IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

CRIMINAL CASE NO: HAC 090 OF 2019

STATE

v

SHYMAL SINGH

Counsel:	Mr M. Rafiq for State Mr A. Reddy for Defence
Dates of Hearing:	04 March 2024
Date of Ruling:	04 March 2024

RULING ON PRELIMINARY OBJECTION

1. On the eve of the trial, the Defence Counsel raised an objection concerning the failure of the Prosecution to make its witness Deslyn Swamy available at the trial whose statement has been recorded and disclosed to the Defence as a potential witness for the Prosecution.

2. The State Counsel informs that this witness has migrated to Canada and therefore the Prosecution do not intend to call her. The State Counsel admits that the non-availability of this witness at the trial was not informed to the Defence in advance. The Defence submits that if it were informed in advance that the Prosecution did not intend to call this witness, they could have pursued her as she would no longer be a witness for the Prosecution.

3. The objection of the Defence is based on Section 116(2) of the Criminal Procedure Act (CPA) and some local and foreign judgments. Section 116(1) of the CPA deals with the discretion of the Court to summon a material witness at any stage of the trial.

> 116 (1) At any stage of trial or other proceeding under this Act, any court may -
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> *(a)* summon or call any person as a witness; or
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> *(b)* examine any person in attendance though not summoned as a witness; or
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> *(c)* recall and re-examine any person already examined –
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> and the court shall summon and examine, or recall and re-examine any such person if the evidence appears to the court to be essential to the just decision of the case.

4. Section 116(2) provides as follows:

> The prosecution or the defence shall have the right to cross-examine any person giving evidence in accordance with subsection (1), and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of any such person as a witness.

5. Section 116(2) is aimed at securing the right of cross-examination of a witness, when a witness has been called by the Court under Section 116(1) of the CPA. This provition is in line with Section 14(2) (l) of the Consitution which provides for the right of the accused to call witnesses and present evidence, and to challenge evidence presented against him or her. It does not deal with a right of the Defence to compel a witness of the Prosecution to be made available at the trial.

6. However, Sections 14 (2) (c) and (e) of the Constituion are somewhat relevant to the issue raised by the Defence. According to those sections, every perosn charged with an offence has the right:

> *(c)* to be given adequate time and facilities to prepare a defence, including if he or she so requests, a right of access to witness statements;

> *(e)* to be informed in advance of the evidence on which the prosecution intends to rely, and to have reasonable access to that evidence;

7. In this case, the Defence has been given adequate time and facilities including the witness statements to prepare a defence. The Prosecution has informed in advance of the evidence on which the prosecution intends to rely and given reasonable access to that evidence.

8. In the unreported case of **Dhansukh Bhika & Others v State**[1], which the Defence has cited, in fact deals with those rights and not relevant to the issue at hand. The right to be served with timely and adequate disclosures was guaranteed to an accused by Section 119 of the Criminal Procedure Code (now repealed) and Section 28(1)(c) of the then Constitution (now abrogated). Shameem J in that case stated as follows:

> This then, is the law on the obligation to provide sufficient particulars in the Information or charge, in Fiji. Section 119 of the Criminal Procedure Code must be read together with section 28(1)(c) of the Constitution, which provides that the defence should have adequate facilities to prepare a defence. What is "reasonable information" to satisfy both section 119 and section 28(1)(b) of the Constitution (which requires disclosure of the reasons for the charge) depends on the circumstances of each case. Where the issue is raised before the trial then the remedy is (in the absence of a deliberate manipulation of proceedings) to order an amendment of charges. I am unable to find any authority which suggests that a stay is the appropriate remedy. It would be a different situation where the prosecution deliberately gave false particulars or refused to allow access to evidence [Emphasis added] (R v. El-Treki Archbold News 826 October 2000 3-4). The remedy after the trial is completed, and it is found that a lack of particularity or disclosure prejudiced a fair trial, is the quashing of the conviction.

9. The Defence submits that the Prosecution has acted in bad faith or for an improper motive by not making the witness available to the Defence, thus prejudicing a fair trial for the Defence. There is no evidence to substantiate the claim that the Prosecution has deliberately given false particulars or refused to allow access to evidence. The Prosecution has taken reasonable steps available to it to secure the presence of the witness at the trial by issuing summons, although it has failed to inform in advance that this witness is not available at the trial.

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[1] Miscellaneous Case No. HAM 85/2008

10. The crucial issue is whether the unavailability of this witness at the trial would not be in the interests of justice, so as not to promote a fair trial. **R v Russell Jones** [2] cited by the Defence is very much relevant and it deals with the issue of witnesses the Prosecution choose not to call at the trial. The Court enunciated the following principles:

> a) Generally speaking the Prosecution must have at Court all witnesses whose statements have been served as witnesses on whom the Prosecution intend to rely, if the defence want those witnesses to attend. In deciding, which statements to serve, the Prosecution have an unfettered discretion, but must normally disclose material statements not served.
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> b) The Prosecution enjoy a discretion whether to call, or tender, any witness they require to attend, but the discretion is not unfettered.
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> c) The first principle which limits this discretion is that it must be exercised in the interests of justice, so as to promote a fair trial. The dictum of Lord Thankerton in Adbel Muhammed El dabbah - v - Att-gen of Palestine (1994) A.C. PC (Court will only interfere if Prosecutor has been influenced by some oblique motive), does not mean that the Court will only interfere if the Prosecutor has acted out of malice; it means that the Prosecutor must direct his mind to his overall duty of fairness, as a Minister of Justice. Were he not to do so, he would have been moved by a consideration not relevant to his proper task in that sense, as oblique motive.
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> d) The Prosecution ought normally to call or offer to call all the witnesses who give direct evidence of the primary facts of the case, unless for good reason. In any instances, they regard the witnesses' evidence as unworthy of belief. In most cases, the jury should have available all of that evidence as to what actually happened, which the Prosecution, when serving statements, considered to be material, even if there are inconsistencies between one witness and another. The defence cannot always be expected to call for themselves witnesses of the primary facts whom the Prosecution has discarded. For example, the evidence they may give, albeit at variance with other evidence called by the Crown, may well be detrimental to the defence case. If what a witness of the primary facts has to say is properly regarded by the Prosecution as being incapable of belief, or as some of the authorities say, "incredible", then his evidence cannot help the jury assets the overall picture of the crucial events; hence, it is not unfair that he should not be called". (Emphasis added)

11. Also relevant is the case of **Whitehorn v R** [3] where Deane J issued a guidance as to the central obligations of the Prosecution which reads as follows: -

> The observance of traditional consideration of fairness requires that prosecuting counsel refrain from deciding whether to call a material witness by reference to tactful consideration. Whether or not their names appear on the back of the

[2] (1995) 1 Cr. App. R. 538
[3] (1983) 49 ALR 488

> indictment or information, all witnesses whose testimony is necessary for the presentation for the whole picture, to the extent that it can be presented by admissible and available evidence, should be called by the Crown unless valid reason exists for refraining from calling a particular witness or witnesses, such as that the interest of justice would be prejudiced rather then served by calling of an unduly large number of witnesses to establish a particular point. All available witnesses whose names appear on the back of the indictment or who were called by the Crown to give evidence on any committal proceedings which preceded the trial should be called to give evidence, or, where the circumstances justice the Crown in refraining from leading evidence from such a witness, either be sworn by Crown to enable cross-examination by the accused or, at the least, be made available to be called by the accused.
>
> Among the considerations which may justify the Crown in refraining from leading evidence from a particular witness is that the evidence which he or she would give is plainly untruthful or unreliable. If the Crown proposes to refrain from calling a witness a person whose name appears on the back of the indictment or information or whom it would otherwise be expected to call as a matter of course, it should communicate that fact to the accused or his lawyer a reasonable time before the commencement of the trial. If the accused seeks to be told why the Crown is refraining from calling such a witness, fairness to the accused would ordinarily require that the Crown communicate the reason or reasons".

12. Let me apply those principles and guidelines to the case at hand. The Prosecution has disclosed the witness statement of Deslyn well ahead of the trial. It has exercised its discretion to call this witness but, due to a reason beyond its control, has failed to secure her presence at the trial because she has migrated. Therefore, it is not reasonable to say that the Prosecution has been influenced by some oblique motive or by reference to tactful consideration. The Prosecutor has directed his mind to his overall duty of fairness, as a Minister of Justice.

13. The Prosecution ought normally to call or offer to call all the witnesses who give direct evidence of the primary facts of the case, unless for good reason. The witness concerned in this case is not supposed to give direct evidence of the primary facts of the case. This is a rape case where the accused for one count has admitted sexual intercourse with the complainant. Therefore, only the complainant and the accused will be able to give direct evidence of the primary facts as to what happened between them.

14. In Fiji, no corroboration of complainant's evidence is required to bring about a conviction in a case of sexual nature. Therefore, the Prosecution has a discretion to close its case without calling witnesses other than the complainant herself. As was stated by the State Counsel, it's

ultimately the Prosecution's case and they have a discretion to decide who and how many witnesses they are going to call at the trial. However, as was stated in **Russell Jones,** that discretion is not unfettered.

15. The State Counsel informed that Deslyn's statement has been recorded on the basis that she received a recent complaint from the complainant after the alleged rape. In a case of sexual nature, recent complaint evidence, though hearse in nature, is admissible so far as it is relevant to test the credibility of the complainant. And also, a recent complaint, if proved would bolster the case for the Prosecution as it would be consistent with the conduct of a rape victim, but would not serve as corroboration of her evidence.

16. Then the question is whether, by not calling or not making this witness available at the trial, and not informing in advance her unavailability, the Defence will be prejudiced so as not to receive a fair trial.

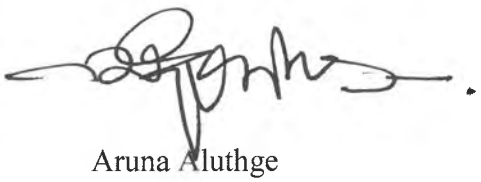
17. I agree, as was stated in **Russell Jones,** that the Court should have available all of that evidence as to what actually happened, which the Prosecution, when serving statements, considered to be material, even if there are inconsistencies between one witness and another.

18. The Prosecution, when serving statements, considered Deslyn's evidence to be material to its case in the manner that was described above. However, I can't comprehend how her absence is going to prejudice the Defence case. The Defence Counsel failed to address this issue in his submission.

19. For the purpose of addressing the issue raised by the Defence, it became imperative for me to peruse the disclosures and the witness statement given by Deslyn. It has been recorded on 30 April 2019, a few days after the alleged rape incident. Deslyn in her statement speaks about a complaint of sexual nature allegedly received from the complainant. If the Prosecution could call Deslyn as a witness and if her evidence could be believed, that would no doubt bolster the case for Prosecution.

20. I am not convinced that Deslyn's absence at trial as a witness is not in the interests of justice so as not to ensure a fair trial. Therefore, I hold that the failure to inform in advance the Prosecution's inability to present Deslyn as a witness at the trial will not be prejudicial to the Defence and its right to a fair trial.

21. The preliminary objection raised by the Defence is dismissed.



Aruna Aluthge

Judge

4 March 2024

At Lautoka

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