

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 037 OF 2018S

STATE

vs

VILIAME KAWA

Counsels : Mr. M. Vosawale and Mr. N. Sharma for State

Mr. M. Young for Accused

Hearings : 9, 10, 11 and 12 March, 2020.

Summing Up: 13 March, 2020.

SUMMING UP

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 accused. There is no obligation on the accused to prove his 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 accused's guilt, before you can express an opinion that he is guilty. If you have any reasonable doubt so that you are not sure about his guilt, then you must express an opinion, that he is 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 accused 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 accused, on 12 January 2018, at Nakasaleka, Kadavu in the Southern Division, without lawful authority, cultivate 37 plants of cannabis sativa, weighing 15 kilograms?

E. THE OFFENCE AND IT'S ELEMENTS

9. The accused was 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 accused
- (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 seed, 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 12 January, 2018, Mr. Viliame Kawa (DW1) was 38 years old. He reached Form 5 level education at Laucala Bay Secondary School. He was married, with three children, two boys and a girl. In the

previous 10 years he had been residing at Nukuvou Village, Nakasaleka, Kadavu. He is a subsistence farmer, planting yaqona, cassava and taro. At times, he was also a fisherman. He also dives for seafood, and according to him, he earns about \$1,000 per week.

15. According to the prosecution, the Kadavu Police Station (KPS) received information on 11 January 2018 that DW1 was cultivating cannabis sativa plants, commonly known as marijuana, at his farm in Yakota. A police raiding party, consisting of 5 police officers was organized, to check out the above information. On 12 January 2018, the raiding party left KPS at 4 am in the early morning. They arrived at Nukuvou Village at 6.30 am. They went to Mr. Kawa's house. They saw him beside a tree drinking liquor. They informed him of the purpose of their visit.
16. According to the prosecution, Mr. Kawa allegedly admitted to them he was cultivating marijuana. He allegedly led police to his farm at Yakota. Police allegedly found marijuana plants growing on the farm. They allegedly uprooted the same. There were 37 plants in total. The police later arrested Mr. Kawa, and took him and the 37 plants of marijuana to Kadavu Police Station. At Kadavu Police Station, the 37 plants were handed over to the exhibit writer (PW5) for safe keeping. The drugs were later analyzed, and confirmed to be cannabis sativa, with a total weight of 15 kg. Mr. Kawa was caution interviewed by police on 12 and 16 January 2018. He allegedly admitted cultivating cannabis sativa to police.
17. On 18 January 2018, Mr. Kawa was taken to the Suva Magistrate Court charged with unlawful cultivation of illicit drugs. Because of the above, the prosecution is asking you, as assessors and judges of fact, to find the accused guilty as charged. That was the case for the prosecution.

G. THE ACCUSED'S CASE

18. On 10 March 2020, the first day of the trial proper, the information was put to the accused, in the presence of his counsel. He pleaded not guilty to the charge. In other words, he denied the allegation against him. When a prima facie case was found against him, at the end of the prosecution's case, wherein he was called upon to make his defence, he chose to give sworn evidence and called no witness. That was his right.
19. The accused's case was simple. On oath, he denied the allegation against him. He admitted the police came to him on 12 January 2018. He admitted, he led police to the marijuana farm. He admitted, he was there when police uprooted the 37 plants of marijuana. He admitted, he was taken to Kadavu Police Station on 12 January 2018 and locked in the cell. He admitted he was caution interviewed by police on 12 and 16 January 2018. But he denied admitting the offence to police. He denied the drugs were his. He asks you to disregard his alleged confession to police, because he only did so, to prevent the police arresting his wife in Sigatoka.
20. Because of the above, the accused is asking you, as assessors and judges of fact, to find him not guilty as charged. That was the case for the defence.

H. ANALYSIS OF THE EVIDENCE

(a) **Introduction:**

21. In analyzing 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 and judges of fact, please bear in mind the directions I gave you in

paragraphs 1, 2 and 3 hereof. In analyzing the evidence, we will first discuss the Agreed Facts, then the state's case against the accused; then we will discuss the accused's position in this case, and lastly, the need to consider all the evidence.

(b) **The Agreed Facts:**

22. The parties had submitted an "Agreed Facts", dated 9 March 2020. A copy of the same is with you. Please, read it carefully. There are 10 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 Accused:**

23. There were two types of evidence that the prosecution relied upon to connect the accused to the crime alleged against him. First, were the direct evidence of the police officers who allegedly raided his house and farm on 12 January 2018. Second, his alleged confession to the police. We will start with the first type of evidence.
24. On 12 January 2018, Sergeant 3642 Josua Gagalia (PW1), was the Crime Officer at Kadavu Police Station (KPS). He is a police officer of 15 years standing. He said that, on 11 January 2018, he received information that Mr. Viliame Kawa (DW1) of Nukuvou Village was cultivating cannabis sativa, that is, marijuana. He said, a police raiding party, consisting of PC 4655 Waisea Bolabiu (PW2), SC 4559 Vilikesa Tokaiqali (PW3), PC 4651 Vakuru Sawalu (PW4), SC Sisa and SC Luke, were formed. The party was to investigate the matter. PW1 said, the party left KPS on 12 January 2018 at 4 am in the early morning. They went in a fiber glass boat. PW1 said, the team returned at midday on the same day.

25. PC Bolabiu (PW2) said, they arrived at Nukuvou Village at about 6.30 am. PW2 said, they went to Mr. Kawa's house. PW2 said, the team surrounded his house. PW2 said, they found Mr. Kawa drinking liquor near his house. PW2 said PC Vilikesa (PW3) questioned Mr. Kawa on the allegation against him. PW2 said, Mr. Kawa agreed to show the team his marijuana farm. PW2 said, Mr. Kawa then led the team through a track to his farm at Yakota. It was a 15 minutes walk from his house. PW2 said, he saw marijuana plants growing on the farm. PW2 said, the plants were later uprooted by the team. PW2 said, there were 37 plants in total. PW2 said, Mr. Kawa was given his legal rights. PW2 said, Mr. Kawa and the 37 plants of marijuana were later escorted by the team to the fiber glass boat and onto KPS. PW2 said, Mr. Kawa was later locked in the cell and the plants handed to the Station Officer. PW2 said, they never assaulted, threatened or made false promises to the accused, while he was in their custody.
26. PW3, in his evidence, confirmed what PW2 said above. PW3 said, he told Mr. Kawa that they were there to investigate the allegations that he was cultivating marijuana. PW3 said, Mr. Kawa admitted the same to him, and led the team to his farm. PW3 said, he saw marijuana plants on the farm. PW3 said, Mr. Kawa admitted to him that the farm was his. PW3 confirmed the team uprooted the 37 plants and took Mr. Kawa and the plants to KPS. PW3 said, he gave Mr. Kawa his legal rights when he formally arrested him. PW3 said, Mr. Kawa fully co-operated with the team, and they did not threaten or intimidate him, while he was in their custody.
27. PC Vakuru (PW4) next gave evidence. He confirmed what PW2 and PW3 said about the raid on Mr. Kawa's house and he leading the police team to his farm. He confirmed the team uprooted 37 plants of marijuana from Mr. Kawa's farm. He

confirmed that Mr. Kawa and the 37 plants of marijuana were later escorted to KPS by the team. He confirmed that at KPS the 37 marijuana plants were handed over to WSC Selai (PW5), the exhibit writer. He also confirmed that Mr. Kawa admitted to the team that the marijuana farm was his. He confirmed that Mr. Kawa co-operated with the police throughout and they did not threaten or intimidate him at all. Ms. Ema Maravou (PW6) and Ms. Miliana Werebauinona (PW7) confirmed that when the 37 plants of marijuana were analyzed at Kadavu Police Station on 16 January 2018, the same were confirmed to be cannabis sativa and weighed 15 kg. Please, refer to Prosecution Exhibits 2(A) and 2(B), including 3(A) and 3(B).

28. At this point, we will consider second type of evidence, the State is relying on against Mr. Kawa, that is, his alleged confession, when caution interviewed. PW4 also confirmed that he caution interviewed Mr. Kawa on 12 and 16 January 2018, at Kadavu Police Station. PW4 tendered Mr. Kawa's caution interview statements as Prosecution Exhibits 1 (A) (i-taukei version) and 1 (B) (English version). PW4 said, he gave Mr. Kawa his legal rights - please refer to questions and answers 1, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 36, 37, 38, 48, 50, 51, 54 and 55 of Prosecution Exhibit 1 (B). PW4 said, in his caution interview statements, Mr. Kawa admitted the offence to him - please refer to questions and answers 34, 35, 39, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50 and 52 of Prosecution Exhibit No. 1 (B). Mr. Kawa's alleged answers to the questions put to him above appear to be a full confession to the crime alleged against him. PW4 said Mr. Kawa was not assaulted, not threatened nor given false promises while he was been caution interviewed and while in police custody.
29. When considering the above alleged confession, 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.

30. If you accept the accused's alleged confession to police, then you must find the accused guilty as charged. If otherwise, you may need to consider the other type of evidence the prosecution is relying on, that is, the direct evidence of all the prosecution witnesses, and decide accordingly. It is a matter entirely for you.

(d) **The Accused's Case:**

31. I had summarized the accused's case to you from paragraphs 18 to 20 hereof. I repeat the same here. You heard his evidence in the last two days. You had observed his demeanor and the way he reacted to questions thrown at him by the prosecution and defence counsels. Basically, he denied the allegation against him. He said, he was treated well by police while in their custody. He said, they rested him well and fed him. He said, the police allegation against him were lies. If you accept his version of events, you must find him not guilty as charged. If otherwise,

you must still assess the strength of the prosecution's case and decide accordingly. It is a matter entirely for you.

(e) **The Need To Consider All the Evidence:**

32. Seven witnesses gave evidence for the prosecution:
 - (i) Sgt 3647 Josua Gagalia (PW1),
 - (ii) PC 4655 Waisea Bolabiu (PW2),
 - (iii) SC 4559 Vilikesa Tokaiqali (PW3),
 - (iv) PC 4651 Vakuru Sawalu (PW4),
 - (v) WSC 2170 Selai Masa (PW5),
 - (vi) Ms. Ema Maravou (PW6),
 - (vii) Ms. Miliana Werebauinona (PW7).

33. One witness gave evidence for the defence:
 - (i) The Accused (DW1).

34. The prosecution submitted the following exhibits:
 - (i) Prosecution Exhibit No. 1(A) – Accused's Interview Notes (i-taukei),
 - (ii) Prosecution Exhibit No. 1(B) - Accused's Interview Notes (English),
 - (iii) Prosecution Exhibit Nos. 2 (A) & 2 (B) – Two Brown Bags of Cannabis Sativa,
 - (iv) Prosecution Exhibit No. 3 (A) – PW7's 16.1.18 letter,
 - (v) Prosecution Exhibit No. 3 (B) – Analysis of Cannabis,
 - (vi) Prosecution Exhibit No. 3 (C) – Certificate of Analysis.

35. You will have to consider the above evidence together. Compare them and analyze them together. If I haven't mentioned a piece of evidence you consider important, please take it on board in your deliberation. If you find a witness credible, you are

entitled to accept the whole or some of his/her evidence in your deliberation. If you find a witness not credible, you are entitled to reject the whole or some of his/her evidence in your deliberation. You are the judges of fact.

I. SUMMARY

36. 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. If you accept the prosecution's version of events, and you are satisfied 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.

37. Your possible opinions are as follows:

(i) Unlawful Cultivation of Illicit Drugs: - Guilty or Not Guilty

38. You may now 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 the State : Office of the Director of Public Prosecution, Suva.
Solicitor for the Accused : Legal Aid Commission, Suva.