

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

CRIMINAL CASE NO: HAC 298/2011

BETWEEN:

THE STATE

AND:

**FRANZ PHILIP DEVOL alias FRANZ ANTON HAPSBURG alias FRANZ VON
HAPSBURG**

COUNSEL: Ms. Nancy Tikoisuva for the State
Mr. D.Toganivalu for the Accused

Date of Hearing: 20-23/11/2012

Date of Ruling: 26/11/2012

RULING

01. The prosecution closed their case on 20/11/2012. Pursuant to section 231(1) of the Criminal Procedure Decree 2009, this court invited both counsels to consider whether accused has a case to answer. Accordingly both counsels made their oral submissions and filed their written submission subsequently. The accused is charged as follows:

AMENDED INFORMATION

Statement of Offence

INCITING THE COMMISSION OF MURDER: Contrary to section 48(1) and (7) (a) and section 237 of the Crimes Decree 2009.

Particulars of Offence

FRANZ PHILIP DEVOL alias FRANZ ANTON HAPSBURG alias FRANZ VON HAPSBURG in between the 18th of August 2010 and the 20th of November 2010, at Suva in the Central Division, urged **STEPHEN MELLRICH** to murder **EILEEN DELOAN JACK**.

02. The prosecution relies on direct and material evidence to prove the charge. Also rely on caution interview statement of the accused.

03. The test at this stage of trial is whether there is some evidence on each elements of the offence. The evidence must be relevant and admissible. In **Kalisoqo v R Criminal Appeal** No: 52 of 1984, the Court of Appeal took the view that if there is some direct or circumstantial evidence on the charged offence, the a judge cannot say there is no evidence on the proper construction of section 293(1). This view was later confirmed by the Court of Appeal in **State v Moses Tuisawau** Cr. App. 14/90.

04. In **State v Woo Chin Chae** [2000] HAC 023/99S Madam Shameem J summarized test under section 293(1):

"In order to come to the conclusion that there was evidence direct or circumstantial, and irrespective of its weight, credibility or its tenuous nature it must be shown that the evidence in question is relevant, admissible and is in totality inculpatory of the accused. That means that the evidence in its totality must at least touch on all the essential ingredients of the offence"

05. In **State v George Shiu Raj & Shashi Shalendra Pal** (2006) AAU0081/05 Court of Appeal recently confirmed that the correct approach under 293(1) is to ask whether there is some relevant and admissible evidence on each element of the charged offence, and not whether the evidence is inherently vague or incredible.

06. Stephen Mellrich has given evidence on 18th November 2012, the accused told him in a serious manner that he wanted 3 people killed and they were Lillian Johnson and her husband and one Eileen DeLoan Jack. He said that when accused told him this he was displaying anger and animosity towards the 3 people for making his life difficult and for Stephen to arrange for their murder. Witness could not believe it at first but believed the accused as the manner and tone in which the accused was speaking caused him to believe that the accused was serious and wanted it done. He further gave evidence that the accused wanted to pay \$400,000 for the 3 people to be killed as he wanted to make sure that they were dead and done properly. Prosecution marked the audio recording of the conversation between PW1 and the accused as exhibit 02.

In the cross examination witness admitted that he told police that he did not take it seriously but accused wanted assurances from him.

07. Alla Mellrich wife of Stephen Mellrich also gave evidence on behalf of the prosecution.

08. Sgt.2344 Aiyaz Ali who recorded the Caution Interview Statement of the accused gave evidence and marked the Caution Interview statement as P3. In the Caution interview statement accused denied the charge levelled against him. Answering question No: 294 of his caution interview statement accused said that Stephen is inventing conversation of murder to be able to cause him to suffer Criminal Charges and that any discussion of this sort is defamation. In their many conversations Stephen has mentioned that he has mafia friends that can deal with people. Also mentioned that why he would offer \$400000.00, whereas he had borrowed \$7500.00 from Stephen.

09. The Court of Appeal in **State v Sat Narayan Pal** AAU 0036/2006 has confirmed that private citizens who engage in "tape and tell" recordings should not be allowed to use such evidence if bad faith can be established, which then amounts to an abuse of process by the courts. The trial Judge in Sat Narayan Pal stated in his summing up which was upheld by the Court of Appeal.

"In considering the overall circumstances in which the conversation was approached and recorded, I find that there has been a lack of bona fides amounting to an abuse of process. Had there been good faith, an absence of conflict of interest, and no manipulation of process, I might have found otherwise for the fruit of recording may well have established guilt. But court cannot stand by and lend credence to such

unjust manoeuvres which undermines the credibility of a judicial system..."

10. As per the para 215 of the "Transcript" Stephen Mellrich said that the recording was a set up one. This demonstrates the mala fide intention of Stephen Mellrich. Accused in his caution interview statement said that it was entrapment. Hence I disregard the audio recording evidence presented by the Prosecution. I consider this a matter of law and not matter of fact that should be left to Assessors.

11. Considering the evidence led before this court I conclude that there is no admissible and relevant evidence touching all the elements of the offence to establish a prima facie case.

12. Hence I find the accused has no case to answer and he is therefore acquitted from the charge.

P.Kumararatnam
JUDGE

At Suva
26/11/2012