

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 064 OF 2015S

**STATE**

**vs**

**1. WAISAKE KALOULIA**

**2. KAMINIELI NAQELECA**

**Counsels** : Mr. Y. Prasad, Ms. S. Serukai and Mr. T. Tuenuku for State  
Ms. N. Karan for Accused No. 1  
Mr. L. Qetaki for Accused No. 2

**Hearings** : 23 to 27 January, 2017

**Summing Up** : 30 January, 2017

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## **SUMMING UP**

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**A. ROLE OF JUDGE AND ASSESSORS**

1. Madam and Gentlemen Assessors, it is my duty to sum up to you. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of fact however, what evidence to accept and what evidence to reject, these are matters entirely for you to decide for yourselves. So if I express my opinion on the facts of the case, or if I appear to do so, then it is entirely a matter for you whether you accept what I say or form your own opinions. You are the judges of fact.
2. State and Defence Counsels have made submissions to you, about how you should find the facts of this case. That is in accordance with their duties as State and Defence Counsels, in this case. Their submissions were designed to assist you, as the judges of fact. However, you are not bound by what they said. It is you who are the representatives of the community at this

trial, and it is you who must decide what happened in this case, and which version of the evidence is reliable.

3. You will not be asked to give reasons for your opinions, but merely your opinions themselves and they need not be unanimous. Your opinions are not binding on me, but I will give them the greatest weight, when I deliver my judgment.

**B. THE BURDEN AND STANDARD OF PROOF**

4. As a matter of law, the onus or burden of proof rest on the prosecution throughout the trial, and it never shifts to the accuseds. There is no obligation on the accuseds to prove their innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he is proved guilty.

5. The standard of proof in a criminal trial, is one of proof beyond reasonable doubt. This means that you must be satisfied, so that you are sure of the accuseds' guilt, before you can express an opinion that they are guilty. If you have any reasonable doubt so that you are not sure about their guilt, then you must express an opinion, that they are not guilty.

6. Your decision must be based exclusively upon the evidence which you have heard in this court, and upon nothing else. You must disregard anything you might have heard about this case outside of this courtroom. You must decide the facts without prejudice or sympathy, to either the accuseds or the victim, which is the public in this case. Your duty is to find the facts based on the evidence, and to apply the law to those facts, without fear, favour or ill will.

**C. THE INFORMATION**

7. You have a copy of the information with you, and I will now read the same to you:

*“... [read from the information]...”*

**D THE MAIN ISSUE**

8. In this case, as assessors and judges of fact, each of you will have to answer the following question:

- (i) Did the accuseds, on 21<sup>st</sup> January 2015, at Davecadra farm, Wainibuka, Tailevu in the Central Division, without lawful authority, cultivated 160.6 kilograms of cannabis sativa plants?

**E. THE OFFENCE AND IT'S ELEMENTS**

9. The accuseds were charged with "unlawful cultivation of an illicit drug", contrary to Section 5(a) of the Illicit Drugs Control Act 2004. For the accused to be found guilty of the offence, the prosecution must prove beyond reasonable doubt, the following elements:

- (i) the accuseds
- (ii) knowingly
- (iii) without lawful authority
- (iv) cultivated
- (v) an illicit drug

10. Under Section 2 of the Illicit Drugs Control Act 2004, an "Illicit Drug" means "any drugs listed in Schedule 1 of the Act". In Schedule 1 Part 8 of the above 2004 Act, a "cannabis plant", whether fresh, dried or otherwise, is an "Illicit Drug". A cannabis sativa plant, commonly known as a marijuana plant, according to the above definition, is an "Illicit Drug". To make the accused liable for the offence, the prosecution must make you sure that what the accused was cultivating, at the material time, was an "Illicit Drug", within the definition of the above 2004 Act.

11. The prohibited act in the offence is the verb "cultivate". Under Section 2 of the Illicit Drugs Control Act 2004, the word "cultivate" means "planting, sowing, scattering the seeds, growing, nurturing, tendering or harvesting". Put simply, the prosecution must make you sure that the accused was planting or growing an illicit drug, at the material time. This is the physical element of the offence.

12. In addition to the above, the prosecution must make you sure that, the accused, at the material time, knowingly cultivated an illicit drug. It must be shown that the accused knew, at the material time, that he was cultivating an illicit drug. This is the mental element or fault element of the offence.

13. The prosecution must also make you sure that the accused had no lawful authority to cultivate an illicit drug, at the material time. However, the accused can escape liability for the offence if he proves, on the balance of probabilities, that he had lawful authority to cultivate the illicit drug. You must look at and carefully consider the total evidence, when answering the above issues.

**F. THE PROSECUTION'S CASE**

14. The prosecution's case were as follows. On 21 January 2015, Mr. Waisake Kaloulia (Accused No. 1) was 28 years old. He resided at Nabulini Village in Wainibuka, Tailevu. He reached Form 5 level education and was a subsistence farmer by profession. Mr. Kaminieli Karusia Naqeleca (Accused No. 2) was 43 years old. He resided at Manu Settlement, Wainibuka, Tailevu. He reached Form 3 level education and was also a subsistence farmer by profession.
15. According to the prosecution, both the accuseds had a farm in Davecadra, Wainibuka, Tailevu. The farm was about 7 hours walk through thick bushes and through a river and streams from Nabulini Village. A team of twenty police officers went on foot to the farm. According to the prosecution, the farm was hidden away in the bushes, and it contained planted rows of Indian hemp plants. The plants were tall and huge. The police team uprooted the cannabis plants and counted the same. It totalled 484 cannabis sativa plants.
16. According to the police, they carried the cannabis plants to Nabulini Village, loaded the same in a police truck and took the same to Korovou Police Station. A police investigation was carried out. Police informers said the two accuseds were cultivating the indian hemp plants. Accused No. 1 was raided by police at his home on 21 January 2015 at 3am. Cannabis sativa leaves were found at his house. He verbally admitted to police he had a farm at Davecadra. Accused No 2 fled from Davecadra farm when spotted by police.
17. The two accuseds were arrested and caution interviewed by police. They admitted cultivating cannabis sativa plants at Davecadra, at the material time. The 484 cannabis sativa plants were later analysed, and confirmed to be cannabis sativa plants. They weighed a total of 160.6 kg. Both accuseds were later charged for unlawful cultivation of illicit drugs. Because of the above, the prosecution is asking you, as assessors and judges of fact, to find both accuseds guilty as charged. That was the case for the prosecution.

**G. THE ACCUSED'S CASES**

18. On 24 January 2017, the first day of the trial proper, the information was put to both accuseds, in the presence of their counsels. They pleaded not guilty to the charge. In other words, they denied the allegation against them. At the end of the prosecution's case, when a prima facie

case was found against them, wherein they were called upon to make their defence, they choose to remain silent and called no witness. That was their right.

19. Nothing negative whatsoever should be imputed to the accuseds, for choosing to remain silent and called no witness. In fact, it was their constitutional right to do so, and you should not hold the above against them. This is because the burden to prove the accuseds' guilt beyond reasonable doubt stays with the prosecution throughout the trial, and it never shifts to them at any stage of the trial. They are entitled to fold their arms, sit there in silence, and demand the prosecution prove their guilt beyond reasonable doubt, as they had done in this case.
20. However, despite the accuseds' positions as described above, you may take a glimpse of their positions on the case by looking at their police caution interview statements. D/Corporal 2254 Alipate Rayasi (PW4) caution interviewed Accused No. 1 at Korovou Police Station on 22 January 2015 and tendered the interview notes as Prosecution Exhibit 1(A) and 1(B). Sergeant 1920 Marika Bavou (PW5) caution interviewed Accused No. 2 at Korovou Police Station on 3 February 2015 and tendered the interview notes as Prosecution Exhibit 2(A) and 2(B). In both interview notes, both accuseds allegedly admitted the offence. However, both accuseds asks you to disregard the above because, according to them, the police force the above alleged admissions out of them. They appear to say that their alleged admissions were given involuntarily and without their free will.
21. Given the above, both accuseds are asking you, as assessors and judges of fact, to find them not guilty as charged and acquit them accordingly. That was the case for the defence.

## H. ANALYSIS OF THE EVIDENCE

### (a) Introduction:

22. In analysing the evidence, please bear in mind the directions I gave you in paragraphs 4, 5 and 6 hereof on the burden and standard of proof. In the acceptance and/or rejection of the evidence presented at the trial and your role as assessors, please bear in mind the directions I gave you in paragraphs 1, 2 and 3 hereof. In analysing the evidence, we will first discuss the "Agreed Facts", then we will consider the State's case against the accuseds, which were fundamentally based on their alleged confessions to the police. Then we will discuss the State's use of identification and circumstantial evidence to advance its case. Then we will discuss the accuseds' case, and the need to look at all the evidence.

**(b) The Agreed Facts:**

23. The parties submitted an "Agreed Facts". For Accused No. 1, there are three paragraphs of "Agreed Facts". For Accused No. 2, there are two paragraphs of "Agreed Facts". Because the parties are not disputing the same, you may treat the same as established facts and that the prosecution had proven those facts beyond a reasonable doubt.

**(c) The State's Case Against the Accuseds:**

24. The State's case against Accused No. 1 was based solely on his alleged confessions to the police and circumstantial evidence. For Accused No. 2, the State's case against him was based on a combination of various types of evidence; first, his alleged confession to the police; second, his alleged identification at the crime scene on 21 January 2015 and circumstantial evidence. We will first deal with the two accuseds' alleged confessions, then discuss the way you should approach this type of evidence. Then we will discuss the State's use of identification evidence against Accused No. 2 at the crime scene on 21 January 2015 and their use of circumstantial evidence to advance their case.
25. Detective Corporal 2254 Alipate Rayasi (PW4) caution interviewed Accused No. 1 at Korovou Police Station on 22 January 2015, a day after his arrest. The interview started at 12.35 pm and concluded at 3.10 pm on the same day. The interview took 2 hours 35 minutes to complete. Forty six questions were asked by PW4 and 46 answers were given by Accused No. 1. According to PW4, he gave Accused No. 1 his right to counsel and his right to see his relative before the interview – see questions and answers 5 and 7. According to PW4, Accused No. 1 was given the standard caution after question and answer no. 8, which included his right to remain silent. He was also given a lunch break between 1.10 pm and 1.35 pm on the same day. Accused No. 1 waived his right to see a counsel or his relatives before the interview.
26. PW4 said, he put the allegation to Accused No. 1 during the interview, in the following way: "...it is alleged that you on 21.01.15 at 3.30 am, at Nabulini, Wainibuka, Tailevu, you were found to be in possession of some dried leaves and you cultivated 484 plants at Davecadra Farm believed to be marijuana or indian hemp and I must remind you that you are not oblige to say anything unless you wish to do so, but what you say may be put into writing and given in evidence..."

27. According to PW4, Accused No. 1 admitted in his interview that he was cultivating cannabis sativa plants at Davecadra Farm – please, refer to questions and answers 20, 23, 24, 25, 26, 27, 28, 30, 32, 33, 36, 38 and 40 of Prosecution Exhibit 1(A). Police officers, on 21 January 2015, uprooted a total of 484 cannabis sativa plants from Davecadra farm. These 484 plants were later analysed and confirmed by a government analyst, Dr. Miliana Werebauinona (PW6), to be cannabis sativa and it weighed a total of 160.6 kilograms. These cannabis sativa plants were tendered as Prosecution Exhibit No. 3, during the trial. According to PW4, in question and answer 32 of Prosecution Exhibit No. 1(A), he showed Accused No. 1 the 160.6 kg cannabis sativa plants, when he posed question 32 to him. According to PW4, Accused No. 1 admitted that the plants were his and from his farm.
28. Sergeant 1920 Marika Bavou (PW5) witnessed the caution interview of Accused No. 1 by PW4. PW4 and PW5 said, they did not assault, threaten or oppressed Accused No. 1 during the caution interview and while he was in their custody. They said Accused No. 1 co-operated with them during the interview, and he signed the interview notes and the same were counter signed by them. They said, Accused No. 1 gave his interview statements voluntarily and out of his own free will.
29. As for Accused No. 2, he was caution interviewed by PW5 at Korovou Police Station on 3 February 2015. The interview started at 11am and it concluded at 12.20 pm. The interview was conducted in 1 hour 20 minutes. According to PW5, he asked Accused No. 2 24 questions and he gave 24 answers. The interview notes were tendered in evidence as Prosecution Exhibit 2(A) – hand written version and 2(B) – the typed version. According to PW5, Accused No. 2 was given his right to counsel, but he waived the same. He was also given his right to remain silent. Because of a lack of manpower, PW5 said there was no witnessing police officer.
30. PW5 said, he put the allegation to Accused No. 2 in the following way:  
**“...it is alleged that you with others on 21.01.15 at Davecadra, Wainibuka, Tailevu unlawfully cultivated illicit drugs. You are not obliged to say anything unless you wish to do so, but what you say may be put into writing and given in evidence...”**
31. According to PW5, Accused No. 2 admitted the above allegation during the interview – please, refer to questions and answers 8, 9, 10, 11, 12, 15, 16, 17, 18 and 20 of Prosecution Exhibit

No. 2(A) – hand written version and 2(B), typed version. According to PW5, he did not assault, or threaten Accused No. 2 to make the above admission. He said, Accused No. 2 co-operated with him and he gave his interview statements voluntarily and out of his own free will.

32. When considering the above evidence, I must direct you as follows, as a matter of law. A confession, if accepted by the trier of fact – in this case, you as assessors and judges of fact – is strong evidence against its maker. However, in deciding whether or not you can rely on a confession, you will have to decide two questions. First, whether or not the accused did in fact make the statements as alleged by the police above. If your answer is no, then you have to disregard the statements. If your answer is yes, then you have to answer the second question. Are the confessions true? In answering the above questions, the prosecution must make you sure that the confessions were made and they were true. You will have to examine the circumstances surrounding the taking of the statements from the time of his arrest to when he was first produced in court. If you find he gave his statements voluntarily and the police did not assault, threaten or made false promises to him, while in their custody, then you might give more weight and value to those statements. If it's otherwise, you may give it less weight and value. It is a matter entirely for you.

33. Counsel for Accused No. 2 submitted that the 160.6 kilograms of cannabis sativa plants produced in court as Prosecution Exhibit No. 3 cannot be linked to Accused No. 2. This was because it was not put directly to Accused No. 2 when he was caution interviewed. In other words, the confrontation with the drugs as done to Accused No. 1 in question and answer 32 of Prosecution Exhibit No. 1(A) and 1(B), was not done for Accused No. 2, when interviewed. So, argued counsel for Accused No. 2 that, Accused No. 2 cannot be taken to be confessing to cultivating Prosecution Exhibit No. 3 in his interview notes, as there was no direct links in the interview notes. Prosecution countered the above argument by saying that when the police raided Davecadra farm on 21.01.15, DC 4206 Akuila Waibuta (PW3) saw Accused No. 2 on the marijuana farm. PW3 said, Accused No. 2 fled when he saw the police.

34. It was therefore important to analyse PW3's identification of Accused No. 2 at the farm on 21.01.15. In doing so, I must direct you as follows. First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused which the defence alleges to be mistaken, I must warn you of the special need for caution before convicting the accused in reliance on the correctness of the identification



because an honest and convincing witness could be mistaken. Second, you must closely examine the circumstances in which the identification was made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way? Had the witness ever seen the accused before? How often? Had he any special reason for remembering the accused? Are there any specific weaknesses in the witness's identification evidence? If the quality of the identification evidence is good, you may rely on it. If it's otherwise, you should reject the same.

35. PW3 said, he was part of the police team that went to Davecadra farm on 21 January 2015. PW3 said, when they arrived on the cannabis sativa plant farm at about 11am on the day, he saw Accused No. 2 standing among the cannabis sativa plants. PW3 said, he observed Accused No. 2 for 60 seconds. He said, Accused No. 2 was 7 meters from him. He said, he chased him. He said, there was bright sunlight around as it was 11 am. PW3 said, his observation of the accused was not impeded. PW3 said, he had seen Accused No. 2 before in November 2014, December 2014 and January 2015. A special reason for remembering his face that day was that at Nabulini Village, Accused No. 1 told him that he and Accused No. 2 owned the farm. Are there any specific weakness in PW3's identification evidence? An identification parade is often counter – productive when it's a case of recognition. In any event, if the quality of PW3's identification evidence was of a high quality, you may use the same. If it's otherwise, you may reject the same.
36. If you accept PW3's identification of Accused No. 2 at Davecadra's farm on 21 January 2015, you will have to consider the same within the context of his alleged admission in his caution interview statements in Prosecution Exhibit No. 2(A) and 2(B).
37. If you accept both accuseds' above confessions, then you will have to find both accuseds guilty as charged. If you don't accept the same, then you will have to find the accused not guilty as charged. It is a matter entirely for you.
38. Lastly, we will discuss how the State intends to use circumstantial evidence to support its case. It asks you to consider the evidence of all its witnesses together. You have heard the evidence of Inspector Amani Bosenawai (PW1); DC 3768 Marika Mare (PW2); DC 4206 Akuila Waibuta (PW3); D/Corporal 2254 Alipate Rayasi (PW4); Sergeant 1920 Marika Bavou (PW5) and Doctor Miliana Werebauinona (PW6). PW1 said, on 21 January 2015, a group of police

officers led by him, raided Accused No. 1's house at Nabulini Village. Marijuana dried leaves were found on him. Accused No. 1 admitted to the police verbally that he had a marijuana farm at Davecadra. PW2 and PW3, who were members of a police team, went to Davecadra farm. They uprooted 484 of cannabis sativa plants therefrom and took the same to Korovou Police Station. PW4 caution interviewed Accused No. 1 on 22 January 2015. PW5 caution interviewed Accused No. 2 on 3 February 2015. Both accused admitted the offence. On 23 January 2015, PW6 confirmed the 484 plants obtained from Davecadra farm as cannabis sativa.

39. It was the State's contention that when you put all the evidence together, that is, the six prosecution's witnesses' verbal evidence and the 4 exhibits together, it was apparent that the irresistible conclusion was that the accused was guilty as charged. That simply means that the prosecution is relying upon evidence of various circumstances relating to the crime and the defendant which they say when taken together will lead to the sure conclusion that it was the defendant who committed the crime. It is not necessary for the evidence to provide an answer to all the questions raised in a case. You may think it would be an unusual case indeed in which a jury can say "We now know everything there is to know about this case". But the evidence must lead you to the sure conclusion that the charge which the defendant faces is proved against him. Circumstantial evidence can be powerful evidence, but it is important that you examine it with care, and consider whether the evidence upon which the prosecution relies in proof of its case is reliable and whether it does prove guilt. Furthermore, before convicting on circumstantial evidence you should consider whether it reveals any other circumstances which are or may be of sufficient reliability and strength to weaken or destroy the prosecution case. Finally, you should be careful to distinguish between arriving at conclusions based on reliable circumstantial evidence, and mere speculation. Speculating in a case amounts to no more than guessing, or making up theories without good evidence to support them, and neither the prosecution, the defence nor you should do that.

**(d) The Accuseds' Cases:**

40. Although the accuseds choose to remain silent and called no witness, they both pleaded not guilty when the information was put to them. They therefore do not admit the allegation against them. In his closing submission, Accused No. 1's counsel submitted, the State had not proven beyond reasonable doubt that, Accused No. 1 was cultivating cannabis sativa plants on 21 January 2015, and as such, he was not guilty as charged. As for Accused No. 2, his counsel

submitted, the drugs produced in court had no links whatsoever to Accused No. 2, and as such, he was not guilty as charged. Furthermore, the police forced the confession out of him and the same was nothing but a fabrication. He said, PW3's identification evidence on Accused No. 2 at the farm was weak and thus you should disregard them. If you accept the defence's submission above, you should find the accuseds not guilty as charged. It is a matter entirely for you.

**(e) Considering All the Evidence:**

41. You will have to consider all the evidence presented by the prosecution.

**I. SUMMARY**

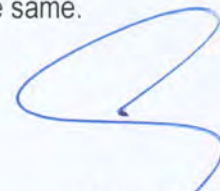
42. Remember, the burden to prove the accuseds' guilt beyond reasonable doubt lies on the prosecution throughout the trial, and it never shifts to the accuseds, at any stage of the trial. The accused are not required to prove their innocence, or prove anything at all. In fact, they are presumed innocent until proven guilty beyond reasonable doubt. If you accept the prosecution's version of events, and you are satisfied beyond reasonable doubt so that you are sure of the accuseds' guilt, you must find them 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 accuseds' guilt, you must find them not guilty as charged.

43. Your possible opinions are as follows:

- |     |                                       |                        |               |
|-----|---------------------------------------|------------------------|---------------|
| (i) | Unlawful Cultivating of Illicit Drugs | : Guilty or Not Guilty | Accused No. 1 |
|     |                                       | : Guilty or Not Guilty | Accused No. 2 |

44. You may retire to deliberate on the case, and once you've reached your decisions, you may inform our clerks, so that we could reconvene, to receive the same.



  
**Salesi Temo**  
**JUDGE**

Solicitor for State	:	Office of the Director of Public Prosecution, Suva.
Solicitor for Accused No. 1	:	Legal Aid Commission, Suva.
Solicitor for Accused No. 2	:	Legal Aid Commission, Suva.