IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO: HAC 73 OF 2013

BETWEEN	:	**STATE**
AND	:	**K.R.A.K**
Counsel	:	**Ms. S. Puamau for the State** **Mr. Iqbal Khan for the Accused**
Date of Ruling	:	**04 July 2013**

RULING ON THE APPLICATION TO AMEND THE INFORMATION

[1] Director of Public Prosecutions, on behalf of the State made an application to amend the Information by substituting two new counts, one count of "**Murder**" and one count of **"Act with intent to cause Grievous Harm",** instead of the existing count of "Manslaughter".

[2] The Learned Prosecutor, on behalf of the Director Public Prosecutions made extensive legal submissions, both written and oral, along with number of case authorities.

[3] State's contention is that after having heard all the evidence of the witnesses adduced at the trial, the Director of Public Prosecutions is of

the view that the appropriate charges, in the present context, should be "Murder" and "Act with intent to cause Grievous Harm". This application is supported with case authorities of **Prosecutor v Mladen Natetilia**, **a.k.a. "Tuta"** and **Vinko Martinovic, a.k.a. "Stela"** (a Judgment of International Criminal Tribunal for former Yugoslavia), **State v Ram** [2010] FJHC 451; HAC 124.2008S (01st September 2010), **FICAC v Vocea** [2010] FJHC 477; HAC 129. 2009 (29th October 2010 and paragraphs 1- 150 of the Archbold, Criminal Pleading, Evidence and Procedure 2010.

[4] It was further submitted by State, that several case authorities in English courts say that an indictment may be amended, when it does not accord with the evidence given at a trial (**R v Hall** [1968] 29.B. 187 C.App. R 528, CA) or in circumstances where the evidence led in support of it discloses more than one offence (**R. v Jones** (J) and others (59 Cr. App. R. 120, CA). In the case of **R v Johal and Ram** (56 Cr. App. R. 5(1)), it was decided the amendment involves of a substitution of a different offence for the original as well or inclusion of an additional count as well.

[5] Director of Public Prosecutions argues that no '**EMBARRASMENT'** is caused to the defence by their proposed amendment or more specifically, introducing totally two new counts by replacing the existing count, as the learned defence counsel;

- Cross-examined Mohammed Nabil Khan on the intention of the Accused to harm him and the deceased;
- Is focusing on a defence of an accident;
- Was verbally indicated in open court on 02nd July 2013 about a possible amendment to the Information by the Director of Public Prosecutions and ;

- After having forewarned about this move, vigorously cross-examined the remaining Prosecution witnesses.

[6] The learned Defence Counsel strongly objected to this move of the Director of Public Prosecutions. He submitted that they were given disclosures for a charge of "**Manslaughter"** and their case theory was focused to that charge. He claimed that he was deprived of cross-examining the prosecution witnesses for a more serious charge of 'Murder'. Further, he said that the court should exercise its discretion judicially in this instance and should look after the interest of the child as well. He said embarrassment is caused to the defence when the charge is enhanced while they are focusing on a lesser offence. Defence submitted a brief written submission to canvass their argument.

[7] Having considered the contentions of both parties, I now proceed to see the legal background of amending an Information. Section 214(2) empowers the court to order amendments to the information, if it appears to court that the Information is defective. In such a situation, the court should consider the merits of the case to see whether such amendment will cause any injustice.
Section 214(2) of the Criminal Procedure Decree 2009 states as follows:

> ***"(2) Where, before a trial upon information (or at any stage of such trial), it appears to the court that the information is defective, the court shall make such order for the amendment of the information as the court thinks necessary to meet the circumstances of the case, unless the required amendments cannot be made without injustice, having regard to the merits of the case".***

These amendments are to be done before the commencement of the trial.

[8] Section 214(9) and (10) reads as follows:

> ***"(9) The Court may, upon application by the prosecution, grant leave to amend an information, whether by way of substitution or addition of charges or otherwise.***
>
> ***(10) In deciding whether or not to grant leave, the Court may consider whether the amendment might embarrass the accused in his defence and whether such embarrassment might be appropriately mitigated by way of adjournment of trial".***

[9] On a plain reading of section 214(9) it is quite clear that allowing an application for an amendment of Information is a discretion of court. In such a situation, the Prosecution should demonstrate to court that the proposed amendment to the information will not embarrass the accused in his defence.

[10] An Accused can be said to have been "embarrassed" if he is placed in a difficulty which he ought not to have fairly been faced with the proposed amendment.

[11] The learned Prosecutor correctly pointed out that there is no specific statutory bar on time in which the Prosecution should make an application for an amendment to the Information. As **Justice Temo** noted in **State –v- Ram** [2010] & JHC 451; HAC 124.2008S (01st September 2010), in a traditional context, prosecutors are always entitled to amend charges at any stage of proceedings, before it closes its case. This is applied to Magistrate Court procedure in express terms as stipulated in **section 182** of the **Criminal Procedure Decree 2009**.

[12] It was decided in **Swaine [2001] Crim. LR 166**, that the later the amendment, the greater the risk that it could cause injustice and therefore very unlikely to be allowed. This is in a situation where the **Indictment Act 1915 of England** specifically provides (**section 5(1**)) a provision allowing the indictment to be amended at any stage of the trial, whether before or after arraignment. (**Blackstone's Criminal Practice 2009, D.11.91 page 1574**).

[13] The line of English authorities in this subject shows that the main concern of the court in deciding to allow or disallow an application to amend the indictment is the risk of injustice to the Accused. The timing of the amendment had been one of the major factors in determining the '**injustice'**. In the case of **Johal [1973] QB 475 Justice Ashworth** noted Blackstone: page 1575)

> **"*As a statement of principle, to be applied generally, this i.e., the decision in Harden is....too wide. No doubt in many cases in which, after arraignment, an amendment is sought for the purpose of substituting another offence for that originally charged, or for the purpose of adding a further charge, injustice would be caused by granting the amendment. But in some cases (of which the present is an example) no such injustice would be caused and the amendment may properly be allowed....***
>
> ***In the judgment of this court there is no rule of law which precludes amendment of an indictment after arraignment, either by addition of a new count or otherwise...***
>
> ***On the other hand this court shares the view expressed in some of the earlier cases that amendment of an indictment during the course of a trial is likely to prejudice an accused***

person. The longer the interval between arraignment and amendment, the more likely it is that injustice will be caused, and in every case in which amendment is sought, it is essential to consider with great care whether the accused person will be prejudiced thereby".

[14] In the cases of **Collison (1980) 71 Cr. App. R. 249** and **Teong Sun Chuah [1991] Crim. L.R. 463,** the amendments were allowed, even though those were made at the very later stages of the cases, as those caused no prejudice to the defence. It was decided in **O'Connor [1997] Crim. LR 516** that there is a risk of injustice when an amendment to indictment is allowed at the close of the Prosecution's case. It was further held that such an amendment is unfair when the Crown's case had changed significantly and the accused has been confronted with a different and more difficult charge.

[15] Having considered the existing legal background pertaining to Amendment of Information, I now turn to discuss the factual background of this case.

[16] This case was initiated with an Information of **Manslaughter**. The first set of disclosures was served on the accused on **25th May 2013** and full typed documents were served on **19th June 2013**. However, the first trial date, which had been fixed for 03rd June to 07th June 2013, got vacated due to State being not ready to proceed. It was informed to court some additional disclosures were served on the Accused on **25th June 2013** and **28th June 2013** before the trial proper commenced on **01st July 2013.** On 02nd July of 2013, the learned Prosecutor verbally informed court that Director of Public Prosecutions is considering the possibility to amend the Information to '**Murder'** from the existing count of '**Manslaughter'**, after considering the available material. The Prosecution, as it stands now, has called all their intended witnesses and

therefore technically closed its case as admitted by the learned Prosecutor herself, though literally not so.

[17] **Firstly**, at this juncture, it is the duty of the court to assess whether the requested amendment to the Information embarrasses the Accused in his defence. **Secondly**, the court has to rule that though an embarrassment is caused, such embarrassment can be appropriately mitigated by way of adjournment of trial, if leave is granted to such an amendment.

[18] As **Justice Marshall** noted in **Ali v State** [2011] FJCA 28; AAU 0041.2010 (01st April 2011), Director of Public Prosecutions will not take a decision to prosecute a case unless, after a proper consideration of all the issues, he concludes that the chance of obtaining a conviction is at least more than 50%. (para. 61).

[19] Therefore, this court has to positively presume that the decision of the Director of Public Prosecutions to base this case on an information of a "**Manslaughter**" should have been a well considered one. On the other hand, the Accused was put on trial on this well assessed decision by providing with all the material that the Prosecution is going to rely on to prove this charge. The case theory of the Accused should have constructed according to those material to negate the allegation of "**Manslaughter**". Simply because the Prosecutor verbally informed court that the Director of Public Prosecutions is considering to amend the Information to '**Murder'** the Prosecution cannot anticipate the defence to have a 'U' turn on their case theory in accordance with that unconfirmed verbal information. The line of cross-examination could have been entirely different on such a charge, had it been officially confirmed and leave of the court is granted to introduce such charge.

[20] On the other hand, when this trial commenced on Monday (01st July 2013), the Prosecution had been very well aware of all the available

material, inclusive of the developments of **Mohammed Nabil Khan** and **Inia Daunikama** in respect of their testimonies. Thus, the Prosecution could have moved this amendment well before the trial proper commenced on Monday. At least, after the latest development of **Aisea Liva Lomalagi** on Monday, the Prosecution should have taken a firm decision where they stand. This sequence of events must have lead the learned Prosecutor to tell in her submissions that the test for granting leave for an amendment is not its prejudicial effect, but embarrassment.

[21] After having a careful consideration of events that took place in court, I conclude that if the courts start entertaining applications of this nature, it will be an opening of flood gates to abuse of process. If the Prosecution starts moving to amend the Information according to the change of tune of their own witnesses with the passage of time it will have a direct bearing on dispensing justice within a reasonable time frame.

[22] At the same time, it has to be borne in mind that each case will depend entirely on its own facts and merits. Thus, whether to grant leave or not to an application to amend an Information depends on the facts of each case. At the end of the day, what matters is whether such an amendment can be made without causing any injustice or unfairness to the Accused leaving him in embarrassment. It is the Prosecution who should decide how to present their case in court. The Prosecution cannot move for an amendment as of right. Hence, they cannot positively anticipate that the court will grant leave for amendments to the Information as sought, particularly when the trial is in progress and especially at the later stages of proceedings. The Courts, as always do, will have to assure the entitlement of the Accused person to have a fair trial as well.

[23] In this back drop, this court concludes that if the court grants leave to amend the Information at this point of time as requested by the

Prosecution, it would definitely cause an embarrassment to the Accused in his defence.

[24] Next issue is to decide whether this embarrassment can be adequately mitigated by way of adjournment of trial or not. In answering to this question, I recall that this is the second time the matter is being fixed for trial. In the first instance, it had to be vacated on Prosecution's account. Even though this is a relatively new case amongst the list of pending cases, there is a reason for this matter to be given priority. The Accused, being a child of 11 years, is a citizen of United States of America. He is pursuing his studies there and since the alleged incident of shooting that is since January 2013, he has to be in Fiji until the conclusion of this case. In this scenario, Accused is entitled to have an expeditious trial. Any more adjournment will directly injure the course of justice.

[25] Hence leave is not granted to the application by the Director of Public Prosecutions to amend the Information at this stage of the trial. Prosecution is hereby ordered to proceed ahead from the point their case was stopped.

J. Bandara

Judge

At Lautoka

4 July 2013

Solicitors: The Office of the Director of Public Prosecutions for State

Messrs Iqbal Khan & Associates for the Accused