

England. The State's application is based on Section 131(2)(b) of the Criminal Procedure Act.

2. The Defence is objecting to the application. The 3rd Accused's objection is based on two grounds. First, it is submitted that the State has failed to satisfy the procedure stipulated in the Mutual Assistance in Criminal Matters Act 1997 (MACMA) concerning evidence to be taken in the foreign country, particularly Sections 35, 40 and 41 of the said Act. In support of this ground the Court of Appeal judgement in State v Hurtado [2016] FJCA 115; AAU00148.2015 (30 September 2016) was cited.
3. The second ground is based on Section 295 of the Criminal Procedure Act (CPA). The Counsel submits that Rusiate is not a vulnerable witness for him to be entitled to give evidence from overseas via Skype under Section 295 of the CPA. The Court of Appeal judgment in Lotawa v State¹ is cited in support of this ground. The 4th Accused is objecting to the application on the basis that the State has failed to satisfy the requirements set out in Sections 131(1), 131(2), and Sections 295 of the CPA.
4. The procedure prescribed in Section 35 of the MACMA and other provisions associated with it specifically deal with requests by the Attorney-General on behalf of a defendant for evidence to be taken in a foreign country. In Hurtado (supra), the Court of Appeal agreed in principle that the provision of the said Act requiring an accused to obtain a certificate from the Attorney General (Section 35) for that purpose is an option and that it does not prevent an accused from considering other options including Skype to lead oral evidence from overseas witnesses.
5. The procedure set out in the MACMA for taking evidence from a witness in a foreign country is undoubtedly cumbersome and time-consuming thus not favourable for case management purposes. Skype was introduced in 2003 and by the time the MACMA was enacted in 1997, the benefit of Skype as a mode of communication was not available to the Courts in Fiji. There is no good reason to deny the benefit of new technologies if they do not inhibit a fair trial and are not prohibited by law. The world is fast shrinking and trans-border movement of people at its height. Further, for this Act to be operational, there had to be an agreement for mutual assistance between Fiji and the country where

¹ Crim App. No AAU 0091 of 2011 (5 December 2014)

the evidence was to be taken. On top of those, this MACMA does not provides for potential overseas prosecution witnesses.

6. After its introduction in 2003, Skype became a widely accepted mode of taking evidence in court proceedings. In Fiji, it is not uncommon for the courts to use this technology in court hearings. In **Hurtado** (supra), the Court was referred to at least two cases in which the prosecution was allowed to lead evidence from overseas witnesses via Skype in criminal trials (see, **Lotawa v State** unreported Criminal Appeal No. AAU0091 of 2011; 5 December 2014, **State v Singh** Misc. Case No. HAM005 of 2012; 7 March 2012). In those two cases, the witnesses were foreign victims of rape who had returned to their respective countries before the trial commenced in Fiji. The use of Skype to receive their oral evidence from overseas was allowed under Section 295 of the CPA.
7. Section 295 of the CPA governs the procedure to record oral evidence from vulnerable witnesses like women and children of alleged sexual assaults. In the present case, the Prosecution did not contend that Rusiate is a vulnerable witness. The Legislature has not restricted the application of section 131 to vulnerable witnesses. If that be the case such intention could have been expressly stated in the same manner the legislature has done under Part XX – Protecting Vulnerable Witnesses (*i.e.* sections 295 and 296). When safety issues or interests of justice require, a magistrate or a judge could act under section 131 independent of section 256 which comes into play when the complainant or the witness is ‘vulnerable’².
8. It appears that Section 131 is of general application to all witnesses while Section 295 is applicable to a special class of witnesses *i.e.* vulnerable witnesses³ The State’s application is based on Section 131 of the CPA which provides as follows:

131 (1) Subject to any other provision of this Act, all evidence taken in any trial under this Act shall be taken—

(a) in the presence of the accused; or

(b) when his or her personal attendance has been dispensed with, in the presence of his or her lawyer (if any).

² Khan v State [2022] FJCA 24; AAU004.2017 (3 March 2022)

³ Khan v State[2002]FJCA 24;AAU004.2017 (3 March 2022)

(2) Nothing in this section shall prevent a judge or magistrate from authorising that appropriate arrangements be made for —

(a) taking of evidence from a remote location; or

(b) the use of any other procedure or means by which evidence may be taken during, or for the purposes of the trial —

where issues of safety or the interests of justice require the use of such means

9. This section does not specify what a remote location is. Therefore, the remote location can be a foreign country. The Court is authorised to make appropriate arrangements for taking of evidence from a remote location, which is England. The Court of Appeal in **Hurtado** held that the phrase ‘any other procedure or means’ in 131(2)(b) can include the use of Skype or similar technology to receive oral evidence from witnesses during the trial. The issue is whether safety or the interests of justice require using Skype in this case.
10. There are no security issues as far as the proposed witness is concerned. The reason advanced was the difficulty in bringing the witness to Fiji from overseas to give evidence in the trial because he was engaged in active military service in England. The crucial question is whether the interests of justice require the use of Skype to receive oral evidence from the overseas witness.
11. The phrase ‘the interests of justice’ is not defined in the CPA or any other legislation. It is a phrase that the courts have not attempted to define and its application depends on the context of the legislation (*Re Chapman & Jansen* (1990) FLC 92-139, per Nicholson CJ). In the context of a criminal statute, Malcolm CJ referred to the phrase in *Mickelberg v The Queen (No 3)* (1992) 8 WAR 236 and said at p 252⁴:

The interests of justice in a particular criminal case are to ensure that a person who is accused of a crime is convicted if guilty and acquitted if innocent after he has had a fair trial. The interests of justice also extend to the public interest and in due administration of justice.

12. The ultimate goal of a criminal justice system is to punish the guilty persons and acquit the innocents. The ascertainment of the truth in a trial which is fair to all parties would

⁴ See: *Hurtado* (supra)

be in the interests of justice. The interests of justice are not confined to the interests of the accused. It encompasses the interests of the prosecution and those of the public as well.


13. In **Hurtado**, the concern for obtaining evidence via Skype from overseas witnesses was expressed by the Court of Appeal in the following terms:

....The only matter that the learned trial judge considered when he authorized the use of Skype was the respondent's constitutional right to call witnesses. But the right to call witnesses was not an issue. The issue was the mode of calling witnesses. The interests of justice required the learned trial judge to ensure the trial was fair to both the defence and the prosecution and that there was accountability over the witnesses called by the parties. Witnesses who give evidence from overseas via Skype escape any form of accountability because the domestic courts lack jurisdiction to hold them responsible for perjury or contempt if they lie on oath. So there is a risk that an overseas witness may not give truthful evidence via Skype because of lack of any form of accountability. The learned trial judge did not consider any of these matters when he authorized the respondent to lead evidence from his overseas witnesses on a contested issue of language difficulty via Skype.

14. The proposed overseas witness in the present case is a Fiji citizen. He is no doubt serving in England under a bilateral agreement between England and Fiji. Both countries are parties to an agreement for mutual assistance in criminal matters. The domestic courts have the power and jurisdiction to hold him responsible for perjury or contempt if he lied on oath. He can be warned of possible prosecution upon his return to Fiji or the possibility of him being extradited to face charges in Fiji.
15. The identity of the proposed witness has been made known to the Defence in advance. The Prosecution is relying on the statement this witness has already given to police which was disclosed to the Defence. In that statement, he stated that he drove some of the accused from Suva to Lautoka a day before the alleged robbery. It appears that Rusiate is an important witness for the prosecution case. His evidence will help this Court to resolve a serious crime if his evidence could be trusted. He will give evidence under oath and be cross-examined by the Defence. The Court can devise a method to avoid inherent weaknesses associated with a dock identification. All the facilities and equipment are available to this Court to take his evidence from overseas.
16. I do not see any prejudice being caused to the Defence in allowing this application. The interests of justice will be served if the application is allowed.

17. The application to use Skype as mode of taking evidence from overseas is allowed.




Aruna Aluthge
Judge

6 May 2024

At Lautoka

Solicitors:

Office of the Director of Public Prosecutions for State

Legal Aid Commission for 3rd, 4th & 5th Accused

1st and 2nd Accused are in Person