

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

**Criminal Case No. HAC 115 of 2018**

**BETWEEN** : STATE

**AND** : YVETTE DIANNE NIKOLIC  
JOHN GEOFFREY NIKOLIC

**Counsel** : Mr L J Burney, Mr Y Prasad, Ms S Kiran for the State  
Mr R Gordon for the 1<sup>st</sup> Accused  
Mr W Pillay for the 2<sup>nd</sup> Accused

**Date of Hearing** : 13 February 2019  
**Date of Ruling** : 14 February 2019

**RULING**

- [1] The prosecution intends to lead evidence from Ms Miliana Werebauinona, a scientific officer employed by the Fiji Police Force. Her specific designation is the Principal Scientific Officer (Chemistry). The prosecution intends to lead evidence that the alleged substances subject of the charges was scientifically tested by this witness at the Fiji Police Forensic Chemistry Laboratory and that the substances were found to be illicit drugs. The officer's findings were documented which the prosecution intend to tender after calling her as a witness.
- [2] Counsel for the second accused, Mr Pillay objects to the admissibility of the scientific findings by the proposed witness on the ground that she is not qualified as a government analyst under the Illicit Drugs Control Act and to give evidence as to the nature of the substances handed to her by the Police for tests. Mr Pillay further submits that a scientific officer employed by the Fiji Police Force is not an independent agent to qualify as a government analyst under the Illicit Drugs Control Act. Mr Pillay supports his submission by citing the following passage from a judgment of Justice

Madigan in *State v Navinsh Nirmal Prasad* Criminal Case No. HAC 05 of 2016 at paragraph 14:

“There was no evidence given as to the production of plants before the chemist or her Superior nor of the weighing of the plants. The chemist is not a “Government” chemist in terms of section 36 (1) of the Illicit Drugs Control Act and as a result her Certificate is not prima facie evidence of the facts stated therein. The only manner therefore that her evidence could be received is in strict compliance with the rules of evidence in relation to movement of the exhibits tested and those rules were not complied with.”

- [3] The statutory provision relied upon by Mr Pillay for this objection is section 36 of the Illicit Drugs Control Act. Mr Pillay submits that section 36 should be construed as an exclusive provision regarding admissibility of scientific evidence in any proceedings under the Illicit Drugs Control Act.
- [4] Mr Burney for the prosecution submits that section 36 is not an exclusive provision for admissibility of scientific evidence but a procedural provision for admissibility of a report by a government analyst in the event the analyst is not called to give evidence. Mr Burney further submits that the prosecution intends to call the witness and lead her evidence from the witness box instead of relying on the procedure provided by section 36.
- [5] Section 36 states:
- (1) In any proceedings under this Act, the production of a certificate purporting to be signed by a Government analyst is prima facie evidence of the facts stated in the certificate.
  - (2) A copy of the analyst certificate must be served by or on behalf of the prosecutor on the accused or his or her defence counsel at least 42 working days before the hearing at which the certificate is to be tendered as evidence and the accused must be informed in writing that the prosecutor does not propose to call the person who made the analysis as a witness.

(3) If the accused intends to cross-examine the analyst, the accused must, in writing give the prosecution at least 21 working days' notice of his or her intention to do so to enable the prosecution to produce the analyst at the hearing.

[6] Section 36 was adopted from section 44 of the Dangerous Drugs Act, Cap 114 before that legislation was repealed and replaced with the Illicit Drugs Control Act. In *Balram v Reginam* [1984] FJSC 62; Criminal Appeal 57 of 1983 (2 March 1984) Justice Cullinan took the view that the section provides for a procedure for admissibility of an analyst report without calling the government analyst to give evidence. There is no ambiguity in the manner in which section 36 is drafted. It is not necessary to look at the intention of the Parliament when there is no ambiguity in the statutory provision. Section 36 provides for the admissibility of an analyst certificate in any proceedings where the analyst is not called to give evidence. An analyst certificate can be relied upon as evidence only if there is compliance of subsection (2) by the prosecution and of subsection (3) by the accused.

[7] The prosecution is not relying upon section 36 but upon the common law to lead the evidence of the witness, which is scientific in nature. Section 36 is not relevant. It is not necessary to make a finding whether a principal scientific officer employed by the Fiji Police Force is a government analyst under the Illicit Drugs Control Act. That issue will have to be resolved in a case where the prosecution intends to invoke section 36 to rely upon an analyst certificate as prima facie evidence of the facts stated in the certificate. That is not an issue here.

[8] Mr Pillay's objection is overruled.



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**Hon. Mr Justice Daniel Goundar**

**Solicitors:**

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