

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**[CRIMINAL JURISDICTION]**

**Criminal Case No. HAC 115 of 2018**

**BETWEEN** : STATE

**AND** : YVETE DIANNE NIKOLIC  
JOHN GEOFFREY NIKOLIC

**Counsel** : Mr L J Burney, Mr Y Prasad & Ms S Kiran for the State  
Mr R Gordon for 1<sup>st</sup> Accused  
Mr W Pillay for 2<sup>nd</sup> Accused

**Date of Hearing** : 15 February 2019

**Date of Ruling** : 18 February 2019

**Ruling on No Case to Answer**

[1] This is an application for a no case to answer by the first accused pursuant to section 231(1) of the Criminal Procedure Act. Section 231(1) provides:

When the evidence of the witnesses for the prosecution has been concluded, and after hearing (if necessary) any arguments which the prosecution or the defence may desire to submit, the court shall record a finding of not guilty if it considers that there is no evidence that the accused person (or any one of several accused) committed the offence.

[2] The second accused has chosen not to make an application for a no case to answer. Section 231(1) allows the court to consider whether an accused has a case to answer or not, regardless of whether an application is made by the accused.

[3] The test for a no case to answer application in the High Court is settled. The test is whether there is some incriminating evidence, direct or circumstantial, on all the essential ingredients of the charged offence or offences (*Sisa Kalisoqo v R* Criminal Appeal No. 52 of 1984, *State v Mosese Tuisawau* Cr. App. 14/90, *State v Woo Chin Chae* [2000] HAC 023/99S).

[4] Both accused are jointly charged with five counts as follows:

**COUNT 1**

STATEMENT OF OFFENCE

Importing an illicit drug, contrary to section 4(1) of the Illicit Drugs Control Act, 2004.

PARTICULARS OF OFFENCE

**YVETTE DIANNE NIKOLIC** and **JOHN GEOFFREY NIKOLIC**, on the 22<sup>nd</sup> day of June 2018, at Nadi in the Western Division, without lawful authority imported an illicit drug, namely, cocaine weighing 12.9 kilograms.

**COUNT 2**

(Alternative to Count 1)

STATEMENT OF OFFENCE

Possessing an illicit drug, contrary to section 5(a) and 32 of the Illicit Drugs Control Act 2004.

PARTICULARS OF OFFENCE

**YVETTE DIANNE NIKOLIC** and **JOHN GEOFFREY NIKOLIC**, on the 22<sup>nd</sup> of June 2018, at Nadi in the Western Division, without lawful authority had in their possession an illicit drug, namely cocaine weighing 12.9 kilograms.

**COUNT 3**

STATEMENT OF OFFENCE

Importing an illicit drug, contrary to section 4(1) of the Illicit Drugs Control Act 2004.

PARTICULARS OF OFFENCE

**YVETTE DIANNE NIKOLIC** and **JOHN GEOFFREY NIKOLIC**, on the 22<sup>nd</sup> day of June 2018, at Nadi in the Western Division , without lawful authority imported an illicit drug, namely cocaine and methamphetamine tablets weighing 34.4 grams.

**COUNT 4**

(Alternative to Count 3)

STATEMENT OF OFFENCE

Possessing an illicit drug, contrary to section 5(a) and section 32 of the Illicit Drugs Control Act 2004.

PARTICULARS OF OFFENCE

**YVETT DIANNE NIKOLIC** and **JOHN GEOFFREY NIKOLIC**, on the 22<sup>nd</sup> day of June 2018, at Nadi in the Western Division, without lawful authority had in their possession an illicit drug, namely cocaine and methamphetamine tablets weighing 34.4 grams.

**COUNT 5**

STATEMENT OF OFFENCE

Possessing arms and ammunition without holding an arms licence, contrary to section 4 and section 42(2) of the Arms and Ammunition Act 2003.

PARTICULARS OF OFFENCE

**YVETTE DIANNE NIKOLIC AND JOHN GEOFFREY NIKOLIC**, on the 22<sup>nd</sup> of June 2018, at Nadi in the Western Division, had in their possession arms and ammunition, namely 2 pistols and 112 rounds of ammunition without holding an arms licence.

- [5] I now deal with Mr Gordon's submissions. Mr Gordon submits that the importation charges are defective or bad in law. In the event this submission is not upheld, Mr Gordon submits that either there is no evidence of importation within the meaning of that word under the Illicit Drugs Control Act or that there is no evidence that the first accused intentionally did an act of importing an illicit drug.

**Are the importation charges defective?**

- [6] The importation charges are counts one and three. Count one alleges importation of cocaine while count three alleges importation of cocaine and methamphetamine tablets. It is not in dispute that both cocaine and methamphetamine are illicit drugs under the Illicit Drugs Control Act. Nor has any accused suggested that they had lawful authority to import or possess.
- [7] Mr Gordon submits that the definition of the word 'import' requires proof of delivery to the intended recipient of the illicit drug, and that in the absence of any evidence to that effect, the charges are either defective or they should fail due to lack of evidence.
- [8] The offence of importation of an illicit drug is prescribed by section 4 of the Illicit Drugs Control Act. Section 4 states:
- (1) Any person who without lawful authority (proof of which lies upon that person) imports or exports an illicit drug commits an offence and is liable upon conviction to a fine not exceeding \$1,000,000 or to imprisonment for life or both.
  - (2) In any proceedings under this Part, proof of lawful authority lies upon the accused person.
- [9] A valid charge is one that contains a statement of the specific offence and such particulars as are necessary for giving reasonable information to the accused as to the nature of the allegation (section 58 of the Criminal Procedure Act). There is no legal requirement to include the evidence in the particulars of the offence. If the charge contains the essential ingredients of the alleged offence and reasonable particulars of the allegation, the charge is valid.
- [10] Both importation charges make reference to the correct statutory provision creating the offence and provide reasonable particulars of the allegation to the accused. The charges allege that the two accused without lawful authority imported illicit drugs, namely, cocaine and methamphetamine. The charges are not defective or bad in law.

### **Is there evidence of importation?**

- [11] Section 2 of the Illicit Drugs Control Act defines import as follows:
- ...to bring or cause to be brought, into Fiji and is a continuing process including any stage thereof until any item reaches the intended recipient.
- [12] There is no ambiguity in the definition. According to the definition, importation is a continuing process. The actual act of importing ceases when an illicit drug reaches the intended recipient. The act of importing embraces activities both preceding and following the arriving of the goods, which are directly related, or proximate or incidental to, bringing the goods into the country. This interpretation is consistent with the interpretation given by the Australian courts to the word importation contained in the Australian narcotic legislation (*R v Sukkar* [2005] HSWCCA 54 (16 March 2005), *R v Toe* [2010] SASC 39(26 February 2010), *DDP Cth v Famer* (a Pseudonym) and Ors [2017] VSCA 292 (17 October 2017)).
- [13] Given that the act of importing is a continuing process and embraces all activities incidental to the bringing of the illicit drug into Fiji, the offence is committed upon the arrival of the illicit drug into Fiji and may extend to a period till the illicit drug reaches the intended recipient. The critical question is whether there is some direct or circumstantial evidence that the alleged illicit drugs subject of the charges on counts one and three were brought into Fiji.
- [14] It is not in dispute that the vessel in which the alleged drugs were found had entered Fiji from abroad. Prior to its arrival, an Advance Notification Inward Report for the vessel known as Form C2-C was submitted by a third party and received by the relevant authorities in Fiji. Form C2-C is a standard form that small vessels are required to complete and submit before arriving into Fiji by sea for the purposes of clearance and compliance with customs, immigration, health and biosecurity laws of Fiji. According to Form C2-C the advanced notice of arrival must be completed no less than 48 hours prior to the estimated time of arrival into Fiji.

[15] There is some evidence that upon receipt of the C2-C Form, the relevant law enforcement authorities categorized the vessel as a vessel of interest. But the Fiji authorities were not able to track the location or movement of the vessel between 20<sup>th</sup> and 21<sup>st</sup> June 2018 using the Automatic Identification System (AIS), a system that enables to identify and locate vessels entering and departing Fiji's Exclusive Economic Zone. The vessel's location was identified by the AIS for the first time on 22 June 2018 when it was within the vicinity of Denarau Marina in Nadi. Upon arrival at Port Denaru on 22 June 2018, the customs officers searched the vessel and found the alleged illicit drugs on board concealed and hidden in different sections of the vessel.

[16] There is no direct evidence that the alleged illicit drugs were brought into Fiji when the vessel entered into Fiji's territory waters. The prosecution relies upon circumstantial evidence to prove the act of importation, that is, the vessel entered into Fiji's territory waters with the alleged illicit drugs. The facts upon which the prosecution is relying upon for an inference is that the illicit drugs were found on board when the vessel arrived at Port Denarau after sailing and visiting various destinations for almost several months. The prosecution further alleges that the vessel's GPS was deliberately turned off to avoid being monitored after it entered into Fiji's territory waters. What inferences could be drawn from the circumstances surrounding the entry of the vessel into Fiji is a matter for the assessors. It is for the assessors to consider whether the only logical and reasonable inference that could be drawn from the circumstances surrounding the entry of the vessel into Fiji's territory waters is that the vessel entered into Fiji with the illicit drugs on board.

**Whether the first accused was complicit in the importation or possession of illicit drugs, or possession of arms and ammunition without a licence?**

[17] Mr Gordon's next submission is that there is no evidence, direct or circumstantial, to prove that the first accused was complicit to the importation or possession of illicit drugs, or possession of arms and ammunition without a licence.

[18] The prosecution case is that the two accused acted together to commit the alleged drug offences. Where a criminal offence is committed by two or more persons, each of them may play a different part, but if they are acting together as part of a joint plan or agreement to commit the offence, they are each guilty. 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 however great or small so as to achieve that aim.

[19] The prosecution case against the first accused is entirely based on circumstantial evidence. The question is whether there is some evidence from which an inference could be drawn that the first accused shared a common intention with the second accused to either import into Fiji or possess an illicit drug. The evidence upon which the prosecution is relying upon for that inference in summary is:

- The vessel on which the drugs were found was owned and registered under the first accused's name.
- The first accused is married to the second accused – they are a couple.
- The particular route that the vessel took after departing Florida, USA and before arriving in Fiji.
- The vessel was a temporary matrimonial home for the first accused when the drugs were found on board on 22 June 2018.

[20] None of these facts are disputed by the first accused. The evidence is that the drugs and the arms and ammunition were concealed in the different sections of the vessel in such a manner that were not visible to the naked eye. There is some evidence that the second accused knew about the concealment as some of the alleged drug was seized upon information given by him under caution to the customs boarder security officers. There is evidence of the conduct of the second accused when the seizure was made and the second accused was confronted with the discovery of the alleged drugs. But there is no evidence of the conduct of the first accused when the discovery of drugs and arms and ammunition were made on the vessel owned by her. She was not present at the scene and she was not confronted with the discovery.

- [21] There is some evidence that she was distressed when her husband the second accused was allowed to speak to her after the drugs were discovered on the vessel. But the evidence of distress is linked to the predicament of her husband and not to her participation to the alleged offences. There is no direct nexus between her distressed condition and the discovery of drugs and arms found on the vessel owned by her. Her conduct after learning of the predicament of her husband is not an incriminating piece of evidence from which an inference could be drawn that she was complicit to the alleged offences.
- [22] Similarly, the other evidence relied upon by the prosecution for an inference of guilt is not incriminating of her. She is the owner of the vessel but there is no evidence that she was in control of the vessel. The evidence led by the prosecution points to the second accused as the person who was in control of the vessel. The evidence is that the second accused was the captain or master of the vessel. What role, if any, the first accused had in the control of the vessel could have been proven by the three crew members that were on board at some stages of their journey before arriving at Port Denarau on 22 June 2018. But the prosecution did not call the crew members as witnesses for the reasons best known to them.
- [23] Apart from owning the vessel and accompanying her husband on a journey, which are not disputed by the first accused, there is no evidence that she was in control of the vessel together with her husband from which an inference could be drawn that both were acting with the common intention to import or possess drugs, or possess arms and ammunition without a licence.
- [24] Further, there is no incriminating and reliable evidence for an inference of common intention based on the route that the vessel took before arriving in Fiji. The fact that she is married to the second accused or had been on board travelling with him for about four months before arriving in Fiji is not incriminating of her for an inference that she is a participant to the crimes that he is accused of.
- [25] As a result, the court makes a finding that there is no incriminating, direct or circumstantial evidence, against the first accused on all five charges to put her to her



defence. There was a further question of law argued in relation to the charge of possession of arms and ammunition without a licence. Mr Gordon contended that the crew or passengers of any vessel or aircraft are exempted from holding arms licence by the operation of section 5(1) (e) of the Arms and Ammunition Act. Mr Gordon also contended that on the facts of this case, an appropriate charge was failure to declare and deliver the arms and ammunition to a Customs Officer contrary to 5(3) of the Arms and Ammunition Act. Since this Court has come to a finding that there is no evidence that the first accused was in possession of arms and ammunition, it is not necessary to make a determination that she was exempted from holding an arms licence.

[26] The application for a no case to answer is allowed and a finding of not guilty is entered on all five charges against the first accused. She may now step down from the dock.

[27] The court finds that there is some direct and circumstantial evidence on all five charges against the second accused. There is a case for him to answer. He will now be put to his defence.



A handwritten signature in blue ink, consisting of a stylized initial 'D' followed by a horizontal line.

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**Hon. Mr Justice Daniel Goundar**

**Solicitors:**

Office of the Director of Public Prosecutions for the State  
Gordon & Co. for both Accused