

**IN THE HIGH COURT OF FIJI**

**AT SUVA**

**[CRIMINAL JURISDICTION]**

**CRIMINAL MISC NO: HAM 042 OF 2021**

**CRIMINAL CASE NO: HAC 063 OF 2019**

**BETWEEN** : JOSHUA AZIZ RAHMAN

**AND** : STATE

**Counsel** : Mr A Jack & Ms S Kiran & Ms M Naidu for the State  
Mr D Sharma & Mr S Deo & Mr A Nandan for the Accused

**Date of Hearing** : 24 March 2021

**Date of Ruling** : 29 March 2021

**RULING**

- [1] This is an application by the State to adduce evidence from a witness in New Zealand through Skype at the trial of the Accused charged with possession of cocaine. The witness, Mr Espinosa is a police officer attached to the New Zealand Police National Organized Group. The witness was part of an investigation team into a transnational drug importing syndicate involved in importing methamphetamine into New Zealand in 2019.
- [2] The State seeks to adduce evidence of documents allegedly found in the house occupied by the Accused at the relevant time to link him to the transnational drug importing syndicate in New Zealand involving his father, Tallat Rahman. The Accused's father was the principal tenant at the house in Caubati where the alleged cocaine subject of the charge before this Court was found.

- [3] The prosecution alleges that the documents found at the Caubati property contain details of transactions in the Accused's handwriting, linking him to the New Zealand transnational drug importing syndicate.
- [4] The prosecution submits that Mr Espinosa will give evidence of the transaction details of the New Zealand drug case involving the Accused's father that corresponds with the handwritten details contained in the documents allegedly found in the bedroom of the Accused during the search of the property by the Fiji Police Force.
- [5] The prosecution submits that the proposed evidence is relevant to rebut any claim by the Accused that his association with his father or his occupation of the house rented by his father was an innocent association or an innocent occupation of the house and with no knowledge of the illicit drug being present inside the house.
- [6] The defence objects to both, the use of Skype to adduce the evidence and the admissibility of the evidence.
- [7] The objection to the admissibility is that the evidence is prejudicial and for that reason admitting the evidence is unfair to the Accused.
- [8] The rules of admissibility of evidence in criminal cases is largely governed by common law. The general rule is that if a particular evidence is relevant, it is admissible. Evidence is relevant if it has probative value, that is, it can assist the court to resolve a fact in issue. If the probative value of the evidence outweighs the prejudicial effect of the evidence on the Accused, the court may admit the evidence - *State v Singh* - Ruling 2 [2009] FJHC 28; HAC072.2008 (26 January 2009), *State v Nayacalagilagi* [2009] FJHC 48; HAC165.2007 (17 February 2009).
- [9] In *B v The Queen* [1992] HCA 68; (1992) 175 CLR 599 the High Court of Australia summarized the principles governing the admissibility of evidence at 617-618:

“Evidence that an accused has committed offences other than those with which he is charged ought not be admitted if it tends to show only that the accused has a propensity or disposition to commit criminal offences of a particular type or generally. If a propensity or disposition of that kind is all that the evidence tends to show, then its prejudicial nature must be greater than any relevance which it might have. To admit such evidence would be to invite the jury to proceed upon prejudice or suspicion rather than proof. But if the evidence of other offences goes beyond showing a mere propensity or disposition to commit crime or a particular type of crime and points in some other way to the commission of the offences in question, then it will be admissible if its probative value for that purpose outweighs its prejudicial effect. That is not to say that it may not still be evidence of propensity or disposition, but it will then be evidence of propensity or disposition of a particular kind which in the circumstances has a degree of relevance justifying its admission”.

- [10] It is not in dispute that the proposed evidence links the Accused to an illicit drug offence in New Zealand that he is not charged. The evidence is prejudicial to the Accused because the evidence if believed may show propensity to deal in illicit drugs.
- [11] For the evidence to be admissible, it must show more than a propensity or disposition to commit a crime. The probative value of the evidence must clearly transcend the prejudicial effect of mere criminality or propensity.
- [12] The prosecution case is founded on the principle of joint possession, that is, the Accused jointly possessed the illicit drug with his father being the principal tenant and the Accused being an occupier of the house where the illicit drug was found. The evidence of the uncharged offence is not being led to show propensity to deal with illicit drugs but to rebut the Accused’s claim of innocent association with his father or innocent occupation of the house where the illicit drug was found.
- [13] The probative value is derived from the fact in issue whether the Accused was in joint possession or control of the illicit drug with which he is charged. The probative value of the evidence clearly transcend the prejudicial effect of mere criminality or propensity. I rule the evidence is admissible.

[14] The main objection to the use of Skype to lead the evidence of the witness is for lack of proper foundation to use Skype.

[15] The mode of taking or recording evidence is governed by section 131 of the Criminal Procedure Act. Section 131 reads:

(1) Subject to any other provision of this Act, all evidence taken in any trial under this Act shall be taken—

(a) in the presence of the accused; or

(b) when his or her personal attendance has been dispensed with, in the presence of his or her lawyer (if any).

(2) Nothing in this section shall prevent a judge or magistrate from authorizing that appropriate arrangements be made for —

(a) taking of evidence from a remote location; or

(b) the use of any other procedure or means by which evidence may be taken during, or for the purposes of the trial —

where issues of safety or the interests of justice require the use of such means.

[16] The reason the evidence of the witness is being adduced through Skype instead from the witness box in the courtroom is due to the international travelling restrictions put in place by New Zealand and Fiji to control the Covid-19 global pandemic. It is proposed that the witness will give evidence from the Fiji Embassy in Auckland, New Zealand.

[17] The logistics or the technicalities involved in the use of Skype to record evidence of an overseas witness are not grounds for not allowing the use of Skype to receive evidence. In the past, Skype has been used to adduce evidence of overseas witnesses in both civil and criminal proceedings in Fiji. Logistics and the technicalities, including the swearing of the witness are matters that can be tested and resolved before the evidence is received. There is no suggestion that Skype is an unreliable method of recording the evidence.

- [18] The evidence of the witness will be recorded using Skype in the presence of the Accused and his counsel. The same rules of admissibility will apply to the evidence as if the witness is giving evidence from the witness box inside a courtroom.
- [19] The witness has given evidence in court before. He is a law enforcement officer. He would know the law on perjury and the consequences of not telling the truth in judicial proceedings.
- [20] I have already ruled that the witness's evidence is relevant for the court to determine a fact in issue, that is, whether the Accused was in a joint possession of the illicit drug found in Fiji together with his father.
- [21] It is in the interests of justice to allow the witness to give evidence through Skype from New Zealand.
- [22] The defence objections are overruled and the State is allowed to lead the evidence of Mr Espinosa through Skype.



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**Hon. Mr Justice Daniel Goundar**

**Solicitors:**

Office of the Director of Public Prosecutions for the State

R Patel Lawyers for the Accused