

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.

Judgment : 25 June 2020

JUDGMENT

1. On 26 May 2020, on the first day of the trial proper, the following information was put to the accuseds, in the presence of their counsels:

Count 1

Statement of Offence

UNLAWFUL CULTIVATION OF ILLICIT DRUGS: Contrary to section 5
(a) of the Illicit Drugs Control Act 2004.

Particulars of Offence

ILAISA CALEVU and **SEMISI TANIMANAQE** on the 15th day of June, 2016 at Navosa in the Western Division, without lawful authority, cultivated one thousand two hundred and six (1206) plants of illicit drugs known as Cannabis Sativa, weighing 6.2 kilograms.

Count 2

Statement of Offence

UNLAWFUL CULTIVATION OF ILLICIT DRUGS: Contrary to section 5 (a) of the Illicit Drugs Control Act 2004.

Particulars of Offence

ILAISA CALEVU between the 1st day of November 2016 and the 7th day of March, 2017 at Navosa in the Western Division, without lawful authority cultivated one thousand four hundred and twenty eight (1428) plants of illicit drugs known as Cannabis Sativa, weighing 128 kilograms.

Count 3

Statement of Offence

RESISTING ARREST: Contrary to Section 277 (b) of the Crimes Act 2009.

Particulars of Offence

ILAISA CALEVU on the 6th day of March, 2017 at Navosa in the Western Division, resisted **POLICE CONSTABLE 5240 ESALA KAMUNAGA** whilst the said **POLICE CONSTABLE 5240 ESALA KAMUNAGA** was effecting arrest in the due execution of his duty.

Count 4

Statement of Offence

UNLAWFUL CULTIVATION OF ILLICIT DRUGS: Contrary to section 5 (a) of the Illicit Drugs Control Act 2004.

Particulars of Offence

ILAISA CALEVU between the 1st day of November 2017 and the 13th day of March, 2018 at Navosa in the Western Division, without lawful authority cultivated one thousand and seventy nine (1079) plants of illicit drugs known as Cannabis Sativa, weighing 43.5 kilograms.

Count 5

Statement of Offence

CRIMINAL INTIMIDATION: Contrary to Section 375 (1) (a) (iv) of the Crimes Act 2009.

Particulars of Offence

ILAISA CALEVU on the 13th day of March, 2018 at Navosa in the Western Division, without lawful excuse, threatened to kill **POLICE CONSTABLE 4482 URAIA LIQORIO** with a cane knife with intent to cause alarm to the said **POLICE CONSTABLE 4482 URAIA LIQORIO**.

2. The trial commenced before myself and three assessors. The first prosecution witness (PW1) gave evidence. On 27 May 2020, Accused No. 1 fell ill because of chicken pox, and the trial adjourned to 15 June 2020. From 15 June, 2020, the trial went on for the next seven working days. I delivered my summing up to the assessors on 24 June 2020. Yesterday, the three assessors returned with mixed opinions.
3. On count no. 1, the three assessors were unanimous that Accused No. 1 was guilty as charged, while Accused No. 2 was not guilty as charged. On Counts no. 2 and 4, the three assessors were unanimous that Accused No. 1 was not guilty as charged, while on counts no. 3 and 5, they were unanimous that Accused No. 1 was guilty as charged.
4. The assessors' opinions showed that they do not accept the prosecution's version of events on counts no. 2 and 4, as far as Accused No. 1's case was concerned, but accept the prosecution's version of events on counts no. 1, 3, and 5. As far as Accused No. 2 was concerned, they do not accept the prosecution's version of events on count no. 1.

5. I had reviewed the evidence called in the trial, and I had directed myself in accordance with the summing up I delivered to the assessors yesterday. The assessors' opinions were not perverse. It was open to them to reach such a conclusion on each count, given the totality of the whole evidence.
6. As a matter of law, as a trial Judge, I am not bound by the opinions of the assessors. However, they are there to assist the trial Judge come to a decision on whether or not the accuseds were guilty as charged. The assessors represent the public during the trial, and their opinions must be treated with respect.
7. I will first deal with Accused No. 1's case, and then move on to discussing Accused No. 2's case. As for Accused No. 1's case, I agree entirely with the three assessors' unanimous opinion on all counts, that is, the unanimous guilty opinion on counts no. 1, 3 and 5; and the unanimous not guilty opinions on counts no. 2 and 4. My reasons are as follows.
8. On count no. 1, I accept the evidence of Sgt. 3657 Leone Vurakania (PW4), who caution interviewed Mr. Calevu on 15 June 2016. He asked 46 questions and got 46 answers from Mr. Calevu. He was given his legal rights, as recorded in the interview notes, which were tendered as Prosecution Exhibits No. 1 (i-taukei version) and 2 (English version). Mr. Calevu signed the pages of the interview notes, and this was counter-signed by PW4 and the witnessing officer D/Sgt. 2509 Joape. During the interview, Mr. Calevu admitted the allegation in count no. 1. In my view, I reject his evidence that he was assaulted by police as not credible. I accept PW4's evidence that he was not assaulted or threatened while in police custody. Even though he was held in police custody for more than 48 hours, that was justifiable as the police had to go to the interior of Navosa, crossing rivers and climbing hills and mountains, to uproot the marijuana plants, mentioned in count no. 1. He was brought before the Magistrate Court as soon as reasonably possible.
9. In my view, Mr. Calevu voluntarily and out of his own freewill admitted the allegation in count no. 1 and his admission was the truth. Furthermore, the chain of custody of the drugs mentioned in count no. 1 was unbroken. I refer to what I mentioned in paragraph 30 of my summing up, and I repeat the same here.

10. As for counts no. 3 and 5, Mr. Calevu admitted the offences in both counts, and I refer to paragraphs 33 and 36 of my summing up, and I repeat the same here. I also accept the evidence of PC 5240 Esala Kamunaga (PW7), the complainant in count no. 3. On count no. 5, I also accept the evidence of the complainant PC 4482 Uraia Liqorio (PW3).
11. Now I move on to discussing counts no. 2 and 4. In my 11 years serving as a High Court Judge, I have heard numerous cases of “unlawful cultivation of Illicit drugs”, contrary to section 5 (a) of the Illicit Drugs Control Act 2004. In these type of cases, it was always essential to prove the drugs involved in the allegation, by the actual production of the drugs involved in the courtroom, during the trial process. The drugs must be produced in court as a prosecution exhibit. This will show that the chain of custody of the alleged illicit drug had not been broken from it being uprooted from the alleged marijuana farm, to the relevant police station, and into the trial courtroom. If the chain of the custody of the alleged drug was broken from where it was obtained by the police to the trial courtroom, the effect of the same is far reaching. It could have the effect of casting a reasonable doubt on any alleged confessions made to the police.
12. The dilemma encountered above occurred to counts no. 2 and 4. The prosecution failed to produce the relevant drugs in counts no. 2 and 4 in the trial courtroom. This obviously cast a reasonable doubt in the minds of the assessors. The prosecution did the opposite for count no. 1, where they produced the drugs in court as Prosecution Exhibit No. 9.
13. Of course, there are legal ways to avoid the problems mentioned above, if the drugs had been destroyed under section 30 of the Illicit Drugs Control Act 2004. A certificate or report prepared in accordance with section 30 (6) of the Illicit Drugs Control Act 2004 must be produced in court. None was done in this case, and that was fatal to the prosecution’s case. Furthermore, under section 30 of the Illicit Drugs Control Act 2004, an application for the destruction of the drugs must be made to a court. The decision of the Court of Appeal in **Kini Sulua, Michael Ashley Chandra v State**, Fiji Law Report, Volume 2, 2012, page 111 – 147, had been around since 31 May 2012. An allegation involving “unlawful cultivation of illicit drug” involving 128 kilograms will obviously end up in the High Court. A destruction order under section 30 of the Illicit

Drugs Control Act 2004 should have been made to the High Court, instead of the Magistrate's Court, which lacks jurisdiction to try cannabis sativa cases involving more than 4 kilograms. In this case section 30 (6) of the Illicit Drugs Control Act 2004 was not complied with.

14. The prosecution relied on the government analyst report submitted under section 36 (1) of the Illicit Drugs Control Act 2004, to avoid the problems encountered above. In my view, it was not enough. A certificate or report under section 30 (6) of the Illicit Drugs Control Act 2004, and photographs or video recording of the drugs destruction, would be more powerful evidence than a government analyst report alone. In my view, without the production of a certificate or report in accordance with section 30 (6) of the Illicit Drugs Control Act 2004, the chain of custody of the drugs alleged in counts no. 2 and 4 had been broken, and a reasonable doubt on the prosecution's case arose. The benefit of that doubt must go to Accused No. 1.
15. As for Accused No. 2, I accept the unanimous decision of the assessors. They did not accept the prosecution case. The allegation of assault by police by Accused No. 2 cast a reasonable doubt on the prosecution's case. The benefit of that doubt must go to Accused No. 2.
16. Given the above, I accept the three assessors' unanimous opinions on both Accused No. 1 and 2. I therefore find Accused No. 1 guilty as charged on counts no. 1, 3 and 5 and not guilty as charged on counts no. 2 and 4. I convict Accused No. 1 on counts no. 1, 3 and 5 as charged. I acquit him on counts no. 2 and 4. I also find Accused No. 2 not guilty as charged on count no. 1 and I acquit him accordingly.




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.**