report of Unlawful Possession of Illicit Drugs and the task force team brought in the suspect with white crystal like substance which was handed over to him.
23. Cpl Leslie was then instructed by the Station Officer to caution interview the suspect, which he did. After the Caution Interview, Cpl Leslie further testified that he had prepared the drugs to be taken for analysis and after analysis it was exhibited at Ba Police Station by the Crime Writer. He then testified that he received further instructions for someone to charge the suspect – Subedar.
24. Ms. Venti Chandra ('Ms. Chandra') was Prosecution's second witness and she testified that she was the Senior Scientific Officer based at the Forensic Lab. She testified that on 23 July 2020, she was rostered for analysis and that samples were brought in by Cpl Leslie and handed over to Susana Lawedrau, who was the person rostered for receiving cases on that day. Ms. Chandra testified that the samples were received in her presence and the Analyst Form that was handed over by Cpl Leslie was cross checked with the number of samples being handed over for analysis.
25. Ms. Chandra stated for this particular case, the samples received by the Lab was 1 sample of crystal contained in a press sealed bag further contained another press sealed bag with there being 5 apparatus being received as well. Ms. Chandra stated that these consisted of 2 straws and 3 glass apparatus which were all contained in a pouch marked as 'Mebourne'. All these samples were then collectively packed in a brown envelope which was the form the sample was received at the Lab.
26. The crystals and the apparatus were analysed by Ms. Chandra and her findings were recorded by her with the relevant reports being prepared by her as well. The reports were signed by her and the samples were sealed by her after analysis with this case being allocated a specific lab reference which was 2201377.
27. The report was shown to Ms. Chandra and she confirmed that it was the report that she prepared as it had her signature. She explained that the first page was a statement describing how the samples were received and from whom, with the second page being the table of results and the third page being the Analyst Form. The Statement was then tendered as 'PEX1A', the table of results as 'PEX1B' and the Analyst Form as 'PEX1C'.
28. Ms. Chandra then went on to testify that from her analysis it was noted that the crystals were methamphetamine whereas all the apparatus submitted tested negative for illicit drugs. Ms. Chandra then testified that the weight of the crystal was 0.0202g. Ms. Chandra then stated that the samples were sealed and the lab reference job number was noted on the exhibit and the exhibit was stored away awaiting dispatch to Cpl Leslie.
29. When shown the sealed brown Evidence Bag 'PEX2', Ms. Chandra testified that it was the same one she had sealed and that it had the same job reference number. She

testified that she had sealed the bag on 23 July 2020 and that it had her initials on the seal.

30. When Ms. Chandra opened 'PEX2' on 17 October 2024, she then testified that the contents of the bag which the Lab received was 1 sample of crystals contained in a press sealed bag being 'PEX2C' which was packed in another pressed sealed bag being 'PEX2B' and the smoking apparatus being 'PEX2E' which was provided to the Lab was contained in the Melbourne pouch being 'PEX2D'. She testified that all of these items were collectively contained in the brown paper bag being 'PEX2A'. After analysis, all the analysed samples were packed in the brown Evidence Bag being 'PEX2' with the lab reference job number 2201377. Ms. Chandra further testified that this exhibit was received on 23 July 2020 and after analysis, the bag was sealed by her on the same date it was received.
31. Consequently, this Court is satisfied that Prosecution has presented evidence to prove the elements for the offence of Unlawful Possession of Illicit Drugs namely Methamphetamine.
32. I now turn to the second limb regarding whether the evidence is so discredited that no reasonable tribunal could convict on it.
33. In *Dirabici* [supra], His Lordship Justice Rajasinghe went on to examine the scope of the second stage of the no case to answer and stated:

"In assessing whether a reasonable tribunal could convict the Accused, it is necessary to make an assessment of the evidence as a whole and not to evaluate the credibility of individual witnesses or evidential inconsistencies between the witnesses. (vide Archbold Ed 2023 4-365 pg 481).


.....the Magistrate must approach an objective test, from the eyes of a reasonable tribunal, in assessing the evidence as a whole. The Magistrate is not required to adopt a subjective evaluation of the testimonial trustworthiness of the witnesses based on the credibility and reliability at this stage of the proceedings."

34. Thus, at this juncture, the Court is not to look into the credibility and reliability of witnesses or the evidential inconsistencies or the probative value of evidence or even the accuracy between witnesses.
35. The counsel for the Accused, during cross examination elicited evidence which goes towards the credibility and reliability of the prosecution witnesses' evidence especially with respect to Ms. Chandra's qualifications and the integrity of the chain of custody of the illicit drugs that had been uplifted in the matter. Moreover, the counsel for the Accused submits that the alleged admission by the Accused ought not to be considered as it was in breach of his constitutional rights. However, these are issues that should not be determined at this stage.
36. The Court has observed that PC Sekove testified that a search warrant was executed on 22 July 2020 and explained to the Accused and upon conducting the raid, seized 2 ziplock plastics which Subedar Khan – the Accused in this matter admitted as belonging to him with Subedar Khan then being arrested. Cpl Leslie testified that on 22 July 2020, the task force team brought in Subedar with white crystal like substance which was handed over to him – Cpl Leslie. Cpl Leslie further testified that he had prepared the drugs to be taken for analysis which was then taken for analysis and thereafter exhibited at Ba Police Station by the Crime Writer.

37. The Court also observed that Ms. Chandra testified that on 23 July 2020, she was rostered for analysis and that samples were brought in by Cpl Leslie and handed over to Susana Lawedrau, in Ms. Chandra's presence and the Analyst Form that was handed over by Cpl Leslie was cross checked with the number of samples being handed over for analysis.
38. Ms. Chandra testified that the sample being the crystals and the apparatus were analysed by her and her findings were that the crystals were methamphetamine with a weight of 0.0202g, whereas all the apparatus submitted tested negative for illicit drugs.
39. Having considered the reasons above, I do not find that the evidence is so discredited to the level that no reasonable tribunal could convict on it.

Determination

40. I am satisfied that Prosecution has presented evidence to prove the elements of the offence, that is, Unlawful Possession of Illicit Drugs and that the evidence presented by the Prosecution has not been so discredited by cross examination to the level that no reasonable tribunal could convict on it.
41. I, therefore, refuse and dismiss the application for no case to answer and hold that at the conclusion of Prosecution case, it appears to the court that a case is made out against the Accused to sufficiently require him to make a defence in respect of 1 count of Unlawful Possession of Illicit Drugs.


N. Mishra
Resident Magistrate

