

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 051 OF 2013S

STATE

VS

1. NEMANI RATUYAWA
2. PAULA NAWADRADRA

Counsels : Mr. T. Qalinauci for State
Mr. M. Fesaitu for Accused No. 1
Ms. S. Vaniqi for Accused No. 2

Hearing : 30 June, 2014

Ruling : 30 June, 2014

Written Reasons: 3 July, 2014

**WRITTEN REASONS FOR DECLARING ACCUSED NO. 2'S COPY OF POLICE
CAUTION INTERVIEW STATEMENTS AS INADMISSIBLE EVIDENCE**

1. On 13 June 2014, both accuseds, in the presence of their counsels, appeared in court, on the following information:

Statement of Offence

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

Particulars of Offence

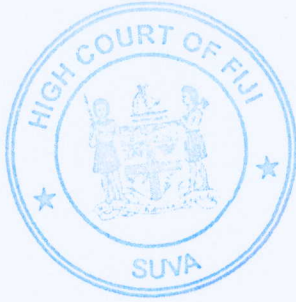
NEMANI RATUYAWA and PAULA NAWADRADRA on the 25th day of January,
2012 at Nukulekaleka farm, Naikorokoro, Kadavu in the Eastern Division, without

lawful authority, cultivated 221 plants of cannabis sativa, an illicit drug, weighing a total of 69.5 kilograms.

2. The information was read and explained to both accuseds. Both accuseds said they understood the same. Accused No. 1 pleaded guilty to the charge, while Accused No. 2 pleaded not guilty to the same. Accused No. 1 admitted the prosecution's summary of facts, and was sentenced to 15 years imprisonment, with a non-parole period of 14 years imprisonment, on 16 June 2014. Accused No. 2's case was set for trial from 30 June to 4 July 2014.
3. In a pre-trial conference on 9 May 2014, the prosecution said, their case against Accused No. 2 depended on his alleged confession, the government analyst report, and other witnesses' evidence. In another pre-trial conference on 29 May 2014, the prosecution advised the court, that the original of Accused No. 2's police caution interview statements, which contained his alleged confession, were missing. Ms. S. Vaniqi, on behalf of Accused No. 2, objected to the use of the copy of Accused No. 2's police caution interview statements in evidence, unless it satisfied the rule in Regina v Vincent Lobendahn [1972] Vol. 18, Fiji Law Report, pages 1 – 9.
4. As long ago as 1972, the prosecution in Regina v Vincent Lobendahn (supra) experienced a similar problem, the prosecutor experienced in this case. The accused in that case, was charged with 17 counts of "fraudulent false accounting", contrary to section 340 of the Penal Code. To prove its case, the prosecution relied on 80 documents, which were in photostat copies. The original documents were lost. Prior to the trial proper, a "trial within a trial" was held to determine the admissibility of the photostat copies of the documents. At the end of the "trial within a trial", the court rejected the use of the photostat copies, as evidence, to replace the missing originals.
5. Regina v Vincent Lobendahn (supra) established the following test, in admitting copies of original documents, to replace the lost originals:
 - ...(a) It must be established that the original itself formerly existed, would have been admissible in evidence, and that the copy tendered is a true and faithful reproduction of the original.
 - (b) The original must be proved to have been lost or destroyed and, if lost, due and diligent search must be established.

(c) It must be shown what happened to the original up to the time when it was lost, and how the copy was made and came into the hands of the person tendering it..."

6. In this case, the prosecution called only 1 witness, to satisfy the above test. He was PC 4134 Paula Matiavi (PW1) of Kadavu Police Station. He was the police investigating officer in the case. In his evidence, PW1 said the original caution interview statements of Accused No. 2 formerly existed, and it would be admissible in evidence. He said, he brought the same to Raiwaqa Police Station, and the same was in a bag, but it was lost in Raiwaqa. He said, copies were made, and the same were put in the police docket, which were sent to the Divisional Prosecuting Officer, Southern. He said, he had conducted a due diligent search, but had not found it.
7. The prosecution managed to prove all ingredients of the above test, but for "that the copy tendered is a true and faithful reproduction of the original" and "how the copy was made and came into the hands of the person tendering it", was not proved nor explained by PW1. In other words, it was not clear from the evidence "how the copy was made", and "how it came into the hands of PW1" and "whether or not the copy tendered was a true and faithful reproduction of the originals". The burden of proof is on the prosecution, and the test must be proved beyond reasonable doubt. Prosecutors need to use the test mentioned in paragraph 5 hereof as a checklist, and take their witnesses through each of the requirements, to ensure that copies of documents are admitted to replace lost originals.
8. In many of the cases that I have heard, prosecutors tend to take an "easy going" attitude to the Regina v Vincent Lobendahn test, when laying the foundation for the admission of copies of original documents that had been lost. This was a case in point. Careful attention is needed to understand the above test, and the extraction of sworn evidence from witnesses to lay the factual foundation for the admission of copy documents, where the original is lost.
9. For the above reasons, I declared the copy of Accused No. 2's police caution interview statements, which contained his alleged confession, inadmissible because the prosecution did not satisfy the test laid down by Regina v Vincent Lobendahn (supra).



Salesi Temo
JUDGE

Solicitor for the State : Office of the Director of Public Prosecution, Suva.
Solicitor for Accused No. 1 : Legal Aid Commission, Suva.
Solicitor of Accused No. 2 : S. Vaniqi, Barrister & Solicitor, Suva.