

IN THE HIGH COURT OF FIJI
AT SUVA
[CRIMINAL JURISDICTION]

Criminal Case No. HAC 115 of 2018[LTK]

BETWEEN : STATE

AND : JOHN GEOFFREY NIKOLIC

Counsel : Mr L J Burney, Mr. Y Prasad & Ms. S Kiran for the State
Mr W Pillay for the Accused

Date of Hearing : 28 - 31 January, 1 February, 11 - 19 February 2019
Date of Summing Up: 28 February 2019

SUMMING UP

Madam Assessor and Gentlemen Assessors

- [1] It is now my duty to sum up the case to you. I have to give you directions on the law and you must accept those directions. You are to decide the facts applying those directions and to give me your opinions as to accused person's guilt or innocence.
- [2] In going through the evidence, I may express an opinion. If you do not agree with that opinion, you are free to ignore it and to form another view of that piece of evidence. I may omit some evidence which you think significant. Nonetheless you may give that evidence such weight as you consider appropriate. You are free to form your own opinions.
- [3] At the end of this summing up, and after you have given your individual opinions, the final decision on the facts rests with me. I am not bound to conform to your opinions. However, in arriving at my judgment I shall place much reliance upon your opinions.

- [4] The burden of proof rests throughout the trial upon the prosecution. In our system of justice there is a presumption of innocence in favour of an accused. The prosecution brings the charge against the accused. Therefore it is for the prosecution to prove the charge against the accused. Each element of the charge must be proved, but not every fact of the story.
- [5] The prosecution must prove its case beyond a reasonable doubt. That means that before you express an opinion that the accused is guilty of the charge you must be satisfied so that you are sure of his guilt beyond a reasonable doubt. If you consider him innocent of the charge you must give your opinion that he is not guilty of that charge. If you entertain a reasonable doubt of guilt, you must also give your opinion that the accused is not guilty of that charge.
- [6] The burden of proof remains on the prosecution throughout the trial unless the law expressly specifies that the burden of proof in relation to the matter in question is a legal burden on an accused, or requires the accused to prove the matter, or creates a presumption that the matter exists unless the contrary is proved. Whenever there is a reverse burden on an accused, he is required to discharge that burden on the balance of probabilities. I will return to the reverse burden and the standard of proof required by an accused later in my summing up.
- [7] The accused has elected not to give evidence in this case. He chose not to answer questions in his caution interview. I must direct you that any person suspected of a criminal offence or charged with one is entitled to say nothing when asked questions about it. You must not hold his silence or refusal to answer questions, against him. The exercise of the right to silence cannot amount to an admission of any kind nor can it be taken to reflect a guilty conscience.
- [8] You must decide this case upon the evidence presented to you by the prosecution. It will be your task to discover which witnesses have given honest and accurate evidence and which may not.

- [9] After I have completed this summing up, you will be asked to retire to your retiring room to deliberate amongst yourselves so as to arrive at your opinions. Upon your return to court, when you are ready, each one of you will be required to state his or her individual opinions orally on the charge against the accused, which opinions will be recorded. Your opinions need not be unanimous. You will not be asked for reasons for your opinions.
- [10] However, it will be helpful to you beforehand in arriving at sound and rational opinions if you ask yourselves why you have come to those opinions.
- [11] Those opinions must be based solely upon the evidence. Evidence consists of sworn testimony of the witnesses, what each witness has told the court in the witness box, as well as the physical and documentary exhibits tendered in court.
- [12] Neither speculation nor theories of one's own constitute evidence. Media coverage of the case is not evidence. Put out of your mind when considering your opinions, anything you may have read or heard in the media about this case. Focus solely on the evidence which you have seen, heard, or examined in this court.
- [13] This summing up is not evidence either, nor is the prosecutor's opening address. Naturally we hope all of these are of assistance to you, but they do not constitute evidence.
- [14] If a witness is asked a question in cross-examination and agrees with what counsel is suggesting, the witness's answer is evidence. If he or she rejects the suggestion, neither the question nor the answer can become evidence for the proposition put.
- [15] In arriving at your opinions, use the common sense you bring to bear in your daily lives, at home and at work. Observe and assess the witnesses' evidence and demeanour together with all of the evidence in the case. You can accept part of a witness's testimony and reject other parts. A witness may tell the truth about one matter and lie about another; he or she may be accurate in saying one thing and be wide of the mark about another.

[16] If you have formed a moral opinion on the conduct alleged in this case, put that to one side. Consistent with your oath, you should put away both prejudice and sympathy. Approach your assessment of the evidence dispassionately. Bring a cool detachment to your task of examining whether the case against the accused has been proved before you, proved with evidence led by the prosecution.

[17] The trial commenced with Mrs Nikolic jointly charged with the accused on all five counts. After the close of the case for the prosecution, the case proceeded against the accused only. You are no longer concerned or are required to consider the charges against Mrs Nikolic. The fact that Mrs Nikolic is no longer facing the charges has no bearing on the evidence against the accused. As for the charges against the accused, you must consider each count separately as your opinions may vary depending on the view you take on the evidence on each count. Counts two and four are alternative counts. You are to consider the alternative counts only if you form an opinion of not guilty on counts one and three. You will not be asked for an opinion on the alternative counts if you express an opinion of guilty on counts one and three.

[18] I turn now to deal with what the prosecution must prove. On counts one and three, the accused is charged with importation of illicit drugs. Count one alleges importation of cocaine while count three alleges importation of cocaine and methamphetamine tablets. In order to prove the offence of importation of an illicit drug, the prosecution must satisfy you beyond a reasonable doubt of the following elements:

1. The accused
2. Without lawful authority (proof of which lies upon an accused)
3. Imported
4. An illicit drug.

[19] If you accept the evidence of the scientific tests that the substances in this case are cocaine and methamphetamine, then as a matter of law I must direct you that cocaine and

methamphetamine are illicit drugs. However, before relying on exhibits PE 11 (substances in tablet form) and PE 38-39 (13 bars containing white powdery substances) as proof of illicit drugs, you have to be satisfied as to feel sure that they are the same substances that were seized from the vessel on 22 June 2018, scientifically tested and found to be illicit drugs and presented in court as evidence. In other words, it is for the prosecution to prove beyond a reasonable doubt that the chain of custody of the illicit drugs remained intact and that the substances were not tampered with to make the evidence unreliable. It is a matter for you to consider whether the chain of custody was intact and that the substances that were seized from the vessel on 22 June 2018 were the same substances that were scientifically tested and found to be illicit drugs before they were tendered in court as exhibits. If you feel sure that the chain of custody remained intact and that there was no tampering of the evidence, then go ahead and consider whether the element of “without lawful authority” has been proven.

- [20] A person acts with lawful authority in relation to an illicit drug if that person has been prescribed the drug on a medical ground or the person's lawful profession involves administration of an illicit drug. There is no suggestion that the accused acted with lawful authority in this case. That brings us to the element of importation.
- [21] To import means is to intentionally bring or cause to be brought into Fiji an illicit drug. The prosecution case is that the accused came from abroad on a yacht with illicit drugs on board. If the vessel in which the illicit drugs were found entered Fiji's territorial waters with the illicit drugs on board, then that would constitute the act of importation. However, if the vessel had entered Fiji's territorial waters without the illicit drugs on board, then the element of importation has not been proven. Whether the vessel had entered Fiji's territorial waters with some sort of illicit drugs on board is a question of fact for you to consider having regard to all the evidence you heard in court. The issue for you to consider on counts one and three is whether the accused intentionally brought into Fiji an illicit drug?
- [22] On counts two and four, the accused is charged with possession of the same illicit drugs that are subject of the importation charges. They are alternative counts. You are required to consider the alternative counts of possession only if you find the accused not guilty of the importation.

[23] Possession is proven if the accused intentionally had the substance in his physical custody or control to the exclusion of others, except anyone who was acting in concert with him in the alleged offence. There is a presumption in law that when any illicit drug is found on any premises, vehicle or vessel in control of the accused, the accused is presumed to be in possession until the contrary is proved. The prosecution case is that the accused intentional had illicit drugs on a vessel he was in control of as the Captain or as the Master. If you find as a matter of fact that the accused was in control of the vessel on which the illicit drugs were found, then it is presumed that the accused was in possession of an illicit drug.

[24] Whenever an issue is raised by an accused that he didn't know or believe or had reason to suspect that the vehicle or vessel in his control had on board some form of an illicit drug, the onus is on him to show on the balance of probabilities that he neither believed nor suspected nor had reason to suspect that the substance found on the vessel was an illicit drug. In other words, it is for the accused to show that it is more likely than not that he didn't know or believe or had reason to suspect that the vessel in his control had on board an illicit drug of some sort. Since the accused has not raised any issue regarding his knowledge or beliefs about what was on the vessel, the issue for you to consider on counts two and four is whether the accused was in control of the vessel on which the drugs were found. If you find that the accused was either solely or jointly in control of the vessel on which the drugs were found, then you may find the element of possession has been proven. That is of course a matter for you to consider.

[25] On the fifth count, the accused is charged with possessing arms and ammunition without an arms licence. In order to prove this offence, the prosecution must prove beyond a reasonable doubt that:

1. The Accused
2. Possessed
3. Arms and ammunition
4. Without an arms licence

[26] The accused does not dispute that the pistols and ammunition found on the vessel are arms and ammunition within the meaning of the Arms and Ammunition Act. An arms licence is

a licence that the Commissioner of Police is authorized to issue to a natural person upon an application under the Arms and Ammunition Act. There is no suggestion that the Commissioner has issued an arms licence for the accused to possess arms and ammunition subject of the charge.

- [27] The question is whether the accused was in possession of arms and ammunition? For the prosecution to prove possession they must prove that the accused intentionally had the arms and ammunition in his physical custody or control to the exclusion of others, except anyone who was acting in concert with him in the alleged offence. The presumption of possession also applies to a charge of possession of arms and ammunition without an arms licence. Where it is shown that arms and ammunition was found in a vehicle or vessel controlled by an accused, the accused is presumed to be in possession of the arms and ammunition, unless the accused proves to the contrary. The standard of proof is balance of probabilities. In other words the accused has to show that it more likely than not that he didn't know or believe or had reason to suspect that the vessel in his control had on board arms and ammunition of some sort. The accused has not claimed that he didn't know or believe or had reason to suspect that the vessel had on board arms and ammunition of some sort. Therefore, the issue for you to consider is whether the accused was in control of the vessel on which the arms and ammunition was found. If you find he was in control of the vessel then you may find the element of possession has been proven. That is a matter for you to consider.
- [28] In the present case, there is no direct evidence that the accused imported or possessed an illicit drug or possessed arms and ammunition without an arms licence. The prosecution relies upon circumstantial evidence to prove the charges against the accused. You are asked to piece the story together from witnesses who did not actually see a crime committed, but gave evidence of other circumstances and events that may bring you to a certain conclusion regarding the commission of the alleged crime.
- [29] A common example of circumstantial evidence is fingerprint evidence. Suppose a person's fingerprints are found on an object at the scene of a crime, such as a murder weapon. It could be inferred that the person has handled that weapon and been present at that place. The inference could be drawn even though there is no direct evidence that the person was seen there.

[30] On some occasions evidence like fingerprints may be the only circumstance relied upon by the prosecution as proof of guilt. However, it is not unusual to find in a criminal case that evidence is given of a number of facts and circumstances. One witness proves one thing and another proves another thing. None of those things alone may be sufficient to establish guilt but, taken together, one circumstance building upon the other, they may lead to the conclusion that the accused is guilty of the crime.

[31] It is not in dispute that two packages of bars containing powdery substances and two packages containing substances in the form of tablets, 2 pistols and ammunition and US\$15,000.00 cash were discovered on board following a search of the vessel by Customs Officers on 22 June 2018. The prosecution case is that after the discovery of the first package of 10 bars, the accused revealed to the Customs Officers existence of another similar package that had 3 bars of powdery substance. Following this revelation, a package containing 3 bars was retrieved from the location pointed out by the accused. It is not in dispute that shortly after the discovery of these items on the vessel; the accused took drug overdose and was hospitalized. The prosecution is relying upon the circumstances surrounding the discovery of all the items from the vessel and the conduct of the accused during the search and following the discovery of the items and the manner in which the items were concealed and hidden inside the vessel for an inference that the accused was involved in dealing with narcotics and arms.

[32] Therefore, you must first consider all the evidence and decide what facts have been proved. From those facts you are entitled to draw proper inferences. An inference is a logical deduction from facts that have been proved. It must not be mere speculation or guesswork. It is not sufficient that the proved circumstances are merely consistent with the accused having committed the crime. To find him guilty you must be satisfied so as to feel sure that an inference of guilt is the only rational conclusion to be drawn from the combined effect of all the facts proved. It must be an inference that satisfies you beyond reasonable doubt that the accused committed the crime. If the inference to be drawn from the circumstantial evidence falls short of that standard then your opinion must be not guilty.

- [33] On the basis of these legal principles that I have explained to you, you must consider the evidence in this case and decide what has been proved. As I said earlier, it is your job to assess the credibility of the witnesses. You decide who is truthful and to be believed.
- [34] In deciding the facts, you must consider the facts that are not in dispute. It is not in dispute that the accused is legally married to Yvette Dianne Nikolic. In October 2017, Mrs Nikolic bought a yacht (the vessel) from USA. The vessel was registered in Australia under the name Shenanigans. On 2 February 2018, the accused and his wife departed Florida, USA. Their ultimate destination was Brisbane, Australia. On 22 June 2018, they arrived at Port Denarau, Fiji en-route to Brisbane. Prior to arrival in Fiji, an advance notice of arrival was electronically submitted by a third party. The notice is given in a form called C2-C Form. Upon arrival in Fiji, the accused signed the declaration on C2-C Form (PE1) in the presence of a Boarding Officer. According to this form, the accused is named as the person in charge of the vessel. The previous ports of call and dates of departure of the vessel are admitted facts.
- [35] It is not in dispute by the accused that on 22 June 2018 the vessel was boarded and searched by Fiji Customs Officers. Upon searching the Lazerette locker a blue bag containing 10 bars sealed with grey and black tape was found from the starboard side and a package containing 3 bars sealed in dark tape were found from the port side. It is not in dispute that upon searching the front bulk head 2 packages sealed in dark tape were found which contained two pistols with loaded magazines and ammunition and cash of US\$15,000.
- [36] It is not disputed by the accused that he took drug overdose on 22 June 2018 and that he was admitted to the hospital until 4 July 2018 when he was discharged. It is not in dispute by the accused that in his caution interview he agreed that he had been living on the yacht with his wife for about 7 months. Finally it is not in dispute that the arms and ammunitions found on the vessel are arms and ammunition within the meaning of the Arms and Ammunition Act.

- [37] I will now remind you of the evidence led at the trial. In doing this it would be tedious and impractical for me to go through the evidence of every witness in detail. I will summarize the salient features. There are also a number of documents which have been constantly referred to during the trial. You have been provided with a list of all the exhibits produced during this trial. If I do not mention a particular witness, or a particular piece of evidence, or a particular document that does not mean it is unimportant. You should consider and evaluate all the evidence in coming to your decision in this case.
- [38] The first set of prosecution witnesses were Customs officers involved in the search and seizure of the alleged illicit drugs and arms and ammunition from the vessel on 22 June 2018.
- [39] Officer Kelemedi Gukirewa gave evidence why this particular yacht became a vessel of interest for the Boarder Enforcement Unit upon receipt of the electronic advance notification report on 19 June 2018. Upon analysis, Officer Gukirewa decided to monitor the movements of the vessel and when he learnt that the vessel was not appearing on their Automatic Identification System that uses satellite based navigation to track vessels, he made the situation known to his manager.
- [40] The next witness was Officer Mereoni Jikotani. She is based at Fiji Navy Maritime Surveillance Centre. She is trained to operate the Automatic Identification System. On 19th or 20th June 2018, Officer Jikotani tried to track the movements of the vessel before reaching Fiji's Exclusive Economic Zone but was not successful. The vessel did not appear on their Automatic Identification System until 22 June 2018 when it was near Denarau. According to officer Jikotani, when a vessel does not appear in the Automatic Identification System, the indication is that the vessel's AIS is turned off.
- [41] The third witness was Officer Lisi Narruhn. She was part of the search and seizure team. As a Boarding Officer she processed the arrival documents of the accused and other four crew members. The accused signed the Authority to Disembark (PE2) and C2-C Form (PE1) in the capacity as the Master or the Captain of the vessel in the presence of Officer Narruhn. She countersigned these two documents after verifying the contents with the accused. She collected the arrival forms (PE3) from the accused and the four crew members. She also took photographs of all the items that were seized from the vessel and

drew sketch of the yacht. She said that the bars, arms, tablets, ammunition and cash were concealed and hidden in different compartments of the vessel as depicted in the photographs she took. The Photograph Booklet and Sketch Plan was tendered as PE 4.

[42] The fourth witness was Officer Tomasi Drisi. He is the Chief Customs Officer in charge of the Drugs Enforcement Unit. His evidence was that the yacht was a vessel of interest based on the analysis of information contained in the advanced notification documents. He led the team that boarded and searched the vessel. Officer Drisi informed the accused of his right to remain silent and not to incriminate himself after the result of the field test of a sample taken from the 10 bars was positive for cocaine. Officer Drisi said that after administering the caution, he noticed that the accused was in tears and the accused responded by uttering words to the effect “I know what you are looking for. There’s another three bars hidden on the opposite side of the same hatch behind the water tanks”. This statement of the accused was not reduced in writing. A further search was done and three bars were discovered at the location disclosed by the accused. After the three bars were discovered, the accused requested to speak with his wife. The accused said that his wife doesn’t know what he did and he needs to give her an explanation. While the accused left to speak with his wife, Officer Drisi remained at the scene with other officers guarding the discovered bars. Officer Drisi was present when the seized items from the vessel were photographed and labeled and handed over to a police officer. He identified the seized items in court from the photographs and labeling that was placed in his presence. Under cross examination Officer Drisi accepted that no finger prints analysis was carried out on any seized items because they don’t have the capacity to do such a test.

[43] The next witness was Officer Joshua Volau. Officer Volau was part of the operations team that boarded the vessel on 22 June 2018. He was the officer who retrieved the blue bag containing 10 bars sealed with grey and black duct tape from the starboard side of the Lazerette locker and the package containing 3 bars with black duct tape from the port side of the Lazerette locker. He also retrieved from the front head 2 packages sealed in dark tape containing substances in tablet form, 2 pistols with loaded magazines, ammunition and cash in US currency. He identified the items he had retrieved from the vessel using the labeling that was placed on them at the time of seizure and the photographs. Under cross examination he accepted that he did not have gloves on when he retrieved the items. He

said the gloves are required for their personal safety only. He also said that fingerprints analysis is a procedure for police and not for Customs.

- [44] The next witness was Officer Amit Ram. He is part of the Fiji Detector Dog Unit. On 22 June 2018, Officer Ram accompanied the search team with his dog a K9 who is trained by Royal New Zealand Police Dog Section on identifying narcotics. After the dog was deployed on the vessel, the dog gave an indication of presence of narcotics by sitting down in front of a vent inside a cabin that led to Lazarette locker where the 13 bars were subsequently discovered. This cabin was occupied by a crew member and the dog gave no indication of presence of narcotics in the cabin occupied by the accused and his wife.
- [45] The next two witnesses were Officer Sakiusa Lasaga and Officer Fenton Williams. They were part of the search team on 22 June 2018. The search was conducted after the accused, his wife and three crew members were moved to a secured area which was a sterile area. They gave evidence of the discovery of items which are not disputed facts. You will also recall that Mr Pillay did not cross examine these two witnesses.
- [46] The next witness was Officer Vasiti Toga. She was the officer who sealed the physical items with customs tape and labeled them before handing to police. She identified those seals, labeling and items which are now exhibits in the case. She said that she did not seal the pistols because she is not trained to handle arms. The arms were sealed by police in two clear plastic containers. Officer Toga prepared Cart Notes of the items she handed over to police. The Cart Notes are exhibits 15 and 16.
- [47] The next witness was Officer Niko Rokodravu. He was also part of the search team on 22 June 2018. He confirms the seizure of the items that are not disputed by the accused and you will recall this witness was also not cross examined by Mr Pillay.
- [48] The next witness was Detective Corpal Atten Prasad. On 22 June 2018, the seized items from the vessel were officially handed to him by Officer Toga. Detective Prasad identified his signature on the Customs seal, the blue bag and the Cart Notes. On the same day, the seized exhibits were secured at Namaka Police Station Exhibit Room. The following morning (23/6/18), Detective Prasad took the 13 bars, a flask and a plastic container to Suva and handed them to the Fiji Police Forensic Chemistry Lab for scientific analysis.

Detective Prasad collected the exhibits from the Lab on the afternoon of 23 June 2018 in a brown bag sealed with a yellow tape and a cello tape. The seal was broken to show Mrs Nikolic the exhibits during her caution interview in Detective Prasad's presence and to the accused during his caution interview on 5 July 2018. After the caution interviews, the exhibits were secured at Namaka Police Station Exhibit Room until they were brought to Suva in a brown bag for the trial.

[49] The next witness was Detective Constable Jone Naviri. In 2018, he was the exhibit writer at Namaka Police Station. On 22 June 2018, he received the exhibits – 13 bars of alleged cocaine, 1 gun with 71 ammunition, 1 revolver with 41 ammunition, substances in tablet form, a stainless steel flask and a small container from Detective Prasad. He identified the exhibits from the packaging, markings or labeling of the items. He released the exhibits to Detective Prasad in the morning of 23 June 2018 to be taken to Suva for scientific testing. The exhibits were returned to him on the same afternoon in a brown bag sealed with a yellow tape. The seal of the brown bag was broken to show the exhibits to Mrs Nikolic during her caution interview on 23 June 2018 at Namaka Police Station. After showing the exhibits to Mrs Nikolic the items were returned to the Exhibit Room for safe keeping. On 5 July 2018, Detective Naviri took out the exhibits from the Exhibit Room and showed them to the accused during his caution interview at Boarder Crime Office. In the process of showing the exhibits, the original brown bag (Exhibit 37) was accidentally ripped. After the exhibits were shown to the accused, they were packed in a new brown bag, sealed with a clear white cello tape and returned to the Exhibit Room for safe keeping. The exhibits remained in the Exhibit Room until they were brought to Suva for the trial.

[50] The last witness for the prosecution was Ms Miliana Werebuinona, a Principal Scientific Officer employed by the Fiji Police Force. Her qualifications are not in dispute. Her main function is to analyze substances that are suspected to be illicit drugs. The tests are done at the Forensic Chemistry Lab in Suva. On 23 June 2018, she received five separate packages for analysis from Detective Prasad. Upon receiving the packages, each item was given a code and labeled. The witness identified the codes and labels in court including the ones placed on each of the 13 bars and the clear plastic bag containing substances in tablet form. According to Ms Werebuinona, the 13 bars tested positive for cocaine while the tablets tested positive

for the presence of cocaine and methamphetamine. The details of the scientific test results are contained in the witness's reports, which are PEs 40, 41 and 42. After conducting the scientific tests, the exhibits were returned to Detective Prasad on the same day, that is, 23 June 2018. Mr Pillay did not cross examine this witness. The weight you want to attach to the scientific findings that the substances involved are illicit drugs is a matter for you bearing in mind the evidence was unchallenged.

[51] That is essentially the prosecution case.

[52] In respect to counts one and three (the importation charges) the questions for you to consider are:

- Did the accused bring into Fiji substances on the vessel Shenanigans on 22 June 2018 without lawful authority?
- Whether the same substances have been tested for presence for an illicit drug and produced in court as evidence?
- Whether the substances are an illicit drug?

[53] If you find the accused not guilty of the importation charges then you must consider the possession charges. In respect to counts two and four (the possession charges), the questions for you to consider are:

- Whether the accused was in control of the vessel on which the substances were found and therefore were in possession of the substances?
- Whether the same substances have been tested for presence for an illicit drug and produced in court as evidence?
- Whether the substances are an illicit drug?

[54] In respect to count 5, the question is whether the accused was in control of the vessel on which the arms and ammunition were found and therefore were in possession without an arms licence?

[55] If you feel sure of the accused's guilt in respect of any count, then the proper opinion would be guilty of that count. If you feel unsure of the accused's guilt or if you entertain a reasonable doubt then you must express an opinion of not guilty in respect of that count. Consider the evidence on each count separately.

[56] That concludes my directions to you. I ask you now to retire and consider your opinions. When you are ready with your opinions, the Court will reconvene to receive them.



A handwritten signature in blue ink, appearing to be "DC" followed by a long horizontal stroke.

.....
Hon. Mr Justice Daniel Goundar

Solicitors:

Office of the Director of Public Prosecutions for the State
Gordon & Co. for the Accused