

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Criminal Case No: HAC 105 of 2006

STATE

v.

PENIASI TIRIKULA

Hearing: 12th February 2009

Ruling: 13th February 2009

Counsel: Mr. A. Rayawa for State
Ms B. Malimali & Ms M. Savou for Accused

ALIBI EVIDENCE

[1] The defence seeks to call three alibi witnesses. They are Iliesa Sousou Cava, Epi Batirerega, and Solo Raura. They are all serving prisoners. No alibi notice was given to the prosecution by the defence until the 26th of January 2009. In a letter dated the 26th of January 2009, and received by the office of the DPP on the 27th of January 2009, counsel for the Accused (Ms Mereoni Savou) wrote:

“We act for the accused in the above matter. The following are alibi witnesses we intend to call during the trial proper and notice of alibi will be filed accordingly.

- 1. Iliesa Soso, Medium Prison Naboro.***
- 2. Jeke Vakarakawa, maximum Prison, Naboro.***

Submitted for your necessary action and feel free to contact the under-signed for any further queries.”

[2] The Accused was charged in May 2006. Transfer was delayed, but upon transfer the Accused applied, through counsel from the Legal Aid Commission for a permanent stay. It was refused but legal representation was confirmed by the Director of Legal Aid, on the 13th of March 2008. The accused then advised the judge then handling the case that he wished to call Iliesa Sousou Cava, Epi Batirerega, Savenaca Ragaraga and Silo Ravou as alibi witnesses but the application was not followed by a formal notice of alibi although Director Legal Aid was present when this was said, and although legal aid was confirmed on the 19th of March 2008. No formal notice of alibi was ever given for these witnesses. Nevertheless, the State obtained the statement of Sousou Cava and served it on the defence. State counsel points to the inconsistency in the defence position, the changing nature of the alibi evidence and the unfairness to the prosecution. Indeed only Sousou Cava’s name reappears in the letter of the 26th of January, and no formal notice of alibi was ever filed and served on the prosecution.

[3] I find the late alibi notice given by the defence to be incomprehensible. If the Accused was represented in March 2008 and the issue of an alibi already raised at that time, why was an alibi letter not given until the 26th of January 2009? Indeed, the form of the letter of the 26th of January does not fulfill the requirements of section 229 of the Criminal Procedure Code which requires disclosure of the “particulars of the alibi.” Why was the alibi notice not given last year in March when, according to Mr. Rayawa, Sousou Cava’s name was disclosed by the defence? The court might be prepared to exercise a discretion in favour of an unrepresented accused, but in this case the Accused has been represented in the High Court since the 13th of March 2008. The late notice of alibi witnesses, the changing identity of the witnesses and the lack of any adequate explanation for the failure to give notice lead me to a conclusion that the Accused should not be permitted to call alibi witnesses of whom the

prosecution has had no notice, or whose identity has now changed. I do grant leave to the defence to call Iliesa Sousou Cava, whose statement has been recorded by the prosecution. No other alibi witnesses may be called.

Nazhat Shameem
JUDGE

At Suva
13th February 2009