

**IN THE HIGH COURT OF FIJI AT SUVA**

CASE NO: HAC. 355 of 2016

[CRIMINAL JURISDICTION]

**STATE**

**V**

**ARISI KAITANI**

**Counsel** : Ms. S. Lodhia and Mr. Z. Zunaid for State  
Mr. T. Ravuniwa for Accused

**Hearing on** : 25<sup>th</sup> June - 06<sup>th</sup> July 2018

**Summing up on** : 09<sup>th</sup> July 2018

**SUMMING UP**

Madam assessors;

1. It is now my duty to sum up the case to you. I will now direct you on the law that applies in this case. You must accept my directions on law and apply those directions when you evaluate the evidence in this case in order to determine whether the accused is guilty or not guilty. You should ignore any opinion of mine on the facts of this case unless it coincides with your own reasoning. You are the judges of facts.
2. Evidence in this case is what the witnesses said from the witness box inside this court room the admitted facts and the exhibits tendered. As I have told you in my opening address, your opinion should be based only on the evidence presented inside this court room. If you have heard, read or otherwise come to know

anything about this case outside this court room, you must disregard that information.

3. A few things you heard inside this court room are not evidence. This summing up is not evidence. The arguments, questions and comments by the lawyers for the prosecution and the defence are not evidence. A suggestion made by a lawyer during the cross examination of a witness is not evidence unless the witness accepted that suggestion. The arguments and comments made by lawyers in their addresses are not evidence. You may take into account those arguments and comments when you evaluate the evidence only to the extent you would consider appropriate.
4. A statement made by a witness to the police can only be used during cross-examination to highlight inconsistencies. That is, to show that the relevant witness on a previous occasion had said something different to what he said in court. You have to bear in mind that a statement made by a witness out of court is not evidence. However, if a witness admits that a certain portion in the statement made to the police is true, then that portion of the statement becomes part of his the evidence.
5. You must not let any external factor influence your judgment. You must not speculate about what evidence there might have been. You must approach the evidence with detachment and objectivity and should not be guided by emotion. You should put aside all feelings of sympathy for or prejudice against, the accused or anyone else. No such emotion should influence your decision.
6. You and you alone must decide what evidence you accept and what evidence you do not accept. You have seen the witnesses give evidence before this court, their behaviour when they testified and how they responded during cross-examination. Applying your day to day life experience and your common sense as representatives of the society, consider the evidence of each witness and decide how much of it you believe. You may believe all, part or none of any witness' evidence.

7. When you assess the testimony of a witness, you should bear in mind that a witness may find this court environment stressful and distracting. Witnesses have the same weaknesses you and I may have with regard to remembering facts. Sometimes we honestly forget things or make mistakes regarding what we remember.
8. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his/her evidence. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. You may also find inconsistencies when you compare the evidence given by witnesses on the same issue. This is how you should deal with inconsistencies. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next. If there is an acceptable explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected.
9. However, if there is no acceptable explanation for the inconsistency which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistencies in the evidence given by a witness influence your judgment on the reliability of the account given by that witness is for you to decide.
10. Therefore, if there is an inconsistency that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of the witness' evidence is inaccurate; or you may accept the reason the witness provided for the inconsistency and consider him/her to be reliable as a witness.
11. You may also consider the ability and the opportunity a witness had, to see, hear or perceive in any other way what the witness said in evidence. You may ask

yourself whether the evidence of a witness seem reliable when compared with other evidence you accept. These are only examples. It is up to you how you assess the evidence and what weight you give to a witness' testimony.

12. Based on the evidence you decide to accept, you may decide that certain facts are proved. You may also draw inferences based on those facts you consider as directly proved. You should decide what happened in this case, taking into account those proved facts and reasonable inferences. However, when you draw an inference you should bear in mind that that inference is the only reasonable inference to draw from the proved facts. If there is a reasonable inference to draw against the accused as well as one in his favour based on the same set of proved facts, then you should not draw the adverse inference.
13. In this case, there are certain facts which are agreed by the prosecution and the defence. You have been given copies of those admitted facts. You should consider those facts as proven beyond reasonable doubt.
14. As a matter of law you should remember that the burden of proof always lies on the prosecution. An accused is presumed to be innocent until proven guilty. This means that it is the prosecution who should prove that the accused is guilty and the accused is not required to prove that he is innocent. The prosecution should prove the guilt of the accused beyond reasonable doubt in order for you to find him guilty. You must be sure of the accused person's guilt.
15. In order to prove that the accused is guilty of an offence, the prosecution should prove all the elements of that offence beyond reasonable doubt. If you have a reasonable doubt in respect of any element of the offence the accused is charged with, as to whether the prosecution has proved that element, then you must find the accused not guilty of that offence. A reasonable doubt is not a mere imaginary doubt but a doubt based on reason. I will explain you the elements of the offences in a short while.

16. You are not required to decide every point the lawyers in this case have raised. You should only deal with the offences the accused is charged with and matters that will enable you to decide whether or not the charges have been proved.
17. Please remember that you will not be asked to give reasons for your opinion. In forming your opinion, it is always desirable that you reach a unanimous opinion. But it is not necessary.
18. Let us now look at the Information. The Director of Public Prosecutions has charged the accused for the following offences;

**FIRST COUNT**

*Statement of Offence*

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

*Particulars of Offence*

**ARISI KAITANI AND ATIKINI MATAKOROVATU** on the 15<sup>th</sup> day of September 2016 at Kadavu in the Eastern Division, unlawfully possessed 1184.4grams of an illicit drug known as cannabis sativa.

**SECOND COUNT**

*Statement of Offence*

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

*Particulars of Offence*

**ARISI KAITANI AND ATIKINI MATAKOROVATU** on the 15<sup>th</sup> day of September 2016 at Kadavu in the Eastern Division, unlawfully cultivated 7975.7 grams of an illicit drug known as cannabis sativa.

19. You would note that the accused is jointly charged with another accused. When it is alleged that a criminal offence is committed by more than one person, remember that each of them may have played a different part, but if they acted together as part of a joint plan or agreement to commit the offence, each of them can be found guilty of that offence. The words "plan" and "agreement" do not denote that there has to be any formality about it. An agreement to commit an offence may arise on the spur of the moment. Nothing needs to be said at all. It can be made with a nod and a wink, or knowing look or it can be inferred from the behaviour of the parties

concerned. Their agreement can be inferred from the circumstances. The essence of joint responsibility for a criminal offence is that each accused shared a common intention to commit the offence and played his or her part in it as to achieve that aim. Therefore the prosecution must prove that there was an agreement with the two accused to commit the offence and that each accused played some part.

20. The aforementioned co-accused had pleaded guilty to the two charges and that is why the said accused was not before this court in the accused's box. You have to bear in mind that when there are multiple offenders charged for the same offence, the case against each accused should be proved beyond reasonable doubt. Therefore, the mere fact that the co-accused had pleaded guilty does not prove the charges against this accused. You should not assume that the accused in this case is guilty because the co-accused had pleaded guilty.
21. You would also note that the accused is charged with two counts. Please remember that you should consider each count separately. You must not assume that the accused is guilty of the other count just because you may find him guilty of one count.
22. To prove the offence of unlawful possession of illicit drugs contrary to section 5(a) of the Illicit Drugs Control Act, the following elements must be proved beyond reasonable doubt;
  - i) the accused;
  - ii) was in possession of;
  - iii) an illicit drug.
23. The first element of the offence is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused committed the offence.
24. In order to prove the third element above in this case, the prosecution should prove beyond reasonable doubt that the items alleged to have been seized from

the possession of the accused is *cannabis sativa* or Marijuana which is an illicit drug.

25. Now, I am going to explain to you on how to deal with the second element where the prosecution is required to prove beyond reasonable doubt that the accused was in possession of the drug in question. A person has in his possession anything which is in his physical custody or under his control and he knows it is there and has the intention to exercise custody or control over it. A person would not have possession unless he either knew, or the circumstances were such that he had the opportunity, whether he availed himself of it or not, to learn or to discover in a general way what the item was.
26. Please remember that you should not equate ownership with possession. In other words, a person can possess an object even though he does not own it. Moreover, an object may be possessed by more than one person at the same time. If two or more persons agree to keep a pool of items in a particular place so that any of them may go there to take or move some of the articles as and when they see fit, then all are in control of those items and all are in possession of it. But a person's mere presence in the vicinity of an item does not itself constitute possession of it. If a person is invited for dinner to a friend's home, he is not in possession of the objects in that home simply because he is there and knows that the objects are there. The objects are not in his physical custody and he has neither the intention nor the authority to exercise control over them.
27. In the first count in this case the items that are alleged to be the illicit drug Marijuana were found in the farm and in a farm house where the Marijuana plants which is the subject matter of the second count were planted. According to the evidence, this farm house did not have any walls. It was a shed where roofing iron had been placed on couple of poles.
28. Please also remember that, when an illicit drug is found in any premises, if the prosecution proves beyond reasonable doubt that the said premises where the

drug was found, was under the control of the accused, it shall be presumed until the contrary is proven that the accused was in possession of the illicit drug that was found.

29. Given the circumstances of this case, in order for you to presume possession in that regard, you have to ask yourself whether it is proven beyond reasonable doubt that;
  - a) the items in question in relation to the first count was found in the premises, which is the farm and the farm house; and
  - b) if it is so, that farm and the farm house were under the control of the accused;
  - c) the accused had the knowledge that the said farm and the farm house existed;
  - d) the accused knew that the items in question were in the farm and the farm house.
  
30. Remember that I mentioned to you that "it shall be presumed until the contrary is proven". This is a rare situation where the burden of proof is shifted to the accused. However, you should bear in mind that an accused is required to prove a particular fact only on a balance of probability. Balance of probability is often compared to weighing the cases in a set of scales. If one side of the scale is weighed down even slightly than the other side, that is sufficient. You need not be sure.
  
31. The above presumption is rebutted if the accused satisfies you that it is more probable that the drugs were not in his custody and they were not subject to his control. He can show that he did not have the knowledge that farm and the farm house in question existed or did not have the knowledge that the items seized existed in the farm and the farm house.



32. To prove the offence of unlawful cultivation of illicit drugs contrary to section 5(a) of the Illicit Drugs Control Act, the following elements must be proved beyond reasonable doubt;
- a) the accused;
  - b) cultivated;
  - c) an illicit drug.
33. The first element of the offence is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused committed the offence.
34. According to law, the word 'cultivate' includes planting, sowing, scattering the seed, growing, nurturing, tending or harvesting, and also includes the separating of cannabis and its extracts from the plants from which they are obtained. In relation to the second element, the prosecution should prove beyond reasonable doubt that the accused took some part in cultivating the plants in question that were seized by the police.
35. In relation to the third element, the prosecution should prove beyond reasonable doubt that those plants that were cultivated are an illicit drug namely *cannabis sativa* or Marijuana.
36. It is a defence in respect of the two offences above that the accused had a lawful authority or a reasonable excuse to do what he did. The burden of proving this defence also lies on the accused. That means if the elements of a particular offence have been proved beyond reasonable doubt by the prosecution, then the accused is required to prove on a balance of probability that he had lawful authority or a reasonable excuse to cultivate or possess the drugs as the case may be. The accused in this case did not take up the position that he had lawful authority to have the possession of or to cultivate the drug in question.

### *Prosecution case*

37. The first prosecution witness was Corporal 4594 Semi Vakanuivuinaka. He said that:
- In 2016 he was based at the Police Special Response Unit located at Nasinu. He was the team leader in the raid where the two accused in this case were arrested. He left for Kadavu for the raid on 14/09/16. During the briefing he had before leaving for Kadavu, he was given the names of the farmers including the names of the two accused. He said he did not know the two accused. He said only the team leaders had access to the list of names and he informed the names to the police officers who was assigned to his team when he briefed them.*
  - On 15/09/16 he went with his team to the targeted farm at Lavidi. There was an informer who led the way. His team comprised of 8 police officers and 4 military officers. They were in their uniforms. They travelled by foot and it took them around 3 hours to reach the farm. The military officers were carrying guns. When they reached the targeted farm, from a distance of 15 to 20 metres he saw two youths uprooting plants believed to be marijuana.*
  - He observed the two accused uprooting the plants for about a minute. He then shouted at them to stand still and went towards them. He explained the two of them their rights and then he asked their names. Then he came to know that they are Arisi Kaitani and Atikini Matakorovatu which were two of the names given to him during his briefing. He then arrested the duo. Thereafter he uprooted the plants he believed to be marijuana with two other police officers. During that time the other officers were surrounding the farm. He said it was a big farm. He said they uprooted a total of 824 plants. They found a blue tarpaulin and a stripe bag and they packed 108 plants in the blue tarpaulin and 760 plants in the stripe bag with loose material they found. He said loose material are the plants without roots and some with only branches and leaves. He initially said the plants without the roots were the plants uprooted by the two youths. He again said that the 824 plants included the plants uprooted by the two accused. He said there was no one else in that farm apart from the officers who took part in the raid, the informer and the two accused.*
  - After they packed the plants they identified a farm house in that farm. He said it was made with four posts and there was an iron rooftop. He went to the farm house with PC Seva, PC Natui and the two accused. After conducting a search they seized one cocoa tin containing marijuana seeds, NPK manure inside a bucket of biscuit and loose material that was scattered around the farm house. That included leaves believed to be marijuana and some with branches. They packed all the leaves in the stripe bag and the branches were put inside a white sack.*
  - Thereafter they headed towards Lavidi village and they took the route shown by the two accused. They reached the village around 4.00pm. It took them 1 hour to reach the village from the farm. He instructed the two accused to be escorted to their houses at the village in order for them to pack their clothes and to inform their families that they will be going to Vunisea Police Station.*
  - They left Lavidi village at 4.20pm in two boats to Vunisea with the accused and the seized items. They loaded all the items they seized into the police vehicle waiting for them at the wharf and they went to the Vunisea Police Station with the two accused in the same vehicle. He said the military officers went to their camp. He handed over the seized items and the two accused to the station orderly at the Vunisea Police Station.*
  - During cross examination he agreed that he did not mention about the list in his police statement. He agreed that he had mentioned in his police statement that he only came*

- to know the name of the accused after he questioned them at the farm. He said for any police officer to arrest a person for marijuana it is of no use to arrest a suspect without any evidence. He agreed that the farm was nearer to Lavidi.*
- h) *During re-examination he said the name of the accused Arisi Kaitani came up on the list given during the briefing on the 14<sup>th</sup> but no one in the team had seen the accused before. He said he came to know the accused when he asked his name in the farm.*
38. The next two prosecution witnesses, PC 4749 Natui Bulivorovoro and PC 4490 Sevanaia Qiolevu said that they were part of the team under the first prosecution witness that conducted the raid at Kadavu. The first three prosecution witnesses said that the two accused were not threatened or assaulted. They said the military officers carried guns but they did not point their guns at the accused.
39. The fourth prosecution witness was Detective Corporal Joshua Gagalia. He said that;
- a) *He conducted the cautioned interview of the accused at the Kadavu Police Station. He said he conducted the interview in the English language. He said he did not force the accused to sign the record of the interview. The cautioned interview he recorded was tendered as PE 1. He said he gave the accused his rights and he cautioned the accused as reflected in PE 1. He read PE 1 in court.*
- b) *He said, on the first day the witnessing officer Special Constable Keperieli was not in the interview room during the entire interview. The reason was that the said officer was also the station orderly on that day. He said the said officer would come in and out of the interview room on the first day. He said there was a shortage of manpower because most of the officers were out in the field for the operation.*
- c) *He said Special Constable Keperieli was present as the witnessing officer throughout the interview on the 16<sup>th</sup> and the 17<sup>th</sup>. He said the 73 answers recorded in PE 1 were given by the accused. He said he did not threaten or force the accused to give those answers. In his presence, no police officer assaulted the accused to give those answers. He said the accused was a quiet person and was cooperative during the three days of interview. He said the accused did not complain to him regarding the manner the interview was conducted. After the interview the accused was released from the police station pending the results of the drug analysis.*
- d) *He received the drugs after testing on 21/09/16 packed in a large brown bag which was sealed. He said he received it from a civilian staff named Susana. He then handed over that brown bag to the exhibit writer. Thereafter he re-arrested the accused for the accused to be formally charged. He said when the accused was released after the cautioned interview the accused was provided with meals and shelter by the police because his village was far and he had nowhere to go.*
- e) *During cross examination he denied the suggestion that the witnessing officer did not sign on PE 1 until it was concluded and he said that the witnessing officer signed soon after the accused and he signed. He denied the suggestion that the accused did not understand English. He denied the suggestion that he swore at the accused. He agreed that he got information about the accused's identity, village and family when he spoke with the accused in the i-Taukei language.*
- f) *During re-examination he said he explained to the accused the meaning of the words such as 'commodities'.*
40. The fifth prosecution witness was PC 4134 Paula Matiavi. He said that;

- a) *He recorded the charge statement of the accused on 21/09/16. He tendered the charge statement as PE 2. Initially he said that it was conducted in itaukei language. But thereafter he said it was in English language and he earlier said that it was in the itaukei language because it has been a long time since he charged the accused. He said the accused did not make any complaint to him regarding the manner the cautioned interview was conducted.*
  - b) *During cross examination he denied the suggestion that the accused was never asked questions in the English Language. He denied the suggestion that the accused told him during the conversation the accused had with him before the charge statement was recorded, that the accused was assaulted at the Tauva farm.*
  - c) *During re-examination he said that it was the accused's decision to have the charge statement recorded in the English language.*
41. The sixth prosecution witness was Private Penisoni Valesomo. He said that;
- a) *He has been with the Fiji Military Forces for four years. He said he took part of the raid that was conducted in Kadavu on 15/09/16. He said four military officers took part in that raid and they were there only to provide security to the police officers. He said the military officers carried guns and the magazines were kept in their pouches. He said when they reached the farm he was the one who scouted the farm and when he scouted, he saw two suspects uprooting. He did not take part in arresting the suspects. From the farm they went to the Lavidu village. He said he did not witness any police officer threaten or assault the two suspects. He said the military officers did not threaten, assault or point guns at the suspects.*
  - b) *During cross examination when it was suggested that he only saw one suspect when he went to the farm he said he saw two suspects uprooting.*
42. The seventh prosecution witness was PC 5322 Timoci Malanicagi. He said that;
- a) *On 15/09/16 he was based at the Kadavu police station. He said he received a blue tarpaulin containing 108 plants with some plant material, a stripe bag containing 716 plants with some plant material, a white sack containing some plant material and a bucket of biscuit containing manure and a cocoa tin. He received these items from Special Constable Keperieli who was the station orderly. He said he was instructed to be the investigating officer of the case and he was also the exhibit writer.*
  - b) *He said he recounted the plants and re-packed them. He packed all the plants in the white sack on the blue tarpaulin. All loose material were packed in the stripe bag. He then registered the items and locked them in their exhibit room as RCE 421/16.*
  - c) *He said he handed over the items to Susana who is a drug analysis officer. However because he thought only manure was inside, he did not give the biscuit bucket and the cocoa tin for testing. He received those items back on 21/09/16 from Corporal Joshua. When he received it, it was packed in a brown bag sealed with a red exhibit tape. The job number 216576 given by Susana was written on the bag. He wrote RCE number 421/16 on the bag.*
  - d) *Thereafter he brought those exhibits to Suva and handed them over to Totogo Exhibit room. The brown bag was marked for identification as MFI 1. He also said he interviewed the other accused and he escorted the accused to Suva on 22/09/16. During cross examination he denied that Namajiu belongs to Lawaki village.*
43. The eighth prosecution witness was Susana Lawedrau. She said that;

- a) *She works with the police as a Scientific Officer. She said, on 20/09/16 she received 824 dried plants that were wrapped in a blue tarpaulin and a white FMF sack and one sample of plant material contained in a stripe bag from Constable Timoci. She documented it and assigned a job number. She then passed it to the Principal Scientific Officer, Miliana. After she received the items back on 21/09/16 she packed the exhibits and sealed it. Thereafter she dispatched it to Corporal Joshua on the same day. She tendered the brown bag with the exhibits as PE 3.*
  - b) *During cross examination she said that the testing was conducted near the Kadavu Police Station.*
44. The ninth prosecution witness was Miliana Werebauinona. She said that;
- a) *She is the Principal Scientific Officer at the Fiji Police Chemistry Lab. She said on 20/09/16 she was at Vunisea, Kadavu. She received exhibits in relation to this case from Susana that day. She prepared a report regarding the exhibits she received. She tendered a page containing a table with regard to the exhibits she received as PE 4A and the certificate she issued after testing as PE 4B. She said after the two tests she conducted, it was ascertained that the plants and the plant material she received were cannabis sativa. She said, plant material are the parts she received without the roots. After testing she handed the items back to Susana.*
  - b) *During cross examination she said that she took the kits containing required chemicals and the equipment for testing to the Kadavu Police Station.*
45. At the end of the prosecution case you heard me explain several options to the two accused. The accused chose to give evidence on oath and to call witnesses.
46. The accused said in his evidence that;
- a) *He has two children and his son who is four years old is sick after having a stroke. He said he reached class 8 but he never finished his school education. He said he does not understand the English Language. It had been roughly about 10 years since he had left school.*
  - b) *On 15/09/16 his wife told him to look for a herbal medicine called Warusi to be given to his son. That medicine is located deep inside the forest and he proceeded to the forest during lunch time.*
  - c) *While he was on the road, on his way looking for Warusi, certain police officers and army officers pointed guns at him and took him to a river bank. He said two army officers and four police officers brought him from the road side. At the river bank he saw a farm and also a person standing there. He said that person he saw was already being arrested at that place. Then the officers started to assault him for him to admit that the farm belongs to him.*
  - d) *He said the officers pointed the gun at him, punched his ribs and they were holding a stick. He said that they told him to remove his trousers, kneel down and to have his buttocks face towards the sky. When this was done Sevanaia, Semi and Natui were there.*
  - e) *He said when he entered the farm, the army officers were sitting at the farm house.*

- He said he spent about ½ an hour in the farm. He said the police officers were repeatedly telling him to admit the allegation. He said he was scared and lost for words when the soldiers pointed the guns at him, and because he was assaulted and was told to take off his trousers.
- f) Thereafter they went to Lavidu village. One of the police officers took him to his house to get his bag and some clothes. He said he was crying when he was at the village. Thereafter he was taken to the Vunisea Police Station. That was the first time he had been to Vunisea police station.
  - g) While he was at the police station he had a conversation with one Keperieli Keteiwai. He said he did not have any conversation with Joshua who gave evidence in this case. He said, while he was in Kadavu he was given some papers to sign and he does not know what is written in his cautioned interview.
  - h) He said the Tauva farm belongs to Lawaki village and a person who is from his village is not allowed to use the land that belongs to Lawaki. He said he does not agree with the evidence of the police officers who said that they saw him uprooting marijuana plants.
  - i) He said Constable Joshua did not give all his rights. He said he was only conversing in the Bauan dialect when he was at the Vunisea Police Station.
  - j) During cross examination he said he used to fail the English Subject when he was at school. When it was suggested that apart from English he took other subjects like Maths and Social Science which were taught in English, he said he used to ask the teachers to teach him in the Fijian language.
  - k) When it was suggested that, for him to reach class 7 he was required to pass the compulsory exam in class 6, he said he used to ask the teacher to translate the English questions to itaukei. When he was asked whether he is saying that the teacher did such translation even for a national exam, he said 'yes'.
  - l) He said he came to know Atikini Matakoroatu at the farm. Then when it was suggested that he was related to Atikini he said 'yes'. He said Atikini is like a brother to his wife. He denied the suggestion that Atikini was living in Lavidu village. He said Atikini was camping at Atikini's farm and he came to know this while they were at the station. He said he first saw Atikini when he was taken to the farm after he was arrested at the road side.
  - m) He said the farm house was located at the far edge of the farm and he denied the suggestion that the farm house belongs to him. When it was suggested that the leaves and branches believed to be marijuana belongs to him and Atikini, he said it was Atikini's. When it was suggested to him that the 824 plants that were uprooted by the police were planted by him and Atikini, he said they belong to Atikini.
  - n) He said he complained to SC Keperieli regarding what happened to him at the farm and also at the village. When it was suggested to him that he did not make any complaint to the interviewing officer during the cautioned interview, he said he only complained to Keperieli Keteiwai.
  - o) He denied the suggestion that he met Special Constable Keperieli at the Suva

*Remand Centre in April this year and that he planned with Keperieli to lie about the police officers.*

47. The 2<sup>nd</sup> defence witness was Keperieli Keteiwai. He said that;
- a) *He was the station orderly at the Vunisea Police Station on 15/09/16. He said he spoke to the accused at the police station and the accused told him that the accused is worried about his daughter as the accused is supposed to take herbal medicine that morning. He also said that the accused told him that the accused was arrested on the road while looking for the medicine.*
  - b) *He said that the accused told him that guns were pointed at the accused and that the accused was assaulted on his stomach and the ribs. The accused also told him that the officers told the accused to 'show his buttocks towards the sky'.*
  - c) *He said Detective Corporal Joshua and the accused were only speaking in the itaukei language.*
  - d) *He said he signed PE 1 on the 17<sup>th</sup> or 18<sup>th</sup>. He said he was not present when PE 1 was recorded. He signed on PE 1 because detective corporal Joshua who is a senior officer told him to sign.*
  - e) *He said he heard Detective Corporal Joshua swear at the accused.*
  - f) *During cross examination he agreed that he was suspended from the police force in April as he was charged with the offence of robbery. He first said that he did not do it. Later he said that he admitted it due to some family problems and because he wanted to resign.*
  - g) *He denied meeting the accused at the remand centre. He denied the suggestion that he is giving his evidence today because he has grudges against his colleagues for getting him suspended from the police force.*
  - h) *During re-examination he said he did not write down the complaint made by the accused because in the Force they always look after each other.*
48. That is a summary of the evidence. Please note that I have only referred to the evidence which I consider important to explain the case and the applicable legal principles to you. If I have not referred to certain evidence which you consider important, you should still consider that evidence and give it such weight you may think fit.
49. The ninth prosecution witness gave her opinion based on what she observed and her experience. She tendered PE 4A and PE 4B. You are not bound to accept that evidence. You will need to evaluate that evidence for its strengths and weaknesses, if any, just as you would with the evidence of any other witness. It is a matter for you to give whatever weight you consider appropriate with regard

to the observations made and the opinion given by the ninth prosecution witness. Evaluating her evidence will therefore include a consideration of her expertise, her findings and the quality of the analysis which supports her opinion.

50. The prosecution relies on the record of cautioned interview tendered as PE 01, more specifically the admissions stated therein, as evidence against the accused. The accused says that he did not give the answers as recorded in PE 1. He says that he does not understand English and he was simply made to sign on PE 1. In other words, he says that PE 1 is a document fabricated by the police. In dealing with the cautioned interview statement you must decide the following;
- a) Did the accused make the statement? If you are not sure that he made it, the matter ends there. You should disregard the cautioned interview statement.
  - b) If you are sure that the accused made it, then you should consider whether that statement was made voluntarily. You have to be sure that the statement was not obtained by oppression and it was not obtained in an unfair manner. If you are not sure that the statement was made voluntarily by the accused, then you should disregard it.
  - c) If you are satisfied that the statement was made voluntarily, then you should decide whether you are sure that the statement is true. Which means that you should consider the cautioned interview statement as you would consider the evidence given by a witness. You may accept the entire statement to be true or a part of it as true or you may consider the entire statement is not true. You may rely only on what you would consider to be true.
51. There are no admissions in the charge statement that was tendered as PE 2. The prosecution wants to rely on that statement only to show that the accused did not make any complaint regarding the manner he was interviewed under caution before or during that statement. However the accused says that he did not make that statement and he was only made to sign on that statement.



52. You may recall that there was evidence about police briefings where names of farmers and farms were given before the raid. The defence of course challenges this evidence where they say no such names were given and the officers were simply searching for farms on that day. Please remember that, even if you accept the prosecution evidence that there were such briefings and that the police were given the accused's name in those briefings, you cannot use that evidence to conclude that the accused was involved in planting Marijuana. The person who conducted the main briefing did not give evidence and we do not know the basis for that person who conducted the briefing to give the accused's name.

### *Analysis*

53. The accused denies both allegations. He says that he was on his way looking for a herbal medicine when the police arrested him and he was just in the wrong place at the wrong time. He says the plants that are uprooted and the loose material found belongs to the other accused whose name is Atikini. He says that he did not give the answers as recorded in the cautioned interview PE1 and he was made to sign on that by the police officers. According to the accused he was scared because guns were pointed at him and he was assaulted and was being sworn at by the police officers.
54. The defence argues that the farm in question which is known as Tavua Farm belongs to the Lawaki Village and the accused who is from Lavidid Village could not have used that land as it is prohibited.
55. The defence also say that the farm was closer to Lavidid Village and if the police officers knew the names of the farmers and the name of the farm, they would have first gone to Lavidid Village. The evidence of the prosecution witnesses was that they were guided by their informer who went with them and the team of officers did not know the location of the farm and the identity of the farmers though a list of names was given.

56. The first three prosecution witnesses said that they saw the accused uprooting plants when they reached the farm on 15/09/16 and the sixth prosecution witness the army officer who did the scouting, said that he saw two suspects in the farm, uprooting plants.
57. You must remember to assess the evidence for the prosecution and defence using the same yardstick. Remember that the burden of disproving possession on a balance of probability in relation to the first count shifts to the accused only if the prosecution proves all the elements of that offence beyond reasonable doubt. Otherwise, the accused does not assume the burden of proving his defence in relation to the first count or in relation to the second count, though he gave evidence.
58. Generally, an accused would give an innocent explanation and one of the three situations given below would then arise in respect of each count;
- (i) You may believe his explanation and, if you believe him, then your opinion must be that the accused is 'not guilty'.
  - (ii) Without necessarily believing him you may think, 'well what he says might be true'. If that is so, it means that there is reasonable doubt in your mind and therefore, again your opinion must be 'not guilty'.
  - (iii) The third possibility is that you reject his evidence. But if you disbelieve him, that itself does not make him guilty. The situation would then be the same as if he had not given any evidence at all. You should still consider whether prosecution has proved all the elements against the accused beyond reasonable doubt.
    - a) In relation to the first count, if you are sure that the prosecution has proved all the elements beyond reasonable doubt, and you find that the burden of proving that he was not in possession on a balance of probability is not discharged by the accused then your proper opinion would be that the accused is 'guilty'.


b) In relation to the second count, if you are sure that the prosecution has proved all the elements beyond reasonable doubt, then your proper opinion would be that the accused is 'guilty'.

59. Any re-directions?

60. Madam Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charges against the accused. When you have reached your separate opinion you will come back to court and you will be asked to state your separate opinion.

61. Your opinion should be whether the accused is guilty or not guilty on each count.



  
Vincent S. Perera  
JUDGE

Solicitors;

Office of the Director of Public Prosecutions for State.

MIQ Lawyers, Suva for Accused.