

IN THE COURT OF APPEAL
[On Appeal from the High Court]

Criminal Appeal No. AAU102 of 2013
[High Court Case No. HAC 059/2011S]

BETWEEN : AMENA ARAIBULU
Appellant

AND : THE STATE
Respondent

Coram : Goundar JA

Counsel : Mr. S. Waqainabete for the Appellant
Mr. M. Korovou for the Respondent

Date of Hearing : 27 August 2014

Date of Ruling : 15 September 2014

RULING

- [1] Following a trial in the High Court at Suva, the appellant was convicted of the following offence:

Statement of Offence

Aiding and Abetting: Contrary to Section 21 (c) of the Penal Code, Cap 17 and Section 6 (b) of the Illicit Drugs Control Act, 2004.

Particulars of Offence

AMENA ARAIBULU, on the 6th day of January, 2010 at Suva in the Central Division, aided and abetted Isikeli Tamani to import into Fiji controlled chemicals namely pseudoephedrine hydrochloride weighing approximately 2.680 kilograms without lawful authority.

- [2] On 4 October 2013, the appellant was sentenced to 8 years' imprisonment. The principal offender, Isikeli Tamani also received the same sentence.

[3] On 21 October 2013, the appellant gave a timely notice to appeal against his sentence. After engaging counsel, the appellant elected to appeal against conviction only.

[4] The grounds of appeal are as follows:

1. "The Learned Trial Judge erred in law and in fact when he did not consider that the duty to verify the identity of the consignee solely belongs to the delivery clerk of Carpenters Shipping and the Custom officer;
2. The Learned Trial Judge erred in law and fact when he overturned the unanimous finding of not guilty by the 3 assessors without considering the fact that the Appellant does not know that the controlled chemicals was inside of the bicycle and neither does he had any intention to assist in the importation of the drugs;
3. The Learned Trial Judge erred in law and fact when he failed to consider that the Appellant only assisted the first accused to clear the consignment because he was asked by the first accused and especially given the latter's disability."

Ground 1

[5] The prosecution case against the appellant was that he accompanied his co-accused to the Carpenters Shipping to pick up a parcel that was sent from China by one Esther Wilson. The parcel was addressed to one Jack Wilson of 77 Malau Place, Vatuwaqa. When the appellant and his co-accused arrived at the Carpenters Shipping Bond Yard in a vehicle, the appellant got off to collect the parcel while his co-accused remained in the vehicle. The appellant was attended by Jonetani Rokosugu who was a receiving/delivery clerk at the Carpenters Shipping. The appellant told Rokosugu that the consignee, Jack Wilson had physical disability and was in the vehicle. Rokosugu then accompanied the appellant to the vehicle. When Rokosugu requested the co-accused for proof of his identification, the appellant replied that the co-accused did not have any identification. Both men then returned to the premises for an inspection of the consignment by a Customs officer. Before inspecting the consignment, Josua Volau who was a Customs officer approached the co-accused for verification of his identity. The co-accused told Volau that he was

Jack Wilson. Thereafter the consignment was opened in the presence of Volau. The consignment contained a tricycle. The co-accused then offered a \$100.00 note to Rokosugu to be shared with Volau. Rokosugu declined to accept the money. The appellant then signed the Waybill on behalf of the consignee. At this point, the law enforcement officer intercepted and arrested the appellant and his co-accused. The consignment was seized and upon further inspection it was discovered that 2.68kg of pseudoephedrine hydrochloride was concealed inside the tricycle.

- [6] At trial, the appellant said he was only assisting the co-accused to clear the consignment. He said he did not know the consignment contained controlled chemicals. He knew the co-accused well. He knew that the co-accused was not Jack Wilson, yet, he presented him as Jack Wilson to the officers when he went to collect the consignment.
- [7] The trial judge's reasons for convicting the appellant for aiding and abetting are contained at paragraph 8 of his judgment:

“Second accused knowing very well that 1st accused is not Jack Wilson produced documents in the name of Jack Wilson to Jonetani and Josua Volau to clear a parcel which contained illicit drugs. Even he introduced 1st accused as Jack Wilson to Jonetani and Josua. Second accused very well knew 1st accused's real name as he was his neighbor and helped him several times to clear parcels from customs. All the documents which he submitted to Jonetani to clear the parcel were in Jack Wilson's name. He had tried to bribe Jonetani and Josua to clear the parcel. Further he had not taken any endeavour to inform this to police or customs.”

- [8] The fact that the appellant concealed the true identity of his co-accused and presented him as the consignee was the most incriminating evidence against the appellant. The appellant's contention that the officers at the Carpenters Shipping should have verified the identity of the consignee before releasing the consignment is devoid of any substance. The prosecution case was that the appellant was aiding and abetting his co-accused to import an illicit substance by using a fictitious name for the consignee. When the appellant attempted to obtain the parcel from the Customs, he made every effort to conceal the true identity of his co-accused. He presented his co-accused as the consignee

knowing the co-accused was not the person named in the Waybill. When the officers asked for verification of identity of the consignee they were told the co-accused did not have any identification with him. Ground one is not arguable.

Ground 2

[9] In order to prove an aiding and abetting, the prosecution must prove firstly an intent to encourage, and secondly an act or omission which amounted to a positive act of assistance (*Reg v Coney (1882) 8 QBD 534*). In order to prove both limbs, it must be shown or inferred from the circumstances that the offender knew that the offence was going to be committed, or was being committed (*Iliaseri Saqasaqa v The State Criminal Appeal No. HAA098 of 2004S*). Whether the appellant knew an offence was being committed was a question of fact for the trial judge. Knowledge is a matter of inference. In this case the trial judge at paragraph 9 of his judgment made a finding that the appellant intentionally assisted his co-accused in importing an illicit chemical. In other words, the trial judge was satisfied that the appellant knew an offence was being committed and the appellant intentionally encouraged his co-accused by accompanying him to collect the illicit substance from the Customs. The use of a fictitious name for the consignee, the concealment of the true identity of the co-accused by the appellant, and the offer of bribe to the officers was evidence from which the trial judge was entitled to infer the guilty knowledge or intention. This ground is not arguable.

Ground 3

[14] The contention that the appellant only assisted a physically handicapped person to clear his consignment from the Customs is a matter that could not have been considered in isolation. If the appellant's association with his co-accused was an innocent association, then there was no need for him to conceal the true identity of his co-accused from the officers, and further there was no need to offer a bribe to the officers to clear the consignment. The trial judge was quite entitled to conclude that the appellant's association with his co-accused was not just an innocent association. This ground is not arguable.

- [15] The grounds of appeal are not arguable. Section 35(2) of the Court of Appeal Act gives a single judge power to dismiss a frivolous appeal. A frivolous appeal is an appeal that one can say with confidence cannot possibly succeed (*Simeli Nasua v State unreported Criminal Appeal No. CAF0010 of 2013, 20 November 2013*). For the reasons given, I feel confident that this appeal cannot possibly succeed.
- [16] Leave to appeal is refused. Appeal dismissed under section 35(2) of the Court of Appeal Act.



A handwritten signature in black ink, appearing to read 'D. Goundar'.

Hon. Justice D. Goundar
JUSTICE OF APPEAL

At Suva
15 September 2014

Solicitors

Office of the Legal Aid Commission for Appellant
Office of the Director of Public Prosecutions for State