

IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISCELLANEOUS JURISDICTION

CRIMINAL MISCELLANEOUS CASE NO: HAM 148 OF 2024

In the matter of an application seeking a disposal order pursuant to Section 30 (3) of the Illicit Drugs Control Act 2004.

BETWEEN: **THE STATE**

APPLICANT

AND: **JUSTIN S. M. HO** **(1st Respondent)**
 DAVID O. HERITAGE **(2nd Respondent)**
 LOUIE F.P. LOGAIVAU **(3rd Respondent)**
 RATU APOROSA DAVELEVU **(4th Respondent)**
 SAKIUSA TUVA **(5th Respondent)**
 JALE AUKEREA **(6th Respondent)**
 RATU OSEA N. LEVULA **(7th Respondent)**
 VILIAME COLOWALILU **(8th Respondent)**
 CATHY T. BAINISAVU **(9th Respondent)**
 KEANIE L. MCPHERSON **(10th Respondent)**

RESPONDENTS

Counsel : Mr. J. Rabuku with J Nasa for Applicant
 Mr. I. Khan with Mr S Heritage for 1st 2nd and 3rd Respondents
 Mr. S. Nand for 4th Respondent
 Ms. K. Vulimainadave for 5th & 10th Respondent
 Mr. E. Wainiqolo for 6th Respondent
 Mr. M. Naivalu for 7th Respondent
 Ms. P. Reddy for 9th Respondent

Date of Hearing : 10 December 2024

Date of Ruling : 13 December 2024

RULING ON DISPOSAL OF CONFISCATED EXHIBITS

1. This is an application filed by the Director of Public Prosecutions (DPP) seeking an order to dispose of exhibited illicit drugs under Section 30 (3) of the Illicit Drugs Control Act 2004.
2. The Respondents were charged on the following information filed by the Director of Public Prosecutions (DPP):

Count 1

Statement of Offence

UNLAWFUL IMPORTATION OF ILLICIT DRUGS: Contrary to section 4(1) of the Illicit Drugs Control Act 2004.

Particulars of Offence

JUSTIN STEVEN MASIH HO AND DAVID OTTO HERITAGE between 01st day of November 2023 to the 23rd day of December 2023 at Nadi in the Western Division, without lawful authority, facilitated the importation of in excess of 4,243.2 kilograms of methamphetamine, an illicit drug.

Count 2

Statement of Offence

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

Particulars of Offence

JUSTIN STEVEN MASHI HO, DAVID OTTO HERITAGE AND LOUIE FRANK PENJAMINI LOGAIVAU on 23rd day of December 2023, Denarau, Nadi in the Western Division, without lawful authority, were in possession of in excess of 4,243.2 kilograms of methamphetamines, an illicit drug.

Count 3

Statement of Offence

UNLAWFUL POSSESSION OF ILLICIT DRUG: Contrary to section 5(b) of the Illicit Drugs Control Act 2004.

Particulars of Offence

JUSTIN STEVEN MASHI HO and LOUIE FRANK PENJAMINI LOGAIVAU on the 23rd day of December 2023 at Nadi in the Western Division, without lawful authority, engaged in dealing for the transfer and transport of in excess 4,242.2 kilograms of methamphetamines, an illicit drug, from David's Marine Repairs, Industrial Road, Denarau, Nadi, to Subzero Car Wash/Café yard, Denarau Industrial Road, Denarau, Nadi.

Count 4
Statement of Offence

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

Particulars of Offence

JUSTIN STEVEN MASHI HO AND LOUIE FRANK PENIJAMINI LOGAIVAU on 24th day of December 2023 at Subzero Car Wash/Café yard, Denarau Industrial Road, Denarau, Nadi, in the Western Division, without lawful authority, were in possession of in excess of 4,243.2 kilograms of methamphetamine, an illicit drug.

Count 5
Statement of Offence

UNLAWFUL POSSESSION OF ILLICIT DRUGS contrary to section 5(b) of the Illicit Drugs Control Act 2004.

Particulars of Offence

LOUIE FRANK PENIJAMINI LOGAIVAU AND RATU APOROSA DAVELEVU between the 28th and 29th day of December 2023 at Nadi in the Western Division, without lawful authority, engaged in dealing for the transfer and transport of in excess of 4,243.2 kilograms of methamphetamines, an illicit drug, from Subzero Car Wash/Café yard, Denarau Industrial Road, Denarau, Nadi, to Motorex Business Center, 15 Nadi Back-Road, Nadi.

Count 6
Statement of Offence

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

Particulars of Offence

LOUIE FRANK PENIJAMINI LOGAIVAU AND RATU APOROSA DAVELEVU on 29th day of December 2023 at Motorex Business Center, 15 Nadi Back Road, Nadi, in the Western Division, without lawful authority, were in possession of in excess of 4,243.2 kilograms of methamphetamines, an illicit drug.

Count 7
Statement of Offence

UNLAWFUL POSSESSION OF ILLICIT DRUG: Contrary to section 5(b) of the Illicit Drugs Control Act 2004.

Particulars of Offence

SAKIUSA TIVA AND ANOTHER between 29th day of December, 2023 to the 14th day of January 2024, at Nadi in the Western Division, without lawful authority engaged in dealing for the transfer and transport of in excess of 4,243.2 kilograms of methamphetamines, an illicit drug, from Motorex Business Centre, 15 Nadi Back-Road, Nadi to Voivoi, Legalega, Nadi.

Count 8
Statement of Offence

UNLAWFUL POSSESSION OF ILLICIT DRUG: Contrary to section 5(b) of the Illicit Drugs Control Act 2004

Particulars of Offence

JALE AUKEREA, SAKIUSA TUVA, IOSEFO ROQICA, MAIKA VAKANAWA YABAKIVOU, RATU OSEA NAIVALUNILOTU LEVULA, CATHY TUIRABE, NANCY ELIA MATEYAWA and VILIAME COLAWALIKU between the 29th day of December 2023 to the 14th day of January 2024, at Voivoi, Legalega, Nadi in the Western Division, without lawful authority, were in possession of in excess of 4,243.2 kilograms of methamphetamines, an illicit drug.

Count 9

Statement of Offence

UNLAWFUL POSSESSION OF ILLICIT DRUG: Contrary to section 5(b) of the Illicit Drugs Control Act 2004.

Particulars of Offence

JALE AUKEREA, SAKIUSA TUVA AND KEANIE LILO MACPHERSON between the 13th to the 20th day of January 2024, at Nadi, in the Western Division, without lawful authority, engaged in the dealing for the transfer and transport of 1,053.5 kilograms of methamphetamines, an illicit drug from Voivoi, Legalega, Nadi, to Magalevu, Narewa, Nadi.

Count 10

Statement of Offence

POSSESSION OF PROPERTY SUSPECTED OF BEING PROCEEDS OF CRIME contrary to section 70(1) of the proceeds of crime act 1997.

Particulars of Offence

JUSTIN STEVEN MASIH HO on the 23rd day of January 2024 at Taveuni in the Northern Division, possessed cash amounting FJ\$21,691.60, AU\$450.00 and US\$100.00 suspected being the proceeds of crime.

Count 11

Statement of Offence

POSSESSION OF PROPERTY SUSPECTED OF BEING PROCEEDS OF CRIME: Contrary to section 70(1) of the Proceeds of Crime Act 1997.

Particulars of Offence

LOUIE FRANCK PENIJAMINI LOGAIVAU on the 23rd day of January 2024 at Taveuni in the Northern Division, possessed cash amounting to FJ\$112.25 suspected of being the proceeds of crime.

Count 12

Statement of Offence

POSSESSION OF PROPERTY SUSPECTED OF BEING PROCEEDS OF CRIME: Contrary to section 70(1) of the Proceeds of Crime Ac 1997.

Particulars of Offence

JALE AUKEREA on the 23rd day of January 2024 at Taveuni in the Northern Division, possessed cash amounting to FJ\$2,100.85 suspected being the proceeds of crime.

3. Section 30 of the Illicit Drugs Control Act deals with disposing of seized illicit drugs. The relevant parts of the section are as follows:

30(1) If scientific analysis of a sample indicates that it is a seized illicit drug, controlled chemical or controlled equipment, the seizing officer must forward a copy of the scientific analysis report to the Director of Public Prosecution.

(2) If the Commissioner of Police, in consultation with the Director of Public Prosecution, is of the opinion that proceedings are likely to be brought against any person and-

(a) physical preservation of all the seized illicit drugs, controlled chemicals or controlled equipment is not necessary for the purposes of any actual or contemplated proceedings under this Act ;

(b) the seized drugs cannot be safely, securely or conveniently stored until the final determination of such proceedings; or

(c) ;

the Commissioner of Police may apply to the court for an order for disposal of any part of the seized illicit drug, controlled chemical or controlled equipment or samples as they determine are not necessary to retain for the due administration of justice.

(3) If the Commissioner of Police, in consultation with the Director of Public Prosecution is satisfied that-

(a) the seized illicit drug, controlled chemical or controlled equipment is illegal property liable to forfeiture under this Act ;

(b) the provisions of this section relating to the taking and analysis of samples have been complied with;

(c) sufficient samples have been taken, analysed and preserved to enable all material questions relating to the seized illicit drug, controlled chemical or controlled equipment to be properly determined in any actual or contemplated proceedings under this Act; and

(d) any suspect or accused person in relation to the seizure has had reasonable opportunity to have samples independently analysed at that person's expense;

the Commissioner of Police may apply to the court for an order for disposal of the illicit drug, controlled chemical or controlled equipment.

4. The application made on behalf of the Commissioner of Police (COMPOL) in consultation with the DPP, is supported by an affidavit filed by Acting ASP Josua Vosaki. By the affidavit dated 30 May 2024, it was informed that the consignment of illicit drugs involved in this

case, amounting to a total weight of 4.15 tons, is currently exhibited in police custody at the Police Mobile Force Unit in Nasinu.

5. A scientific analysis of samples has been conducted at the Fiji Police Forensic Laboratory by the Principle Scientific Officer. The analysis has confirmed that the seized consignment consists of Methamphetamine, an illicit drug under the IDCA. The Analyst's Report which the COMPOL has received, is attached to the affidavit (JV-1). The production of a certificate purporting to be signed by a Government Analyst is *prima facie* evidence of the facts stated in Certificate¹.
6. The COMPOL, in consultation with the DPP, is satisfied that the provisions relating to the taking and analysis of samples have been complied with. He is also satisfied that sufficient samples have been taken, analysed and preserved to enable all material questions relating to the seized illicit drug to be properly determined in the Court proceedings.
6. The photographs of the consignment have been taken. A photographic booklet has been compiled and disclosed to each Respondent. [Copies of the pictures are attached to the affidavit marked as JV-1).
7. Even before this application was filed, Respondents were advised through court proceedings that they were at liberty to engage their experts and pursue independent testing of the drugs if they so wished. Some of the Respondents informed the Court that they would challenge the analyst's certificate and the chain of custody.
8. The Ruling on the application was delayed because some of the Respondents opposed the destruction of drugs, stating that they needed to have samples independently analysed through foreign experts. The confiscation was made in January 2024, and this application was made in May 2024. However, no serious attempt was made by any of the Respondents to pursue independent testing. No formal application has so far been filed seeking an alternative analysis despite repeated advice by the Court.

¹ Section 36(1) of the Illicit Drugs Control Act

9. The 1st, 2nd and 3rd Respondents, in their joint affidavit filed on 1 July 2024, stated that they could not at that stage confirm whether they needed to have the substance verified by their own scientific officers apparently because the full disclosures had not been served by then. However, as of now, full disclosures have been served.
10. The opposition to disposal appears to be based on three premises: (i) the photographs taken would not give a clear picture as to the quantity of the drugs; (ii) the quantity of the drugs in the Analyst's Certificate differed from the quantity in the charge sheet and (iii) a purity test has not been conducted.
11. In an illicit drug case, weight and purity matter for the sentence, although they may be relevant to challenge the credibility of the chain of custody at the trial. Quantity may also be relevant to the issue of knowledge. If knowledge cannot be proved, possession cannot be established². The disparity in weight is already on record. Therefore, any challenge to the weight could be taken up at the trial even without an independent weighing.
12. To prove continuity, it is not always essential that the substance alleged to be an illicit drug be exhibited at the trial. What is essential is that all stakeholders involved in the process must come and give evidence as to the role each one of them played from the seizure to the courthouse with sufficient credibility. *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 could be produced in court*³.
11. The COMPOL, in consultation with the DPP, is of the opinion that physical preservation of all the seized illicit drugs is not necessary for the purposes of court proceedings and that the seized drugs cannot be safely, securely or conveniently stored until the final determination of the case.

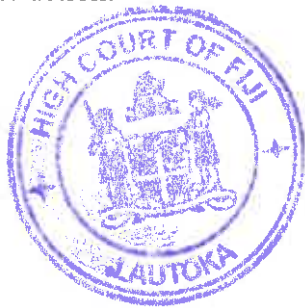
² Blackstone in Criminal Practice (2019) 27-67 p 2929

³ Temo J in State v Calevu [2020] FJHC 448; HAC211.2018L (25 June 2020)

12. The Court is informed that, given the volume of illicit drugs exhibited in this case, it is a challenge for the Police Force to continuously monitor and stretch public resources in guarding the exhibits at the Police Mobile Force Unit in Nasinu. Based on their intelligence gathering and investigation, they believe that there is a risk of interference with the exhibits. Any interference would greatly undermine the integrity of the criminal justice process.
13. There were instances where the confiscated drugs, even when the quantities were smaller, got stolen or fell into the wrong hands. Attempts could be made to steal exhibits to create doubt that the drugs have been tampered with. The stolen hard drugs could be sold in the underground market for high prices. Considering the volume of drugs, there are also serious health concerns and a big security risk affecting the whole nation if this application is not allowed.
12. The trial date is fixed in April 2025. It is unnecessary and impractical to transport a consignment of 4.15 tons from Nasinu to Lautoka and tender them as exhibits during the trial. There is a factual presumption in Section 33 of the IDCA to the effect that if in any prosecution for an offence against the IDCA, it is proved that a sample which was taken from any illicit drug or controlled chemical possesses particular properties, it is presumed that any such illicit drug or controlled chemical possesses the same properties. Therefore, keeping the bulk until the trial is not strictly required.
13. The certificate of the government analysts is filed of record and served to the Defence. Section 36(1) of the IDCA provides that in any proceedings under the 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.
14. The Respondents had a reasonable opportunity to have samples independently analysed. None of them have taken that opportunity. There is no legitimate reason to keep the consignment any longer in the custody of the police. Therefore, the application should be allowed in the interests of justice.

15. The following Orders are made:

- i. The Application is allowed.
- ii. A police officer not under the rank of Assistant Superintendent of Police designated by the COMPOL is authorised to dispose of the illicit drugs by incineration, or other safe means of destruction.
- iii. Before the destruction, two weeks' notice shall be given to the Court and all the Respondents indicating the date, venue and the modus operandi of destruction.
- iv. Subject to security protocols, the legal counsel of the Respondents may be allowed to observe the destruction process.
- v. The process of destruction shall be photographed and preferably video recorded.
- vi. To ensure the transparency and judicial supervision of the destruction process the ODPP may request the Resident Magistrate of the area where the destruction is to take place to observe the destruction process.
- vii. The police officer in charge of carrying out the disposal order shall prepare a report signed by him and two witnesses to the disposal stating that the illicit drug has been disposed of in accordance with the order.
- viii. The Report/certificate shall be filed in Court not later than two weeks after the destruction.




Aruna Aluthge
Judge

12 December 2024

At Lautoka

Counsel:

- Office of the Director of Public Prosecution for Applicant
- Iqbal Khan & Associates for 1st, 2nd and 3rd Respondents

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- S. Nand Lawyers for the 4th Respondent
 - Law Solution for the 6th Respondent
 - Legal Aid Commission for the 5th, 9th and 10th Respondent
 - Law Naivalu for the 7th Respondent