

**IN THE HIGH COURT OF SOLOON ISLANDS.**

Criminal Jurisdiction.

**(Faukona, DCJ).**

Criminal Case No: 371 of 2024.

**BETWEEN: JADE KEKEA**

- **Appellant.**

**AND: THE STATE (Rex)**

- **Respondent.**

*Ms. E. P. Rusi for the Appellant.*

*Ms. F. A. Luza for the Respondent.*

**Date of Hearing: 23<sup>rd</sup> June 2025.**

**Date of Decision: 26<sup>th</sup> September.**

**DECISION ON APPEAL FROM DEPUTY CHIEF MAGISTRATE ON CONVICTION.**

**Background:**

1. The appellant was tried in the Magistrate Court, on 26<sup>th</sup> May 2022, for a charge of Arson Contrary to Section 319 (a) of the Penal Code. The maximum penalty for Arson is life imprisonment.
2. It is noted that the defendant had entered a plea of not guilty in the Magistrates Court, hence, a trial was conducted. There was no dispute the defendant had set fire to the house. The only contested issue for trial was the ownership of the house.
3. The defendant actually was not relying on any legal defence, but merely testing the credibility and reliability of the prosecution evidence. He even exercises his Constitutional right to remain silent and not to call any witnesses. That should turn on a simple exercise for the Magistrate to determine.
4. The defendant acknowledges that the complainant (deceased) built and owned the house and land upon which the house was erected. The defendant asserted that the complaint had verbally transferred the ownership of the house and land to him. Because his right of ownership was acquired lawfully, he could lawfully burn the house. So, there was no dispute that he did so wilfully according to him.

5. There is no evidence that the land was a registered land, there was no mention of it. Therefore, I presume it must be a customary land, even so, it must have at least a value, or any evidence related to that.

**Ground One:**

6. In ground one the appellant pointed out that, the learned Magistrate was erred in law in disregarding his right to put his case to the witness during cross-examinations. Here he refers to a single witness without "s" at the end, means only one witness and not the rest of the witnesses, see paragraph (1) and (6) of the appellant's submissions.
7. That desire to put and cross-examine carries the implication that the appellant wishes to examine the complainant in this case who actually died before the trial. If it is a common knowledge about the death without being a source of an issue, then that desire to cross examine a deceased person is nonsensical and an absolute mad. How would a dead person answer a question from a living being, may be the appellant and his counsel have an answer, but I don't.
8. However, though logic denies such ignorance and human shortcoming, the appellant persisted by relying on S.10 (i)€ of the Constitution that the court below disregarded his right provided under the Constitution, therefore, resulted in unsatisfactory and unsafe conviction against him.
9. I noted the case of R v Tesinu <sup>1</sup> which adopted the legal pronouncement of R v Mede, <sup>2</sup> which the Court of Appeal up-held the right of an accused in trial to include the right for cross-examine prosecution witnesses by himself or his Counsel.
10. At this juncture it is relevant in my opinion to reserve discussing the evidence of the 4<sup>th</sup> Witness and the issue of corroboration. But to specifically inquired into the issue of exception to the right of an accused which is presumed to cross-examine a witness.
11. The Counsel for the appellant argues, that the court in convicting the appellant based on the unchallenged three (3) witness statements of the complainant who died before the trial, was unfair and those statements were unsatisfactory and unsafe. In fact, the appellant had objected to the production and tendering of those statement, expecting the court to address that in the judgment.

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<sup>1</sup> No citation provided

<sup>2</sup> No citation provided

12. Counsel for the Crown appears confident that the processes under S.118 of Evidence Act was well complied with, by calling three (3) Police Officers who extract 3 statements from the complainant before he died, and gave their evidence affirming the three statements.
13. From reading the judgment issued by the learned Magistrate, I noted he stated in paragraph (31), I find the written statements obtained by Police from the complainant are reliable and credible”, and in paragraph (34) the learned Magistrate stated, “The submissions is further complicated by the fact that the only evidence available to this court consists of statements provided by the Complainant. These statements constitute direct evidence.
14. And on paragraph (35), the learned Magistrate stated: “Although the defence could not test the evidence through cross-examination”, that implicated to me that the officers whether they have sworn on oath before tendering those statements or not. If they did, they must be cross-examined. If the Police Officers merely tendering those statements to the Court, even if under oath, without cross examination the statements are still hearsay evidence. Therefore, the Learned Magistrate cannot treat them as reliable and credible evidence, nor direct evidence as well. He has to address and test the production of all such statements in full.
15. The process the learned Magistrate should have resort to, is provided under S.118 of the Evidence Act. S.117 of Act states, “A hearsay evidence is not admissible as provided by this Act”.
16. However, S.118 (i) allow a hearsay statement be admissible, where the maker is unavailable as a witness. This is an exception to the hearsay rule provide in S.117 above.
17. In a Criminal proceeding a hearsay statement cannot be offered as evidence, or merely tendering it to the court, and be admitted, unless the party propose to offer the statement given reasonable notice of the intention to rely on the statement to the other party – see S.118 (2) (a). If there is no reasonable notice given it will be counted as the first breach of the processes provided for by S.118 of the Evidence Act.
18. The formal notice is critically important. If there is any objection by the other party, then an application by the party relying on the statement be filed; allowing the other side to respond. Eventually the court must hear the arguments to decide on the circumstances relating to the statements pursuant to S.118 (4) (a) – (d), and must be such as to provide reasonable assurance that the statements are reliable.

19. S.118 of the Evidence Act seek to remove the restrictive application of the principle of hearsay rule. In other words, allowing evidence that would be otherwise caught under this rule as statutory exception.
20. The issue before the court is whether the Magistrate Court can admit a hearsay statement in the absence of the maker who will not be available due to his death, the court must be satisfied itself on the factual circumstances related to the statements provide reasonable assurance that the statements are reliable.
21. Two key words stipulated in S.118 (i) (a) one "circumstances" and "reliability". The words circumstance is defined in S.118 (4) of the Act to include, nature of statement, content of the statements, circumstances related to making of the statements, circumstance related to the truthfulness of the person and any circumstance related to the accuracy of the observation of the person. Reliability denote the statements must be reliable after being satisfied through the process.
22. To satisfy with those circumstances, the Police recording officers must be called as witnesses and be cross-examined, before tendering the statements to court.
23. A statement cannot provide a reasonable assurance, if upon consideration of the factual situation, is not reliable owing to the fact that the criteria's stipulated above are not satisfied.
24. For a statement to be admissible, the above requirements must be satisfied. The section stipulates criteria for admissible of a witness statements, who cannot attend court due to the death, as acceptable evidence.
25. The court must divide this process in a separate application altogether, then after being satisfied; the court can rule admitting that statement as good evidence in court.
26. I have read the judgment of the learned Magistrate and I can express no such process being resumed to there. By treating the statements as reliable and credible or direct evidence is a sloppy advantage that denies well thought judgment.
27. Upon reading the Vanuatu case Criminal Appeal No. 371 of 2024, I noted some significant aspect of a similar case as this. One that the judge conducts a separate hearing in a form of application. Secondly, that Vanuatu does not have law on evidence codified, so the Judge had to rely on Article 47 of the Constitution, which allow the court to determine such matter according to substantive justice.

28. The Judge had evidence before him that the girl was of tender age and had mental condition, is someone who is not intentionally refusing to attend court; hence the court accepted that as in the interest of justice. Therefore, the court allowed her story to be told through her statement to Police.
29. In this case, I do not know whether the learned Magistrate had conducted a separate application under S.118 of the Evidence Act. It seemed there was nothing implicated by the judgment and I can assume nothing was done. In the light of the narratives I therefore allow this ground accordingly.

**Ground two:**

30. In any criminal trial, in particular, where a conviction has been entered, it is expected that the whole criminal elements has been considered, analyse, and subsequently treated as credible and convincing to the legal standard before a conviction is pronounced.
31. In this case, there is only one witness evidence, PW4. The Police witnesses have been dealt with as above. S.7 of the Evidence Act has abrogated the requirement of corroboration. That simply mean if the court is satisfied on one evidence which proved all matters beyond reasonable doubt, the court can convict on that single evidence – noted the case of Mani v R.<sup>3</sup>
32. At paragraph (37) of the Magistrates judgment, the learned Magistrate did mention that he considered the evidence and he was satisfied beyond reasonable doubt that the defendant had unlawfully set fire to his grandfather's house. That was the conclusion reached by the Magistrate. How else can we change? That expression is similar to the one alluded to in the case of Marai v R<sup>4</sup>.
33. In the case of Mahmood v Western Australia,<sup>5</sup> I noted a significant part of the paragraph quoted by the prosecution. In this case, a witness expected to be called by give evidence is not called, so the court reach a conclusion that the question is not whether they jury may properly reach a conclusion about the fact, but whether, in the circumstances, they should entertain a reasonable doubt about the quilt of the accused.
34. In this case the absence of the complaint has been dealt with by the process provided under S.118 of Evidence Act. In such absence would the court reach a proper conclusion about the issue of fact or would the court entertain a reasonable doubt about the guilt.

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<sup>3</sup> No citation provided.

<sup>4</sup> No. citation supplied.

<sup>5</sup> (2008) 232 CLR 397 at (27) High Court of Australia.

35. If the learned Magistrate has failed to adhere to the process provided under S.118, then he should rather consider reasonable doubt about the guilt, instead he did the adverse.
36. The appellant pointed out in paragraph (32) of the judgment that he claimed ownership of the burned house during cross-examination of PW4. However, the Magistrates stated that there is no evidence provided to substantiate that claim.
37. The appellant argues that the learned Magistrate had shifted the burden of proof upon him. However, he relies on the case of R v Liva<sup>6</sup>, which the court upheld that the onus is resting entirely on the prosecution to prove his guilt beyond reasonable doubt and he carries no legal burden of proof.
38. In reality, the defendant has not relied on any legal defence, even claim of right to the property. What he claims is that his grandfather (complainant) had given right to own the house he destroyed by fire. In such circumstances, the standard of proof has never shifted. The prosecution still carries the onus to prove the guilt of the appellant, see R v Liva<sup>7</sup>.
39. Just because the Learned Magistrate maintain no evidence to substantiate the claim; practically in the judgment nothing was shown to that effect. Perhaps because the appellant failed to call a witness and himself elected to remain silent, however he is exercising his right under the Constitution.
40. In any event, this ground is more or less associated with ground one, see how the Crown encompass in her arguments provided in her submissions in paragraphs 28-29.
41. In terms of corroboration, if the lower court did not comply fully with S.118 of the Evidence Act, the complainant(deceased) 3 statements recorded by 3 Police officers were tendered without cross examinations, and investigation made into the requirements of S.118(4), then those statements are hearsay evidence and the evidence of PW4 cannot corroborate with them.
42. Further still, if the learned Magistrate did not conduct a separate hearing of an application by the prosecution who wish to rely on the statement, then that is a breach of S.118 of the Evidence Act, and no formal notice was given to the defence in respect of reliance of those statements, then there is also a fault in the process.

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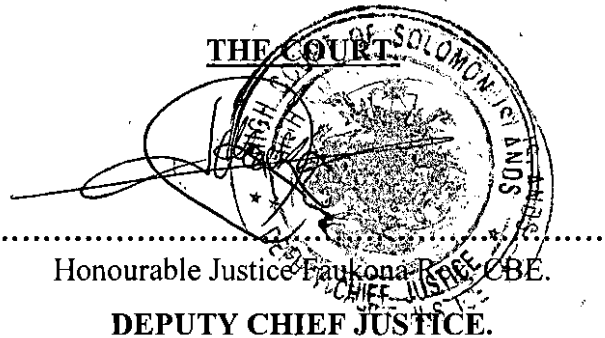
<sup>6</sup> No citation

<sup>7</sup> No citation

43. Therefore, any reliance on those statements after those failures will warrant those statements hearsay. With these explanations, I would also allow ground 2.
44. In totality, I must allow the whole appeal, quashed the sentence of 8 months imprisonment, and revert the case back to Central Magistrates Court for re-hearing.

**ORDERS OF THE COURT.**

1. Appeal dismissed in its entirety.
2. Sentence of 8 months imprisonment quashed.
3. Case revert back to the Central Magistrates Court for re-hearing.



THE COURT OF SOLOMON ISLANDS  
HIGH COURT  
HONOURABLE JUSTICE PAUKONA R. PAUKONA, CBE.  
DEPUTY CHIEF JUSTICE.