

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

LAUTOKA CRIMINAL CASE NO. HAC 211 OF 2018L

STATE

vs

1. ILAISA CALEVU

2. SEMISI TANIMANAGE

Counsels : Mr. M. Vosawale for State

Ms. V. Narara and Mr. K. Skiba for Accused No. 1

Ms. E. Radrole for Accused No. 2

Hearings : 19, 21, 22, 25, 26, 27 May, 15, 16, 17, 18, 19, 22 and 23 June, 2020.

Summing Up: 24 June, 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 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 ISSUES

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

- (i) On count no. 1, did Accused No. 1 and 2, on 15 June 2016, at Navosa in the Western Division, without lawful authority, cultivate 1,206 plants of cannabis sativa, an illicit drug, weighing 6.2 kilograms?
- (ii) On count no. 2, did Accused No. 1, between 1 November 2016 and 7 March 2017, at Navosa in the Western Division, without lawful authority, cultivate 1,428 plants of cannabis sativa, an illicit drug, weighing 128 kilograms?
- (iii) On count no. 3, did Accused No. 1, on 6 March 2017, at Navosa in the Western Division, resist Police Constable 5240 Esala Kamunaga, in the due execution of his duty?
- (iv) On count no. 4, did Accused No. 1, between 1 November 2017 and 13 March 2018, at Navosa in the Western Division, without lawful authority, cultivate 1,079 plants of cannabis sativa, an illicit drug, weighing 43.5 kilograms?
- (v) On count no. 5, did Accused No. 1, on 13 March 2018, at Navosa in the Western Division, criminally intimidate Police Constable 4482 Uraia Liqorio, by threatening to kill him with a cane knife?

E. THE OFFENCES AND THEIR ELEMENTS

9. In count no. 1, 2 and 4, the accuseds were charged with “unlawful cultivation of an illicit drug”, contrary to section 5 (a) of the Illicit Drugs Control Act 2004. Of all the five counts, counts no. 1, 2 and 4 are the serious ones, and we will discuss it first. 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.
14. In count no. 3, Accused No. 1 was charged with “resisting arrest”, contrary to section 277 (b) of the Crimes Act 2009. For the accused to be found guilty, the prosecution must prove beyond reasonable doubt, the following elements:
 - (i) the accused
 - (ii) resisted or willfully obstructs
 - (iii) any police officer
 - (iv) in the due execution of his duty.
15. Police officers, as a matter of law, are required to arrest people they suspect, on reasonable grounds, to have committed a crime. It is unlawful for a suspect to resist or willfully obstruct a police officer, in due execution of his duty to arrest him.
16. In count no. 5, Accused No. 1 was charged with “criminal intimidation”, contrary to section 375(1) (a) (iv) of the Crimes Act 2009. For the accused to be found guilty, the prosecution must prove beyond reasonable doubt, the following elements:
 - (i) The accused

- (ii) Without lawful excuse
- (iii) Threaten the complainant with any injury
- (iv) With intent to cause alarm to him.

17. It is unlawful for any person to threaten anyone with personal injury to his or her person, without any lawful excuse. The threat must be accompanied with an intention to cause alarm to the person.
18. There are five counts in the information. You must consider each count separately, and come to considered decision on each of them separately, in the light of the whole evidence.

F. THE PROSECUTION'S CASE

19. The prosecution's case were as follows. Mr. Ilaisa Calevu (Accused No. 1) was born on 19 July 1983. In 2016, he was 33 years old. He reached class 6 education at Yalavou Primary School. He was single with no children. He resided in Natukalevu, with his brother in his parent's house. His parents are both deceased. He was a farmer by profession. He plants cassava, yaqona and other vegetable crops. He also rears cattles, goats and horses in his farm. As for Mr. Semisi Tanimanage (Accused no. 2), he was 38 years old, married with 4 young children. He resided at Kulukulu, Sigatoka. He reached class 8 education and was a farmer by profession.
20. According to the prosecution, on 15 June 2016, both accused no. 1 and 2, allegedly had a marijuana farm high up in the hills of Navosa. In June 2016, a police raiding party raided their farm and uprooted 5,827 of cannabis sativa seedlings and plants. The plants were brought to Navosa Police Station, analyzed by the government analyst and found to be the illicit drug cannabis sativa. The drugs allegedly weighed

6.2 kilograms. The drugs were kept in a brown paper bag and tendered in court as Prosecution Exhibit No. 9 (count no. 1).

21. On 6 March 2017, according to the prosecution, information was received that Accused No. 1 was allegedly cultivating marijuana in a farm high up in the hills of Navosa. A police raiding party was sent up to the farm to raid the same. Accused No. 1 was found and arrested near his farm. When police arrested him, he allegedly resisted arrest by fleeing from them and struggled against them when arrested (count no. 3). He allegedly showed the police his farm, and the police allegedly uprooted 1,428 plants. The plants were brought back to Navosa Police Station, analyzed by the government analyst and allegedly found to be cannabis sativa, weighing 128 kilograms. The drugs were later destroyed on 16 March 2017, as a result of an order by the Sigatoka Magistrate Court (count no. 2).

22. On 11 March 2018, according to the prosecution, the police were sent to Natukalevu in Navosa to arrest Accused no. 1, who was allegedly wanted on a bench warrant. The police allegedly went to his farm. When approaching his farm, a police officer (PW3) allegedly saw Accused no. 1 planting marijuana. The police allegedly told him they had a bench warrant against him. Accused no. 1 then allegedly threatened to kill PW3, while holding a cane knife. He was later overpowered by police (count no. 5). Accused no. 1 later took police to another farm, and allegedly showed them his marijuana plants. The police allegedly uprooted 1,079 plants, took the same to Navosa Police Station, and later to Sigatoka Police Station, where it was analyzed by the government analyst. The plants were confirmed to be cannabis sativa and the same weighed 43.5 kilograms.

23. 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 CASE

24. On 26 May 2020, 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 charges. In other words, they denied the allegations against them. When a prima facie case was found against them, at the end of the prosecution's case, wherein they were called upon to make their defence, both accuseds chose to give sworn evidence in their defence. Accused no. 2, in addition, called Doctor A. Chand (DW2) as his witness. What the accuseds did were their constitutional rights.

25. Both accuseds cases were simple. On oath, they denied the charges against them. They said, they were not cultivating any cannabis sativa plants, therefore they were not guilty as charged. As for their alleged confessions to the police, as contained in Prosecution Exhibits No. 1, 2, 3, 4, 5, 6, 7 and 8, they asked you to disregard the same as they said, they were assaulted and threatened by the police, while they were in their custody. They appear to say that their alleged confessions were not given voluntarily by them, and that the statements were a complete fabrication by the police. They said, they were allegedly injured by police, while they were in their custody. Accused no. 2 called Doctor A. Chand (DW2) to prove the above.

26. Because of the above, the accuseds are asking you, as assessors and judges of fact, to find them not guilty as charged, on all counts. That was the case for the defence.

H. **ANALYSIS OF THE EVIDENCE**

(a) **Introduction:**

27. 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 state's case against the accuseds; then we will discuss the accuseds' position in this case, and lastly, the need to consider all the evidence.

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

28. The State's case against the accuseds were based on a combination of two types of evidence. First, the State obtained alleged confessions from both accuseds on count no. 1, as shown in Prosecution Exhibits 1 and 2 for Accused no. 1, and Prosecution Exhibits 3 and 4 for Accused no. 2. Secondly, on count no.1, the state relied on an alleged chain of custody of the alleged drugs from where it was uprooted by police from the accuseds' alleged marijuana farm to when it was produced in the courtroom as Prosecution Exhibit No. 9. For count no. 2, the state first relied on Accused No. 1's alleged confession in Prosecution Exhibit No.5 and 6, and secondly, on the alleged chain of custody of the alleged drug from where it was uprooted by police from the accused no. 1's farm to when it was destroyed on 16 March 2017, as a result of an order by the Sigatoka Magistrate Court. For count no. 4, the above process also applied. First, the state relied on accused no. 1's alleged confession in Prosecution Exhibit No. 7 and 8, and secondly, on the alleged chain of custody of the alleged drug when it was uprooted by police from the accused's farm

to when it was destroyed on 6 April 2018, as a result of an order by the Sigatoka Magistrate Court. We will now discuss the above evidence in turn.

29. For count no. 1, we will look at Prosecution Exhibit No. 2, the English translation. Please read it carefully. It appeared Accused no. 1's legal rights was given to him, his right to counsel, he was cautioned and his meal break was given to him. There were 46 questions and 46 answers. In questions and answers 21, 24, 25, 27 to 35, 40, 41 and 42, Accused no. 1 admitted the offence to police. As for Accused no. 2, we will have to look at Prosecution Exhibit No. 4, the English translation. Please, read it carefully. It appeared Accused no. 2's legal rights were given to him, his right to counsel, he was cautioned and his meal break was given to him. There were 66 questions and 66 answers. In questions and answers 29, 30, 34, 35, 39, 40, 42, 43 to 45, 47 to 52, 55, 56 and 57, Accused no. 2 admitted the offence to police.

30. As to the chain of custody of the drugs mentioned in count no. 1, Sergeant 2846 Paulino (PW2) said, he led a police team into the hills of Navosa on 13 June 2016. They crossed rivers, climbed steep mountains and cliff to reach Accused no. 1 and 2's marijuana farm in Natukalevu. PW2 said they went to the accuseds' farm at Wainisomu, located the marijuana farm and uprooted 5,827 plants and seedlings. He said, they brought the same to Navosa Police Station on 15 June 2016. He handed it over to PC 4480 Saula (PW10), the exhibit writer at the station. PW10 said he handed the drugs to Corporal 4180 Tevita Radu (PW12) to take the same to the government analyst, Miliana Werebauinona (PW14), for analysis. PW14 analyzed the same and confirmed it to be cannabis sativa and it weighed 6.2 kilograms. Please, refer to Prosecution Exhibit No. 11, the government analyst's certificate. The drugs were later returned to PW12, then to PW10, and the same was tendered in evidence as Prosecution Exhibit No. 9.

31. You will have to consider all the above evidence together. When considering the above alleged confessions, 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.
32. As for count no. 2, the state obtained an alleged confession from Accused no. 1, when they caution interviewed him on 11 March 2017. Please, refer to his caution interview statements, submitted as Prosecution Exhibit No. 5 and 6. Read them carefully. We will discuss the English translation, Prosecution Exhibit No. 6. It appeared the accused was given his rights, his right to counsel, he was cautioned, he was given the standard rest and meal breaks. There were 58 questions and 58 answers. In questions and answers 27, 28, 40, 41 to 50 and 51, Accused No. 1 admitted count no. 2 to police. As to the chain of custody of the drugs mentioned in count no. 2, Inspector Usaia Donu (PW6) said he led a police team to Tukalevu on 6 March 2017. He said, they crossed rivers, climbed mountains and the terrain was

rough. He said, accused no. 1 later showed them his marijuana farm and they uprooted 1,428 plants. PW6 said they brought the same to Navosa Police Station and handed the same to PC 4480 Saula (PW10), the station's exhibit writer. PW10 later took the drugs to the government analyst (PW14) to analyze the same. PW14 confirmed the same to be cannabis sativa, and it weighed 128 kilograms. Please, refer to Prosecution Exhibit No. 12, the government analyst's certificate. PW10 said, he later kept the drugs in the exhibit room. PW10 said, on 16 March 2017, the above drugs were destroyed as a result of a Sigatoka Magistrate Court order. In analyzing the above evidence, please take on board what I said in paragraph 31 hereof.

33. On count no. 3, please refer to questions and answers 52, 53 and 54 of Prosecution Exhibit No. 6. Accused no. 1 admitted he resisted being arrested by police, as alleged in count no. 3.

34. On count no. 4, the state obtained an alleged confession from Accused no. 1, when they caution interviewed him on 16 March 2018. Please, refer to his caution interview statements, submitted as Prosecution Exhibit No. 7 and 8. Read them carefully. We will discuss the English translation, Prosecution Exhibit No. 8. It appeared accused was given his rights, his right to counsel, he was cautioned and he was given his standard rest and meal breaks. There were 49 questions and 49 answers. In questions and answers 32 to 36, 37, 43 and 44, Accused admitted count no. 4 to police. As to the chain of custody of the drugs mentioned in count no. 4, PC 4482 Uraia (PW3) said the police went to the accused's farm in Navosa on 12 March 2018. PW3 said, as he approached the accused, he was planting marijuana seedlings on his farm. PW3 said, the police uprooted 1,079 plants from the accused's farm on the same day. PW3 said they took the drugs to Navosa Police

Station, where he handed the same to Corporal Timoci. PC 4480 Saula (PW10) said, he received the above drugs from Corporal Timoci on 15 March 2018. PW10 said, he later took the drugs to Sigatoka Police Station to be analyzed by the government analyst on 16 March 2018. The government analyst confirmed the same were cannabis sativa and it weighed 43.5 kilograms. Please, refer to Prosecution Exhibit No. 13, the government analyst certificate. PW10 later received the drugs and handed the same to Corporal 3793 A. Prasad (PW11), the Sigatoka Police Station Exhibit writer. On 6 April 2018, PW11 handed the drugs to ASP Ratu for destruction, as ordered by the Sigatoka Magistrate Court. When examining the above evidence, please take on board what I said in paragraph 31 hereof.

35. It must be noted that in count no. 2 and 4, none of the drugs mentioned therein were produced in court, as exhibits, because according to the prosecution, the Sigatoka Magistrate Court had ordered their destruction. The defence had argued that because the drugs were not produced in court as exhibits, Accused no. 1 should be acquitted on count no. 2 and 4. However, you must consider section 36 (1) of the Illicit Drugs Control Act 2004, which reads as follows:

“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.”

After listening to Ms. Miliana Werebauinona (PW14) evidence that she not only does scientific work for the Police Department, but also for the Health, Fiji Military, Fiji Correction Service, Agriculture Departments, Navy and Fisheries Department, in my view, she is a government analyst. You must therefore carefully consider her analyst reports as submitted in Prosecution Exhibit No. 11, 12 and 13.

36. As to count no. 5, Accused No. 1 admitted the offence in questions and answers 27 to 31 of Prosecution Exhibit No. 8.
37. If you accept the prosecution's witnesses' evidence as discussed above, you must find the accuseds guilty as charged. If otherwise, you must find them not guilty as charged. It is a matter entirely for you.

(c) **The Accuseds' Case:**

38. I had summarized the accuseds' cases to you from paragraphs 24 to 26 hereof. I repeat the same here. You had watched them give evidence in court. They said they were assaulted by police while in their custody. They denied the allegations against them. If you accept their version of events, you must find them 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.

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

39. Fourteen witnesses gave evidence for the prosecution:
- (i) Inspector Esira Dokoni (PW1),
 - (ii) Sgt 2846 Paulino Wakaniniu (PW2),
 - (iii) PC 4482 Uraia (PW3),
 - (iv) Sgt 3657 Leone Vurakania (PW4),
 - (v) PC 4689 Lemeki Kurisoqo (PW5),
 - (vi) Inspector Usaia Donu (PW6),
 - (vii) PC 5240 Esala Kamunaga (PW7);
 - (viii) D/Cpl 3757 Sekonaia Ravono (PW8);
 - (ix) PC 4222 Viliame Uqeuqe (PW9);

- (x) PC 4480 Saula Kunavatu (PW10);
- (xi) Cpl 3793 Anilesh Prasad (PW11);
- (xii) Cpl 4180 Tevita Radu (PW12);
- (xiii) SC 1821 Taniela Lalakobau (PW13) and
- (xiv) Ms. Miliana Werebauinona (PW14).

The defence called the following witnesses:

- (i) Accused No. 1 (DW3);
- (ii) Accused No. 2 (DW1) and
- (iii) Doctor A. Chand (DW2).

40. The prosecution submitted the following exhibits:

- (i) Prosecution Exhibit No. 1- Accused No. 1 Interview Notes (i-taukei)
- (ii) Prosecution Exhibit No. 2- Accused No. 1 Interview Notes (English)
- (iii) Prosecution Exhibit No. 3- Accused No. 2 Interview Notes (i-taukei)
- (iv) Prosecution Exhibit No. 4- Accused No. 2 Interview Notes (English)
- (v) Prosecution Exhibit No. 5- Accused No. 1 Interview Notes (i-taukei)
- (vi) Prosecution Exhibit No. 6- Accused No. 1 Interview Notes (English)
- (vii) Prosecution Exhibit No. 7- Accused No. 1 Interview Notes (i-taukei)
- (viii) Prosecution Exhibit No. 8- Accused No. 1 Interview Notes (English)
- (ix) Prosecution Exhibit No. 9- Drugs (count no. 1)
- (x) Prosecution Exhibit No. 10- PW14's Resume
- (xi) Prosecution Exhibit No. 11- Certificate of Analysis (Count no. 1)
- (xii) Prosecution Exhibit No. 12- Certificate of Analysis (Count no. 2)
- (xiii) Prosecution Exhibit No. 13- Certificate of Analysis (Count no. 4)

The defence submitted one exhibit:

- (i) Defence Exhibit No. 1 – Accused No. 2's medical report.

41. 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

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 accuseds 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) Count No. 1: Unlawful Cultivation of Illicit Drugs: Accused No. 1 – Guilty or
Not Guilty
Accused No. 2 – Guilty or
Not Guilty
- (ii) Count No. 2: Unlawful Cultivation of Illicit Drugs: Accused No. 1 – Guilty or
Not Guilty
- (iii) Count No. 3: Resisting Arrest: Accused No. 1 – Guilty or Not Guilty

- (iv) Count No. 4: Unlawful Cultivation of Illicit Drugs: Accused No. 1 – Guilty or
Not Guilty
- (v) Count No. 5: Criminal Intimidation: Accused No. 1 – Guilty or Not Guilty

44. 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 No. 1 : **Legal Aid Commission, Suva.**

Solicitor for the Accused No. 2 : **Legal Aid Commission, Suva.**