IN THE DISTRICT COURT OF NAURU
AT YAREN
CRIMINAL JURISDICTION

Criminal Case No. 02A of 2020

BETWEEN: **REPUBLIC OF NAURU**

PROSECUTION

AND: **JAYGILL DAGEAGO**

DEFENDANT

BEFORE: Resident Magistrate Mr Vinay Sharma

DATE OF TRIAL: 24, 25, 27 June and 26 August 2025

DATE OF JUDGMENT: 10 October 2025

APPEARANCE:
PROSECUTION: W Deiye
DEFENDANT: C Adeang

JUDGMENT

INTRODUCTION

1. The defendant is charged as follows:

Statement of offence

UNLAWFUL SUPPLY OF AN ILLICIT DRUG: *Contrary to Section 6(a) of the Illicit Drugs Control Act 2004.*

Particulars of Offence

JAYGILL DAGEAGO *on the 6th day of January, 2020 at Denig District in Nauru, without lawful authority supplied approximately 1.33 grams of cannabis sativa known as an Illicit Drug, to T-J AKUBOR to sell on his behalf.*

2. The prosecution opened its case on 24 June 2025.

3. On 25 June 2025, the prosecution closed its case.

4. On 27 June 2025, the defendant was put on his defence. Directions were given to him in relation to his right to remain silent, give evidence under oath or make an unsworn statement in court. He chose to give evidence under oath. He then gave evidence, and thereafter he closed his case.

5. The parties sought time to file written closing submissions. The defendant's counsel filed her closing submissions on 28 July 2025, and the counsel for the prosecution filed her closing submissions on 20 August 2025. I heard the parties' closing submissions on 26 December 2025.

6. I am to determine whether the prosecution has proven beyond a reasonable doubt that the defendant supplied 1.33 grams of cannabis sativa to T-J Akubor to sell on his behalf.

7. The following are my reasons for this judgment.

PRINCIPLES RELEVANT TO THE DECISION-MAKING

8. I will outline my role before I proceed to consider the evidence of the witnesses.

9. I am required to decide whether the prosecution has proven the essential elements of the alleged offence beyond a reasonable doubt. The prosecution has the onus to prove

the elements of the charge beyond a reasonable doubt. The defendant is not required to prove or disprove anything. I cannot find the defendant guilty unless the evidence which I accept satisfies me beyond a reasonable doubt of his guilt. If there is an explanation consistent with the defendant's innocence, or if I am unsure where the truth lies, then I must find that the charge has not been proven beyond a reasonable doubt.

10. A reasonable doubt will result if, in my mind, I am left with an honest and reasonable uncertainty about the guilt of the defendant after I have given careful and impartial consideration of the evidence.

11. While the burden of proof is on the prosecution, it does not mean that every fact in dispute is to be proved beyond a reasonable doubt; only the elements of the charge need to be proven beyond a reasonable doubt. However, evidentiary facts must be clearly proved before they are treated as established.

12. I have considered all the evidence placed before me. I must determine whether each witness is honest, reliable, and credible. By doing so, I can rely on the evidence provided and make a finding that the facts have been proven. With this regard, I can accept part of the witness's evidence and reject part of that evidence or accept or reject it all. I am not required to give all evidence the same weight.

13. In assessing the credibility of a witness, I examined the veracity and/or sincerity of the witness to see whether he or she was trying to be truthful. Further, to assess the reliability of a witness, I examined the witness's ability to recall a memory accurately. The following are the factors that I considered:

i. *ability and opportunity to observe events*
ii. *firmness of memory*
iii. *capacity to resist pressure to modify recollection*
iv. *factors which might have resulted in reconstruction or mistaken recollection*
v. *willingness to make concessions where recollection may be faulty, especially when favorable to the other party*
vi. *testimony that seems unreasonable, impossible or unlikely*
vii. *partiality/motive to lie*
viii. *general demeanor*
ix. *Internal consistency: does testimony change during direct or cross examination?*
x. *External consistency: does testimony harmonize with accepted,*

independent evidence?[1]

14. I remind myself that inaccuracy about secondary, marginal or unimportant facts often arises in cases because the witnesses are focused on central facts, and may differ on what evidence they give based on what they perceive to be essential. Further, witnesses also have different abilities in observing and recalling their memories.

15. I must deliver my judgment in accordance with the evidence, which would require me to make findings of fact upon considering the evidence before me. With this regard, I am to carefully consider the evidence logically and rationally, bringing an open and unbiased mind to the evidence, but I may use my common sense and experience in my assessment of the evidence before me. I must do this dispassionately, impartially, without prejudice, and without favour or ill-will.

16. From the established facts, I may draw a reasonable inference, which must be justifiable and drawn beyond a reasonable doubt. I must not draw an inference from the direct evidence unless it is a rational inference in all the circumstances.

17. The defendant did not give evidence in his defence, and he did not have to do so. I may not draw any adverse inference against the defendant for not giving evidence, unless the law permits me to do so. I can only find the defendant guilty of the alleged offence after I have considered all the evidence, and have accepted beyond a reasonable doubt the prosecution's evidence in relation to the essential elements of the alleged offence.

18. I must emphasise that in reaching my decision, I am not required nor is it necessary for me to articulate findings about every part of the evidence. All I have to do is determine whether the prosecution has proven all the elements of the alleged offence beyond a reasonable doubt. With that regard, I may have to resolve some primary disputes over the facts.

19. I have considered all the evidence before me. I will summarise most of the evidence before me, and discuss the parts of the evidence which are essential to my analysis.

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[1] ***R v Killman*** [2024] BCPC 104

PROSECUTION'S CASE

20. The counsel for the prosecution called 6 witnesses, namely, T-J Akubor ("PW1"), Maureen Eididok Akubor ("PW2"), Senior Constable Shane Bretchefeld ("PW3"), Sergeant Alice Fritz ("PW4"), Acting Superintendent Iyo Adam ("PW5"), and Constable Conzaly Detabene ("PW6").

21. I have considered all the evidence given by the prosecution witnesses. A summary of the prosecution witnesses' evidence is as follows.

Evidence of PW1

22. PW1 gave evidence that he is 18 years old, is unemployed and that he lives at the Location compound. He identified the defendant in court. He gave evidence that on January 7, 2020, at around 9:00 a.m., he was at his home. He was with his mother at home. PW1 stated that his mother was speaking with him about a packet of cannabis that fell out of his pocket when he was sleeping. She asked him to whom the cannabis belonged, and PW1 said that he didn't tell her anything. When asked by the prosecutor who gave him the cannabis, PW1 replied by saying that he got it from the defendant.

23. PW1 gave evidence that, around 7 pm the previous night (6 January 2020), the defendant gave him the marijuana at the basketball court. The defendant was with someone at the basketball court at the time. PW1 stated that he didn't know the person with the defendant. PW1 also said that the defendant told him to sell the cannabis. He stated that this was the first time the defendant had asked him to sell cannabis. He was between 13 and 14 years old at the time. PW1 stated that the defendant told him that the substance given to him was cannabis at the time he gave it to him. After he received the cannabis, he went to his home and are a while he went to sleep.

24. PW1 gave evidence that the cannabis was in a small plastic pack, and it appeared to be leaves. He said that he wanted to sell the cannabis because he needed the money, and that the defendant would pay him.

25. PW1 gave evidence that he knows the defendant because he also lives in the blocks at the Location compound, and that he is acquainted with the defendant.

26. PW1 gave evidence that his mother called the police and that the police came and took him away. He told the police that the defendant gave him the cannabis, and his statement was recorded. In his statement, PW1 had stated that when his mother asked him about the cannabis, he had told her that it was given to him by the defendant. PW1 stated that he could not recall which version of the event was correct when asked by the prosecutor whether his evidence in chief was correct, during which he said that he didn't tell his mother anything, or whether what he stated in his statement that he told his mother that the defendant gave him the cannabis was correct.

27. PW1 identified the cannabis that he stated he received from the defendant from a photo

booklet. He said that the police had taken the cannabis from him.

28. During cross-examination, it was put to PW1 that he was lying that the defendant gave him the cannabis because the defendant was at work at the time. PW1 did not agree to this.

29. PW1 confirmed that he recognised the person with the defendant at 7pm, but he did not know his name.

30. It was put to PW1 that he lied about meeting the defendant and another person at the basketball court. He denied it. It was also put to PW1 that the defendant didn't give him cannabis at the basketball court and that he was telling lies to protect himself. He denied this as well.

31. The prosecution did not re-examine PW1.

Evidence of PW2

32. PW2 gave evidence that she is a widow and the mother of PW1. She lives in the Location compound with her brother, her eldest son, his wife and children, her eldest daughter, PW1 and her grandchildren. PW2 identified the defendant in court and told the court that he was her neighbour.

33. PW2 gave evidence that on 7 January 2020, at around 9 am, she was at home. That morning, her daughter told her that she had found a "pack" of dried leaves, which she believed to be cannabis, near PW1 while cleaning. PW2 asked her daughter to call PW1. PW2 then asked PW1 about the "pack" that was found beside him. PW1 told PW2 that he found the "pack" on the ground. PW2 stated that she knew PW1 was lying, so she threatened him to get the truth by saying she would call the police on him. After that, PW2 stated that PW1 told her the defendant had given him the "pack" and threatened to beat him if he didn't sell it for him. So, he took the "pack," put it in his pocket, and brought it home. PW2 stated that she called the police after speaking to PW1. The police came and took her son.

34. PW2 stated that the community liaison officer had told the mothers of the community to ensure that their children do not associate with the defendant because he is involved with cannabis. This is hearsay, and the community liaison officer did not present evidence regarding it. Therefore, it cannot be accepted as evidence that the defendant was involved with drugs. However, it does establish what PW2 thought of the defendant.

35. PW2 identified the "pack" that was found near PW1 from a photo booklet.

36. During cross-examination, PW2 confirmed that initially, PW1 told her that he had

found the "pack" on the ground, but after she had threatened PW1, he told her that the defendant gave it to her.

37. It was put to PW2 that PW1 was not telling the truth about receiving the "pack' from the defendant. She denied it. It was also put to her that PW1 had to lie to her and blame the defendant because he was afraid of you. She also denied this.

38. It was put to PW2 that she chooses to believe the version that the defendant gave the "pack" to PW1 because that excuse suited PW1. She also denied this.

39. During re-examination, PW2 clarified that she believed the version that the defendant gave the "pack" to PW1 because PW1 always "hung around" the defendant. She also explained that the defendant is more afraid of the police.

Evidence of PW3

40. PW3 gave evidence that on 7 January 2020, he was at the Central Police Station. Inspector Imran instructed him to attend a report made by PW2 requesting police presence in relation to PW1.

41. PW3 gave evidence that when he arrived at PW2's residence, PW2 had asked me officers to deal with PW1 regarding the drug that PW2 found on PW1. PW3 stated that he approached PW1 and asked him where he found the "pack." When PW1 refused to say anything, PW3 took him to the Central Police Station ("CPS"). PW3 stated that at the CPS, he gave the "pack" to Inspector Imran. He further stated that Inspector Imran told him that he would deal with PW1.

42. PW3 described the substance he received from PW1 as cannabis leaves. He also identified the substance he received from a photo booklet. He also stated that he attended the report with another police officer at the time, namely "Takawea Taumea".

43. During cross-examination, PW3 confirmed that he did not know where the substance he believed to be cannabis leaves that he received from PW2 came from.

Evidence of PW4

44. PW4 evidence that on 6 February 2020, at around 11 am, she was at RONPHOS with Senior Drusky Dabwado (who is now deceased) and Constable Joshua Batiku. She stated that she was accompanying Senior Drusky to weigh a substance at the RONPHOS laboratory that she believed to be cannabis. She stated that Senior Drusky had taken the cannabis with him to the laboratory and that she only accompanied him to the laboratory.

45. PW4 gave evidence that she saw the cannabis on that day, and stated that it was contained in "a small see-through plastic", and she described the contents of it as

cannabis. She identified it from a photo booklet, and from the same booklet, she confirmed the weight of the cannabis on the scale as depicted in the picture contained on page 4 of the booklet. PW4 also stated that the cannabis was weighed by someone with the "second name" as "Korora", who assisted Senior Drusky in weighing the cannabis.

46. PW4 was not cross-examined.

Evidence of PW5

47. PW5 gave evidence that on 6 February 2020, he was at the CPS working in the Criminal Investigations Unit ("CIU"). He stated that he used the Narcotics Identification Kit ("NIK") to conduct a test on illicit drugs that were reported to the police, which were alleged to be cannabis ("referred to as NIK test"). He stated that the cannabis leaves were in a "small plastic bag". He also stated that when he conducted the test, he took a photograph of it, and a colour change was observed, indicating a positive result. He confirmed page 5 of the photo booklet was the photo of the test.

48. PW5 gave evidence that he conducted another NIK test on 29 October 2021 of the same cannabis. The types of testing equipment used on February 6, 2020, and October 29, 2021, were the same, namely a NIK. He also stated that he observed a colour change, indicating a positive result. He tendered as evidence a single page of a colored photo of the test conducted on 29 October 2021.

49. PW5 gave evidence that issues were raised concerning the first test, which is why the second test was done. He stated that previously, they used to send samples to Fiji for conclusive testing. However, the laws were amended to allow the acceptance of presumptive testing as evidence.

50. During cross-examination, PW5 was asked about the investigations he undertook concerning the alibi notice given by the defendant's counsel.

51. It was put to PW5 that what he did in relation to the Alibi Notice was incorrect and that the Alibi was to be included as a witness. PW5 responded by saying that he was not aware.

52. It was put to PW5 that his affidavit concerning what the Alibi stated was hearsay and that the Alibi should have been called as a witness. PW5 denied that his affidavit was hearsay and stated that the Alibi's name was not included in the List of Witnesses.

53. During re-examination, PW5 clarified that he didn't think of obtaining a statement from the Alibi because he had been calling the Alibi to "make arrangements, and he wasn't complying with providing a statement."

Evidence of PW6

54. PW6 gave evidence that on 9 January 2020, at around 10.29 am, he was at the CPS. He was then instructed to get the defendant together with Senior Drusky to conduct the defendant's Record of Interview. He accompanied Senior Drusky. The report was concerning cannabis. He couldn't remember much because he was taking the lead. He remembered that a Record of Interview was conducted and that he, Senior Drusky, and the defendant were present during the interview. He went through the Record of Interview document in court.

55. PW6 identified the defendant in court.

56. The prosecutor asked PW6 why they didn't investigate the alibi, which was given during the Record of Interview, referring to questions 12 and 14, that is, he was at work and was with Octavia. PW6 said he forgot.

57. PW6 stated that Senior Drusky took pictures 1 to 4 in the photo booklet and tendered them as evidence.

DEFENCE CASE

58. The defendant gave evidence in his defence. I have considered h. I will provide a summary of his evidence. I will give a summary of his evidence that is essential to my determination of the charge before me as follows.

Defendant's evidence

59. The defendant gave evidence that he is 22 years old and is married with two children. He gave evidence that on 6 January 2020, at around 7 pm, he was at work. He was working for "Eigigu" at the time. He also stated that he was at work with one person, namely "Octavia". He stated that he had informed the police officers at the CPS after he was arrested and taken there. He confirmed this also while referring to his Record of Interview document.

60. The defendant gave evidence that he never met up with PW1 at the basketball court. He also gave evidence that he did not provide PW1 a small packet containing cannabis.

61. During cross-examination, the defendant confirmed that in 20202 he lived at Location. During the cross-examination, I saw that the Prosecutor had a piece of paper with all the cross-examination questions typed out. To speed up the process of my note-taking, I asked the prosecutor if I could get a copy of the document (which only had computer-printed questions). A copy was shown to the defendant's counsel. He did not object. A copy was also given to the defendant's counsel for their reference. The cross-examination continued.

62. It was put to the defendant that he gave a small packet of cannabis to PW1 to sell it for him. He denied it. It was also put to him that he was at the basketball court with PW1 on the day in question. He also denied this.

63. It was put to the defendant that he was not at work on the night of 6 January 2020. The defendant denied this. It was also put to the defendant that he lied about his alibi in his Record of Interview. The defendant rejected this as well.

64. It was further put to the defendant that on 6 January 2020, at around 7 pm, he met with PW1 and gave PW1 a packet of cannabis to sell for him, and that he would pay PW1 for that. The defendant rejected this as well.

WHETHER THE PROSECUTION HAS PROVEN BEYOND A REASONABLE DOUBT THAT THE DEFENDANT SUPPLIED 1.33 GRAMS OF CANNABIS SATIVA TO T-J AKUBOR TO SELL ON HIS BEHALF?

65. The defendant is charged with unlawful supply of an illicit drug in contravention of section 6(a) of the ***Illicit Drugs Control Act 2004***, which provided that:

> ***Unlawful possession, manufacture, cultivation and supply***
> Any person who without lawful authority;
>
> > (a) acquires, sells, supplies, possess, produces, manufactures, cultivates, uses or administers any illicit drug; or
> >
> > (b) engages in any dealings with any other person for the transfer, transport, supply, use, manufacture, offer, sell, agree to sell, offer for sale or have possession for sale, import or export of any illicit drug.
>
> Is guilty of an offence and is liable to imprisonment for 10 years and fine not exceeding $50,000.00.

66. In this matter, the prosecution must prove beyond a reasonable doubt that:

i. The defendant supplied a substance;

ii. The substance was an illicit drug; and

iii. The defendant knew that what was supplied was an illicit drug.

Has the prosecution proven beyond a reasonable doubt that the defendant was present at the basketball court on 6 January 2020 at 7 pm?

67. The defendant, in his Record of Interview, provided an alibi, that is, he was at work

with one "Octovia" on 6 January 2020 at 7 pm. Unfortunately, there is no evidence that the police officers investigated the alibi. The defendant also gave Notice of Alibi in court. The police officers just investigated the alibi in November 2024, 4 years after the alleged offence.

68. I will now discuss case laws on how the courts deal with an "alibi defence".

69. The High Court of Australia in ***Killick v R*** (1981) 147 CLR 565; 37 ALR 407; BC8100121 at CLR 569–570; ALR 409–410 made the following observation concerning the obligation of the prosecution when a defendant gives an Alibi Notice:

> *Although an alibi is not uncommonly referred to as a defence, no onus of proving an alibi rests on the accused; the prosecution must negative an alibi if one is put forward, as it must negative a claim that the accused acted in selfdefence or as a result of provocation: see R v Johnson (1961) 46 Cr App R 55; [1961] 3 All ER 969 ; R v Taylor [1968] NZLR 981 at 985–6.*

70. In ***R v Small*** (1994) 33 NSWLR 575; 72 A Crim R 462 at 481, the New South Wales Court of Appeal made the following observations on what happens when the defendant raises an issue of alibi:

> *The judge thereupon became obliged to give directions that, by raising an alibi, the accused was not undertaking to prove anything, and that the onus remained on the Crown to remove any reasonable doubt which may have been created by the alibi claim. In other words, the Crown had to eliminate any reasonable possibility that the alibi was true. The mere fact that the issue was raised — and however it may have been raised — required such directions to be given [Pemble v R (1971) 124 CLR 107; [1971] ALR 762 at CLR 117, 130; Viro v R (1978) 141 CLR 88; 18 ALR 257 at CLR 118].*

71. White J in the Court of Appeal of Queensland in ***R v DAH*** (2004) 150 A Crim R 14; [2004] QCA 419 at [86] made useful observations on the approach of the courts when a defendant fails to provide evidence on his alibi notice:

> *[86] ... So long as the essential elements which must be conveyed to a jury, that is, that no adverse inference may be drawn from the defendant's failure to give evidence, that the onus of proof lies upon the prosecution, that the defendant is presumed innocent until the prosecution adduces sufficient evidence to reach a conclusion of guilt beyond reasonable doubt and that the failure to give evidence does not strengthen the prosecution case or supply additional proof against a defendant or fill gaps in the evidence, then there is no error.*

72. Gaudron and Hayne JJ in the High Court of Australia in ***Dyers v R*** (2002) 210 CLR 285; 192 ALR 181; [2002] HCA 45; BC200205956 at [19] of the judgment of the court made the following observations on how the courts address the issue of the defendant not calling alibi witnesses to support his alibi defence:

> *Even if the unsworn statement of the appellant was evidence of alibi, the absence of evidence of those whom the statement, or other evidence, revealed might support the applicant's contention that he was engaged otherwise does not lead to some different conclusion about the application of Jones v Dunkel. Even in such a case it would be wrong to invite the jury to conclude from the absence of those persons that their evidence would not support some contention of the appellant. The attention of the jury should remain focused upon the central question for their decision — whether they were persuaded beyond reasonable doubt that the appellant had committed the acts described by the complainant. They should not have been distracted by being invited to make what amounted to inquiries about whether the appellant had made out a case. ... They should have been told that they should not speculate about what others may or may not have said had they been called to give evidence. Those conclusions do not depend upon the fact that in this case the appellant was able to, and did, make an unsworn statement. If the appellant had elected to give sworn evidence (but not call those whom it might be thought would have supported his assertions in evidence) a like direction should have been given.*

73. Roden J in ***R v Amyouni*** (NSWCC, 18 February 1988, unreported, BC8802201) (at 5) made the following observations on how the courts determine a matter in which issues in relation to alibi have been resolved:

> *One is that they accept the alibi, in which event they would be obliged to acquit. The second is that they reject the alibi, in which case they would not necessarily convict but must assess the evidence as a whole. The third possibility is that although they do not accept the alibi, the[y] also do not reject it in the sense that they regard it as something which could reasonably be true. In that event also, in such a case, they must acquit.*

74. I adopt the legal principles discussed in the cases above. The prosecution is required to disprove the alibi beyond a reasonable doubt. The defendant gave evidence under oath, including alibi evidence, stating that he was at work with someone named "Octovia". However, the defendant failed to call Octovia to give evidence on his behalf. As per the cases discussed above, this failure cannot be relied upon to make an adverse inference against the defendant's alibi evidence. The onus is still on the prosecution to discredit the alibi evidence.

75. The police officers were aware of the alibi since 2020. However, they did not adequately investigate the alibi. The alibi was that the defendant was with Octovia at work at 7 pm on 6 January 2020. The police officers could have obtained records from the defendant's employer and even called the defendant's supervisors to provide evidence regarding his attendance at work during the material time in question. This was not done in 2024, and based on the materials before me, it is highly likely that they did not do so in 2020 either.

76. PW5 investigated the alibi in November 2024. He did not provide evidence regarding his investigations during his examination in chief. He was cross-examined about it and the fact that the alibi witness's statement was not recorded. I don't need to consider PW5's evidence in relation to this part because he speaks of an out-of-court statement made over the phone with the purported alibi witness, which is hearsay. However, it was indicated that the alibi witness stated that he was not the defendant. If that was the case, once the defendant gave his alibi evidence and closed his case, the prosecution could have applied to subpoena the alibi witness to rebut the defendant's alibi evidence because the alibi witness would have been the best person to give evidence on the alibi.

77. In light of the above, I find that the prosecution has not disproved the alibi beyond a reasonable doubt. There is a reasonable possibility that the defendant was at work on 6 January 2020 at 7 pm. Therefore, the prosecution has not established that the defendant was at the basketball court at 7 pm on 6 January 2020. On this basis alone, the defendant should be acquitted of the charge laid against him.

Whether the substance in question is an illicit drug, namely, cannabis sativa?

78. Continuity of evidence and/or the chain of custody is an essential matter in cases involving illicit drugs. As a bare minimum, there is an onus on the police to preserve the integrity of the evidence until it is tested. I now discuss cases that establish legal principles regarding the continuity of evidence and/or the chain of custody.

79. The Supreme Court of British Columbia in ***R. v. Larsen*** [2001] B.C.J. No. 824 made the following observations at [62] – [65] of its judgment concerning the continuity of evidence (chain of custody):

> *62 It is important to appreciate what the Crown must prove in a narcotics-related case. In essence, the Crown must show beyond a reasonable doubt that the material seized from an accused was a prohibited substance. To that end, the Crown must prove that the substance dealt with by, or in the possession of, the accused is the same substance that is alleged in the information or indictment (and prohibited by law). Undoubtedly, then, continuity of possession of the substance from the accused to the law enforcement officer to the analyst is crucial. However, Canadian case law makes it clear that proof of continuity*

is not a legal requirement and that gaps in continuity are not fatal to the Crown's case unless they raise a reasonable doubt about the exhibit's integrity. See R. v. Dawdy and Lamoureaux (1971), 4 C.C.C. (2d) 122 (Ont. C.A.); R. v. Oracheski (1979), 48 C.C.C. (2d) 217 (Alta C.A.), R. v. DeGraaf (1981), 60 C.C.C. (2d) 315 (B.C.C.A.); and R. v. Taylor (1988), 93 N.B.R. (2d) 246 (N.B.Q.B.). These cases establish there is no duty upon the Crown to show detailed continuity of the location and handling of the exhibits from the time of their seizure by law enforcement officers to their deposit with analysts.

63 It should be observed that in each of the above-mentioned cases evidence was proffered by the Crown showing how the exhibit in question ultimately came into the possession of the analyst. In none of the cases did counsel for the accused present evidence that the substances were interfered with before they came to the hands of the analyst. So, there really was no question of contamination.

64 Where the evidence respecting continuity prior to analysis is not continuous, and on the whole of the evidence there is a reasonable apprehension that the exhibit is not in the same condition as it was at the time of seizure, the courts have generally resolved any doubt on the issue in favour of the accused: R. v. Laborgne, [1924] 2 W.W.R. 610 (Man. Co. Ct.); Rapchalk v. Atlas Ass'ce Co. Ltd. (1967), 63 D.L.R. (2d) 612 (Sask. Q.B.). Nonetheless, such doubts must be based on reasonable grounds arising from the evidence: R. v. Kolkiczka, [1933] 1 W.W.R. 299 (Man. Co. Ct.); R. v. Castell (1973), 34 C.R.N.S. 199 (Ont. C.A.); R. v. Oracheski, supra; R. v. DeGraaf, supra. In Rapchalk, supra, a civil action by an insured against an insurer, the court found that evidence of a blood sample of the plaintiff was inadmissible because "[n]o one testified as to who handled the blood sample, or as to what, if anything, was done to it from the time if left Yorkton until the envelope with the broken seal came into the possession of [the analyst]." In the alternative, if the evidence was admissible, then its weight would "surely be negligible or non-existent."

65 In short, there is no specific requirement as to what evidence must be led or by whom to establish continuity. There is also no specific requirement that every person who may have had possession during the chain of transfer should himself or herself give evidence. If there is a gap in continuity and if the trier of fact is not satisfied beyond a reasonable doubt that substances taken from the accused were the substances analyzed, the evidence may still be admissible but the weight given to the exhibit and the evidence would be affected. The weaker the evidence regarding continuity and the stronger the evidence suggesting

contamination, the lower the weight that should be given to the evidence or analysis thereof.

80. The Court of Appeal of British Columbia in ***R. v. DeGraaf*** [1981] B.C.J. No. 857 also made useful observations concerning the integrity of the evidence submitted to a drug analysts:

> *4 I construe those reasons to mean that it was incumbent on the Crown to show detailed continuity of the location and handling of the exhibits from the time of their deposit into the locked narcotic exhibit security box until their return to the officer after analysis before commencement of trial. I think the judge erred in such conclusion, which lays much stricter requirements of proof upon the Crown than the law requires. In effect, what was held was that the judge had a reasonable doubt that the substances deposited in the box were the same as the ones sampled and certified to by the analyst and in due course returned to the officer. In other words, the requirement of showing continuity extends much farther than the cases have held. It seems to have been completely overlooked that the evidence was clear and uncontradicted that the substances seized and identified in the manner described by the constables, were placed in a locked receptacle and received therefrom by the analyst who analysed and certified the substance as Cannabis (marihuana) which he found in a "sealed and unopened package" bearing the identification that the officer swore in court was placed by him after taking possession thereof from the respondent.*
>
> *5 In my view the applicable law as to the extent the Crown must go to establish "continuity" has now been clearly established. In Regina v. Labreche (1972) 9 C.C.C. (2d) 245, the Ontario Court of Appeal speaking through Schroeder, J.A. said:*
>
> > *We are also of opinion that there was no break in the continuity of the transportation and delivery of the substance to the analyst, and of the transportation and delivery to the sender of the package in which it had been contained. That package was produced, appropriately initialled and properly identified when it was filed as an exhibit. To give effect to the argument of counsel for the appellant would be to require the personal attendance upon the analyst, in every case, of an officer who would make personal delivery and stand over his shoulder while he was making the analysis. It is perfectly proper, in our view, to dispatch the suspected substance to the office of the analyst by mail and to have it returned by mail in accordance with the ordinary practice which prevails in commercial dealings in our country.*
>
> *In this court in Regina v. Millier & Cyr (1968) 65 W.W.R. 96, affirmed by the*

Supreme Court of Canada (1969) 67 W.A.R. 221, it was held, inter alia, that in circumstances not unlike those here there was such an unbroken chain of evidence as was required. Again, in Regina v. Welsh (1976) 24 C.C.C. (2d) 382 when the exhibits were sent by regular mail to the analyst, it was held that the analyst's certificate sufficiently established the continuity to meet the requirement of the Crown to establish the essential ingredients of the offence. Lastly, the Court of Appeal of Alberta, in Regina v. Oracheski (1980) 48 C.C.C. (2d) 217, had to deal with circumstances very similar to those in the case at bar. The learned trial judge in that case with similar facts had the same diffIculty as did the Provincial Court judge here. He was concerned about lack of evidence as to the condition of the envelope when sent to the laboratory and so found himself in doubt that the substance as analysed was the same as when the officer put it in the drug vault. McDermid, J.A., with whom the other justices agreed, said at p. 220:

> *The Crown can only appeal if the trial Judge has made an error of law. What the Crown must prove is that the material found on the respondent was a forbidden drug. It appears to me that the trial Judge, when he said the "problem is with respect to the continuity of that article" was in error. He was saying that the Crown must show and must call every person through whose hands the exhibit passed from when it was seized by the police from an accused until it gets into the hands of the analyst. In my opinion the Crown has no such duty. It must prove beyond a reasonable doubt that the article seized by the police from an accused was a prohibited substance. Here there can be no doubt that ex. 1 was seized from the respondent and was taken by some person not called as a witness to the analyst and then was returned by the analyst by some method not shown and ended up in Court being identified by the detective.*

The trial Judge stated that he was not satisfied on the evidence that the substance ex. 1 was the substance seized from the respondent. The only reason for his dissatisfaction was that the other person who took the exhibit to the analyst was not called and that it might have been opened by someone else. In my opinion, the Judge's speculation that the exhibit might have been interfered with and opened by someone other than the analyst had not a tittle of evidence to support it.

In R. v. Wild (1970), 11 D.L.R. (3d) 58 at p. 66-7, [1971] S.C.R. 101, 72 W.W.R. 603 17 at p. 612, Martland, J., giving the judgment of the majority in the Supreme Court of Canada, said:

> *On the facts of this case, however, the issue to be determined was*

whether, in the light of the appellant's having been pinned behind the wheel, there was any rational conclusion, on the evidence, other than that the appellant was the driver of the car at the time of the accident. He did not find that there was such a rational conclusion. What he did was to conjecture that the appellant might have been riding as a passenger in the back seat and, if so, might have been thrown into the front seat on impact.

The only evidence in this case was that ex. 1 was taken from the respondent and it was analysed by the analyst. That it might have been interfered with was mere speculation on the part of the trial Judge.

In R. v. Dawdy and Lamoureaux (1971), 4 C.C.C. (2d) 122, [1971] 3 O.R. 282, the Ontario Court of Appeal considered a similar question and the headnote reads:

In order to permit the introduction of a certificate of analysis pursuant to s. 28A(1) (enacted 1968-69, c. 41, s. 4) of the Food and Drugs Act, 1952-53 (Can.), c. 38 (later R.S.C. 1970, c. F-27, s. 30, proclaimed in force July 15, 1971), it is unnecessary that there be evidence from a third person that he handed the container and substance to the analyst and requested that he proceed to analyse it. To constitute proof that the substance has been submitted to an analyst, it is sufficient that the evidence discloses a sealed container deposited by an officer came to the hands of the analyst without interference.

In the same case McClung, J. (ad hoc), and with whom the other justices also agreed, said at p. 221:

I am of the view that the learned trial Judge 18 erred in law in that he failed to properly take 19 into account all the evidence provided by the analyst's certificate which was before him by virtue 20 of 5.9 of the Narcotic Control Act, R.S.C. 1970, c. N-1, and that he may have drawn an unjustified 21 inference against the Crown from the absence of Constable Nadwidny who delivered the sealed drug 22 envelope to the analyst.

It is clear from the judgments of the Ontario Court of Appeal in R. v. Welsh (1975), 24 C.C.C.(2d) 382, 31 C.R.N.S. 337, and R. v. Dawdy and Lamoureaux (1971), 4 C.C.C. (2d) 122, [1971] 3 O.R. 282, that S. 9 of the Narcotic Control Act, in the absence of evidence to the contrary, makes the statements contained in the certificate relative to the identification of the analysed substance, admissible in the proof thereof.

It therefore follows that Constable Nadwidny was not a witness who was essential to the unfolding of the narrative as it affected continuity of the exhibit and no unfavourable inference could have been drawn from his failure to testify.

Any suggestion that the manila drug envelope may not have reached the analyst in the same plight and condition as it was when deposited by Detective Willett in the drug locker is speculative and unsupported by any evidence before the learned trial Judge. In this regard the observations of Evans, J.A., speaking for the Ontario Court of Appeal in R. v. Torrie, [1967] 3 C.C.C. 303, [1967] 2 O.R. 8, 50 C.P. 300, seem to me to be in point. Evans, J. A., said [at p. 306]:

> *I recognize that the onus of proof must rest with the Crown to establish the guilt of the accused beyond a reasonable doubt, but I do not understand this proposition to mean that the Crown must negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused.*

6 In my view, as already expressed, I think there was clear error in the Provincial Court judge in failing to appreciate the evidence contained in the admissible analyst's certificate, and in giving rise in her mind to a doubt which was based on pure conjecture and speculation of a possible tampering with the exhibits, without a shred of evidence to give support to it. In short she misinterpreted the law as to the extent of continuity required to be proved by the Crown in a case of this kind.

81. The Court of Appeal of Fiji in ***Kumar v. State*** [2023] FJCA 125; AAU132.2018 (27 July 2023) made the following observations of what is required in terms of continuity of evidence, that is, the chain of custody:

[34] However, before parting with this ground of appeal I wish to make some helpful observations with regard to the steps that may be taken and strived to be achieved by law enforcement agencies to maintain the integrity and reliability of the evidence and to prevent tampering, contamination, or loss. However, these are only key aspects of the chain of custody process and not rules of law or procedure which means that breach of one or more of them alone may not lead to a breach in the chain of custody.

> *1. Identification and Documentation: When evidence is collected at a crime scene, it is identified, described, and documented in detail. This includes information such as the*

date, time, and location of the collection, as well as the names of the individuals involved in the process.

2. Sealing and Packaging: The evidence is properly sealed and packaged to protect it from contamination, damage, or loss. Containers, bags, or other appropriate packaging materials are used, and seals or evidence tape are applied to ensure the evidence remains intact.

3. Documentation of Custody Transfers: Whenever the evidence changes hands or is transferred from one person to another (e.g., from the crime scene investigator to the evidence technician, or from the evidence technician to the forensic laboratory), each transfer is documented, including the date, time, location, and the individuals involved.

4. Storage and Security: The evidence is stored in a secure and controlled environment to prevent unauthorized access, tampering, or degradation. Proper storage conditions, such as temperature and humidity controls, may be required for specific types of evidence.

5. Monitoring and Recordkeeping: The chain of custody is continuously monitored and documented throughout the handling process. Each person who comes into contact with the evidence must document their activities, such as examinations, tests, or analyses performed, to maintain a complete record of the evidence's movement and condition.

6. Courtroom Presentation: When the case goes to trial, the evidence is presented in court. To establish its authenticity and reliability, the prosecution must demonstrate an unbroken chain of custody. This involves providing detailed testimony and documentation, including all the individuals who had possession of the evidence and the steps taken to preserve its integrity.

82. From the above, it is clear that the common law position with regard to continuity of evidence and/or chain of custody generally is flexible, and there is no hard and fast rule regarding the collection and processing of evidence after seizure. However, the position in Nauru is slightly different. Section 39 of the ***Illicit Drug Control Act 2004*** provides the following about the collection and processing of evidence:

Collection and processing or evidence at seizure

(1) The officer in charge at the seizure scene shall ensure that all material evidence is collected and processed, and in particular that any seized illicit drug, controlled chemical or controlled equipment is properly marked for identification, weighed, counted, sampled, scaled, labelled and, until destroyed or otherwise disposed of in accordance with Section 38, preserved for evidentiary purpose.

(2) Where any illicit drug, controlled chemicals or controlled equipment that has been seized pursuant to this Act was found in packages or containers of similar size and weight and bearing identical markings, and colour testing of the contents of a representative number of them yields similar results for each, the seizing officer shall cause all such packages or containers to be classified, serially numbered and separated into lots ready for weighing, counting, sampling, scaling and labeling.

(3) Where it is physically possible to count and weigh the seizure as a complete entry, the seizing officer shall cause it to be counted and weighed and where it is not physically possible to count and weigh the seizure as a complete entry, the seizing officer may estimate the gross and net weight as the case may be.

(4) The seizing officer shall also prepare a report of the seizure as soon as practicable but no later than 72 hours after seizure which includes particulars of:

> *(a) the time, place and date of seizure;*
> *(b) the identity of the seizing officer and all persons present;*
> *(c) the circumstances in which seizure took place;*
> *(d) a description of the vehicle, craft, place or person searched and the location where the illicit drug, controlled chemicals or controlled equipment was found;*
> *(e) a description of the illicit drug, controlled chemicals or controlled equipment found;*
> *(f) a description of the packaging, seals, and other identifying features;*
> *(g) a description of quantity, volume and units and the measurement method employed;*
> *(h) a description of any preliminary identification test used and results;*
> *(i) all subsequent movements of the seized illicit drug, controlled chemicals or controlled equipment; and*
> *(j) any other prescribed matter.*
> *[subs (4) am Act 15 of 2021 s 4, opn 14 Sep 2021]*

(5) The officer in charge of an investigation following a seizure shall ensure

that all items of evidentiary value are stored in appropriate conditions for the prevention of loss, theft or any other form of misappropriation, as well as accidental or accelerated deterioration.

83. In light of section 39 of the ***Illicit Drugs Control Act 2004***, there is a legal requirement on law enforcement agencies to ensure that they properly collect and process the evidence. They are also required to prepare a seizing officer's report accordingly. However, no seizing officer's report was tendered as evidence as well.

84. I have considered the evidence before me, and I find that the seized substance was not collected and processed as per section 39 of the ***Illicit Drugs Control Act 2004***. Further, the photographs regarding the tests on 6 February 2020 ("PE4"), and 29 October 2021 ("PE3") illustrate that the test result on 6 February 2020 was negative for cannabis and that the test result on 29 October 2021 was positive for cannabis. There is no evidence that the alleged substance was sealed and stored properly after the 6 February 2020 test. Further, there is no evidence as to whether the testing officer on 29 October 2021 received the substance in a sealed exhibit bag before conducting the test.

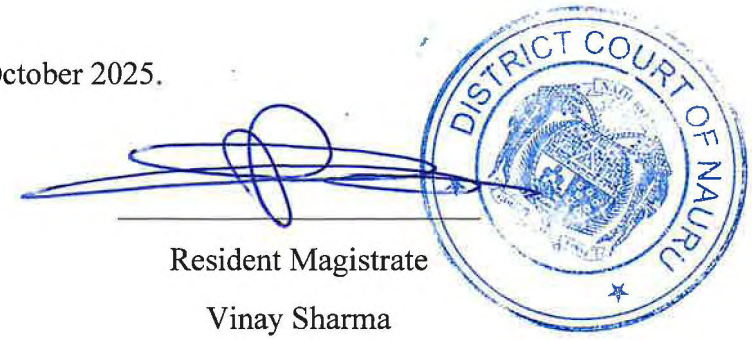
85. I also observed that the picture of the substance in a small zip-lock plastic bag taken on 7 January 2020 ("PE5") appears to be different from the picture of the small zip-lock plastic bag taken on 29 October 2021 ("PE3"). The small zip-lock plastic bag in the picture taken on 29 October 2021 seems to be broader and shorter.

86. In light of the non-compliance with section 39 of the ***Illicit Drugs Control Act 2004,*** I find that there is a substantial breach in the continuity of evidence and/or the chain of custody and that the evidence in relation to the substance and its test results is prejudicial and inadmissible. Even if they were admissible, they would not have much probative value, and I would not be able to give them much weight when considering the evidence before me. Therefore, I also find that the prosecution has failed to prove beyond a reasonable doubt that the seized substance is an illicit drug.

VERDICT

87. For the foregoing reasons, I find the defendant not guilty of the charge laid against him.

Dated this 10th day of October 2025.



Resident Magistrate

Vinay Sharma