

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL NO. AAU 090 OF 2016
(High Court No. HAC 288 of 2016)

BETWEEN : **APAKUKI KAUYACA VITUKAWALU**

Appellant

AND : **THE STATE**

Respondent

Coram : **Gamalath, JA**
Prematilaka, JA
Dayaratne, JA

Counsel : **Mr K. Maisamoa for the Appellant**
Mr R. Kumar for the Respondent

Date of Hearing : **05 May, 2022**

Date of Judgment : **26 May, 2022**

JUDGMENT

Gamalath, JA

[1] Apakuki Kauyaca Vitukawalu, the appellant who has already spent nearly 7 years in prison out of the total sentence of 13 years imprisonment with a 11 years non-parole period as had been handed down at the High Court, Suva on 8 July 2016, following a conviction on a single count of "unlawful cultivation of Illicit Drugs", contrary to section (5)(a) of the Illicit Drugs Control Act 2004, the particulars of which state that between the 1st of July 2011 and the 3rd of January 2012 at Kadavu in the Eastern Division, without lawful authority cultivated 32 plants of *cannabis sativa*, an illicit drug weighing 11.0 kg, is presently seeking to canvass his conviction on several grounds of appeal for which he was granted leave by the learned Single Judge.

[2] Accordingly the leave to appeal against the conviction is based on the following grounds;

- 1) That the learned trial Judge erred in law and fact when the defence counsel asked the trial judge during the summing up to address the assessors in regards to the inconsistency of the prosecution witnesses, but the trial judge directed the defence counsel to withdraw such a statement.*
- 3) The learned trial judge erred in law and in fact when he failed to direct the assessors during the summing up that the prosecution witnesses were carrying out a raid at the Appellants house and farm illegally since the prosecution failed to produce the 'search warrant' during the raid of the Appellants house and farm on the 3rd January 2012 causing substantial prejudice to the Appellant.*
- 4) That the learned trial judge erred in law and in fact when he failed to direct the assessors the effect of carrying out the raid without the 'search warrant' being issued by the Magistrate or Justice of the peace pursuant to section 98 of the Criminal Procedure Decree 2009 causing substantial prejudice to the Appellant.*
- 5) That the learned trial judge erred in law and in fact when he failed to direct the assessors during the summing up about the medical report tendered as evidence by the Appellant, which was not opposed by the prosecution causing substantial prejudice to the Appellant.*

- 6) *That the learned trial judge erred in law and in fact when he did not adequately direct himself and the assessors that the medical report was tendered as evidence to proof that the Appellant was actually assaulted before and during the caution interview.*
- 7) *That the learned trial judge erred in law and fact when he failed to direct the assessors during the summing up that the Appellant was not questioned in his 'caution interview' about whether or not he was forced, threatened, induced or given any promise during his caution interview.*
- 9) *That the learned trial Judge erred in law and in fact during the voire dire to give written ruling as to why he admitted the caution interview admissible as evidence in spite that during the voire dire enquiry the Appellant tendered the Medical Report to show he was actually assaulted before and during the caution interview, causing substantial prejudice to the Appellant.*
- 11) *That the learned trial judge erred in law and in fact in convicting the accused based on involuntary confession taking into consideration that the Appellant was assaulted in which the trial judge lean to the prosecution as this can be evidence in his summing up."*

[3] Having examined the transcript, I am of the opinion that the general directions on the burden of proof as found in the paragraphs 36 and 37 of the summing up are fraught with irregularities that is tantamount to misdirection and since this is an issue to be addressed as a fresh ground I have provided in writing the ground and invited the counsel to address the matter, either at the present hearing or on a later date if they feel as they are in need of time to consider the issue, later during the current session. Since the counsel agreed to address the Court in the present hearing itself, I shall be dealing with the matter later in this judgement.

The Facts

- [4] Against the appellant, the prosecution relied on the evidence of the Police Officers who carried out the raid at his residence at Nasele Settlement near Nasele Village in Kadavu on an allegation that the appellant was in possession of marijuana. Accordingly, the search warrant was obtained to search the appellant's house for allegedly having in his possession marijuana. It is important to state that having searched the appellant's house the police have found nothing incriminating. On the issue of the search warrant the learned counsel for the appellant submitted that despite his application to peruse the warrant, the police officers failed to produce it at the trial as the warrant had become illegible, according to the police witnesses.

Taken as a whole the investigating police officers evidence had been that having met the appellant at his residence, and on being questioned about a marijuana cultivation that the appellant had been allegedly cultivating in the bushes, the team of police was led into a place in the jungle, where there had been an area covered with about 154 marijuana plants, which were taken into the police custody as exhibits of the case. These facts are borne out by the evidence of the prosecution witnesses, Sgt 1739 Adriu Naitukuni, SC895 Timoci Tokaiqali, SC217 Waisale Salu, Sgt 1785 Sakarala Tuberi.

- [5] One important matter relating to the search of the appellant's house; the evidence of Sgt 1739 Adriu Naituku (p.279 of the proceedings) has a specific reference to some marijuana plants hanging out side of the house of the appellant when he arrived at his house to execute the warrant. As can be seen the charges under which the appellant faced trial in the High Court has no connection with this allegedly incriminating piece of evidence and it leaves room therefore for surmise as to why the prosecution led that material in evidence. Be that as it may, upon a careful consideration of the evidence of the other police officers who formed the team of the raid, I do not find any reference to such a finding. Further, if the witness Sgt 1739 Naituku in fact had observed the marijuana plants hanging outside of the house of the appellant, what he did with such incriminating evidence is not clear having regard to the totality of the evidence for the prosecution. However, what causes concern is that in the summing up the learned trial Judge had made a specific reference to that

evidence when he directed the assessors as follows; "*PW1 said he saw marijuana plants hanging outside his house*" (para 25 p.125 of the summing up).

In my observation, this piece of evidence raises several issues in the case against the appellant and the learned trial Judge seemed to have lost sight of the aspect of it when he invited the assessors to consider the evidence, despite its inherent controversial nature. Firstly, if there had been in fact such an observation as alleged by the single witness, there was nothing on record to show that the investigation was carried out further to a finality relating to that evidence. Were those plants ever taken into custody of the police is not clear in the evidence and if the police did not take them into custody, was there a particular reason for such inaction is also not clear in evidence. If the plants the witness said to have observed were never sent for any analysis, what was the basis upon which the witness made an assertion that the plants he saw were in fact marijuana plants, also is not clear having regard to the evidence. Despite the wide gaps of this nature found in the evidence sans any clarification coming from the prosecution, disregarding that there is a possibility for the prejudicial effect of such evidence to outweigh the probative value, particularly in relation to the charge under consideration at the trial, the learned trial Judge had left that evidence for the consideration of the assessors and I find that that was a serious miscarriage of justice to the appellant.

- [6] Prematilaka J. raised another issue with regard to the exhibits of the case, and since its importance to the final outcome of the case, it should be placed on record. As it is the evidence of the investigating police officers that they uprooted 154 marijuana plants from the cultivation that is said to be the accused's, one would expect the prosecution to offer some evidence to establish the manner in which the exhibits were dealt with following the completion of the raid. There is clear insufficiency of evidence to take one through the process adopted in relation to the exhibits following their being taken into custody by the police. However, as the charges on the indictment referred only to 32 plants of marijuana, weighing 11.0kg, the disparity between what was taken into custody in the jungle and what was referred to in the indictment ought to have been explained by the prosecution at the trial. How could one be certain that the samples tested for drugs are the same drugs that are referred to in the indictment is unclear having regard to the proceedings in the case.

These disparities are vital matters to be considered by the assessors in their deliberations, however, I find no reference to these unclear areas in the summing up.

- [7] The learned trial Judge had placed the emphasis on the confessions supposed to have been made by the appellant on his arrest by the police. According to the learned trial Judge the police evidence referred to three confessions of the appellant. (see para 24 of p,125 of the proceedings).

“The State’s case against the accused rested solely on his alleged confessions to the police. He allegedly made three forms of confessions. First, when the police visited him at home in Vuravu Settlement on 3 January 2012, he allegedly admitted unlawfully cultivating cannabis sativa at his farm. Second, when he was cautioned interviewed by police on 3, 4 and 5 January 2012 he allegedly admitted unlawfully cultivating cannabis sativa. Finally, when he was formally charged by police on 7 January 2012, he allegedly admitted unlawfully cultivating cannabis sativa.”

- [8] In so far as the case for the prosecution relating to the instant appeal is concerned, the prosecution relied on the specific cautioned interview statement said to have been voluntarily made by the appellant. Referring specifically to that fact in paragraph 24 the learned trial Judge stated as follows; “the State’s case against the accused rested solely on his alleged confession to the police”. The appellant giving evidence at the trial disputed the fact that the police did not carry out an assault him while conducting the raid. His position in evidence was clear that they forced him to accompany him into the bush where they found an area with marijuana cultivation of which he disclaimed having any knowledge. He said the police continuously assaulted him at home as well as at the area where the cultivation was found and despite his protest the police insisted that the marijuana cultivation was his.
- [9] In the summing up referring to the appellant’s version the learned trial Judge stated that “however, that the accused said exactly the opposite. On oath he said police repeatedly assaulted him when they raided his home on 3 January 2012.” (see para 30 page 126 of the summing up). As it is the most crucial to the case against the appellant, whether or not he was assaulted during the course of the investigation becomes a deciding factor in this

case for it has a direct bearing to the voluntariness of the confession. As already discussed it was his position that the police assaulted him repeatedly on his arrest and after he was released on bail, about 8 days later, he had seen a private doctor for aches and pains and the doctor had observed certain injuries on his body.

- [10] It is therefore important to re-evaluate the nature of the evidence upon which the prosecution relied in establishing the voluntariness of the purported confession of the appellant. In relation to that specific aspect, the evidence of SC 217, Waisele Salu, shines a light on the crucial issue of the voluntariness of the confession of the appellant. In the evidence at the *voire dire* inquiry he admitted to have been a team member of the police who arrested the appellant at his home. His evidence was that "Sgt Adriu and other police officers did not assault, threaten or made promises to accused when he was in our custody. After arresting the accused, we took him to KPS .He made no complaints to us." Answering the cross examination the witness reiterated that "no police officers punched the accused during his arrest" (ps.272-273 of the proceedings).
- [11] However, bringing to our attention of a subsequent statement of the very same witness, which the counsel claimed was not made available to him prior to the trial in the High Court, the learned counsel for the appellant submitted that that statement is an admission of the assault said to have been carried out on the appellant by the police at the time of his arrest.
- [12] On a perusal of the Court Record I find that the said statement had been submitted to the High Court by the prosecution on 10th June 2016, as a new disclosure and as such the prosecution had the prior knowledge of the changed stance of the witness with regard to the issue, directly relevant in deciding on the voluntariness of the appellant's confession. The said statement is at p.258 of the court record while the disclosure notice is at p.257 of the record. Significantly, notwithstanding the prior knowledge of the existence of the new material that clearly pointed to an assault on the appellant at the time of his arrest, the prosecution had relied on the evidence of the very same witness as part of the prosecution case to establish the "voluntariness" of the caution interview statement of the appellant. (see p.272 of the record).

The statement of the officer (as then was) is as follows:

"I could clearly recall on 03/01/12 I was part of a drug raid team at Gasele Vula Yale, Kadavu. On this particular day we raided Ratu Apakuki's farm and house. I would like to state that there was force and assault done to the accused. The accused voluntarily admit to be the owner of the farm and marijuana. That is all I wish to say."

- [13] This I perceive as a serious matter and in my opinion since the onus is on the prosecution to establish beyond any reasonable doubt that the caution interview statement had been obtained voluntarily, this crucial material should have been brought to the attention of the learned trial Judge. The significance arising out of the lapse on the part of the prosecution could be understood having regard to the fact that the sole evidence upon which the prosecution sought to resolve the ownership issue of the marijuana plantation relating to the charge in the indictment was the appellant's confession and that alone. It is important to note that the daughter of the appellant and the brother of the appellant had also testified at the trial to the effect that the appellant was repeatedly assaulted in front of their eyes by the arresting officers. (see the evidence of Alipate Malia Kososo and Siteri Keva Kauyaca Vitukawalu p.294 of the proceedings). I do not find anything on the record to show that the evidence of the said witnesses was seriously discredited in the cross examination. Besides, as already stated in paragraph [5] the appellant had tendered a medical report of one private medical officer one Doctor Bogitini and the report was tendered in evidence marked DE1. The medical findings are (DE1), contained in a Fiji Police Medical Examination Form dated 27th January 2012. This was about 24 days after the date of arrest on 3rd January 2012. According to the medical findings there had been tenderness of the left lateral chest wall and the Doctor had opined that the injuries may have been due to "possible blunt trauma to the left chest wall". It is perplexing that there had been nothing on the record that the learned trial judge gave any directions based on this evidence and that in my view is fatal to the issue of the admissibility of the prosecution evidence on the issue of the voluntariness of the purported confession.
- [14] In the light of this evidence the findings at the voire dire inquiry becomes seriously doubtful.

[15] About the new ground that I raised; raising another new issue of concern, I have, with prior notice being given to the parties in conformity with the Rules, raised a ground on the accuracy of the directions found in the summing up in which the learned trial judge had directed as follows;

"36. *You will have to look at and consider all the evidence together. You will have to compare and analyze all the evidence together. You have heard and seen all the witnesses give evidence. You had observed their demeanor in the courtroom. Who do you think was the evasive witness? What do you think, from your point of view, was telling the truth? If you think the prosecution's witnesses were credible witnesses and you accept their evidence, then you must find the accused guilty as charged. If otherwise, then you must find the accused not guilty as charged. It is matter entirely for you.* (emphasis added).

37. *Remember, the burden to prove the accused's guilt beyond reasonable doubt lies on the prosecution throughout the trial, and it never shifts to the accused, at any stage of the trial. The accused is not required to prove his innocence, or prove anything at all. In fact, he is presumed innocent until proven guilty beyond reasonable doubt so that you are sure of the accused's guilt, you must find him guilty as charged. If you do not accept the prosecution's version of events, and you are not satisfied beyond reasonable doubt so that you are not sure of the accused's guilt, you must find him not guilty as charged.*" (emphasis added).

[16] Clearly, nowhere in the summing up the learned trial judge gave any direction in which the need to consider the proposition based on law, what would be the ultimate result of the case if the assessors entertained a reasonable doubt whether or not to believe the evidence as placed before court by the appellant. The important direction that the uncertainty about the veracity of the defense evidence as a whole should be enured to the benefit of the appellant and he should therefore be found not guilty, a very basic and an important direction had not been parted with the assessors; and that the learned trial judge was guided by such consideration is absent from the record. Keeping with the best traditions Mr. Kumar, the learned counsel for the State conceded that the absence of the said direction is tantamount to a non-direction in the nature of a misdirection and conceded that the conviction cannot be supported accordingly.

[17] In the light of above I am of opinion that the conviction is unreasonable and cannot be supported having regard as such the appellant should be acquitted.

Prematilaka, JA

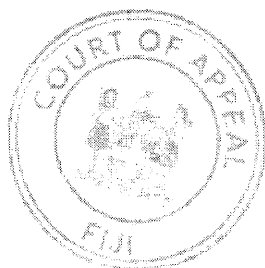
[18] I am in agreement with the reasons and the outcome proposed by my brother Gamalath, JA in the draft judgment that the appeal should be allowed. However, following Sahib v State [1992] FJCA 24; AAU0018u.87s (27 November 1992) and Aziz v State [2015] FJCA 91; AAU112.2011 (13 July 2015) I would allow the appeal on the basis that the verdict is unreasonable and cannot be supported having regard to the evidence resulting in a substantial miscarriage of justice as set out in section 23 of the Court of Appeal Act and not on the basis that conviction is unsafe. I am of the view, as expressed in the above decisions, that the words 'unsafe', 'unsatisfactory' and 'dangerous' have no place in the legislative framework of section 23 of the Court of Appeal. I discussed this aspect in detail in Govind Sami v The State AAU 0025 of 2018 (26 May 2022) and needs no further elaboration.


Dayaratne, JA

[19] Having read the draft judgment of Gamalath J. I agree with his reasons and conclusion.


Order of the Court

The appeal is allowed and the appellant is acquitted.

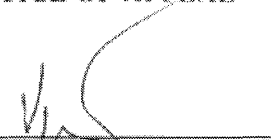




Hon. Justice S. Gamalath
JUSTICE OF APPEAL



Hon. Justice C. Prematilaka
JUSTICE OF APPEAL



Hon. Justice V. Dayaratne
JUSTICE OF APPEAL