IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL NO. AAU 48 OF 2012
(High Court HAM 31 of 2011)

BETWEEN : MUSKAN BALAGGAN

*Appellant*

AND : THE STATE

*Respondent*

Coram : Chandra RJA

Counsel : Mr A J Singh with Mr Nand for the Appellant
Mr M D Korovou for the Respondent

Date of Hearing : 28 July 2014

Date of Ruling : 4 December 2014

# RULING

1. This is an application for leave to appeal against conviction and sentence pursuant to Section 21 of the Court of Appeal Act (Cap.12).

2. The Appellant was jointly charged with another with one count of attempt to export an illicit drug, namely cocaine, contrary to sections 4 and 9 of the Illicit Drugs Control Act 2004, and a second count of possession of an illicit drug contrary to section 5(a) of the Illicit Drugs Act.

3. The Appellant was convicted of both counts with the Court accepting the unanimous opinion of the Assessors of the Appellant's guilt and on 4th June 2012 she was sentenced to 11½ years imprisonment on each count to run concurrently with a non-parole period of 9 years.

4. The Appellant filed her Notice of Appeal on 27th June 2012 setting out 29 grounds of appeal against conviction and 6 grounds of appeal against sentence.

5. Subsequently by an amended notice of appeal filed on 30 June 2014 the appellant set out the following grounds of appeal against conviction and sentence which were relied on at the hearing.

6. The prosecution case was that the two accused were guests at Hexagon Hotel, the 2nd accused had checked in on 12 January 2011 and the 1st accused had checked in on 24 January 2011. When the 1st accused had arrived at the front desk of the hotel to check in, the 2nd accused had paid for the room and had wanted a room next to his for the 1st accused but no such room had been available. On 26 January 2011 the 1st accused had been seen in the 2nd accused's room. On that day both accused had come to the front desk to check out and the 1st accused had paid the remaining balance for the two rooms using her Master Card. That evening the two accused had been seen leaving the hotel in different taxis at the same time. The two accused had checked in separately for an outbound flight to Melbourne which was to depart at 6.25 p.m. The 1st accused had been the last passenger to check in, with one bag. A search had been done of the bags of the two accused. When the 1st accused's bag had been opened, a powdery substance had been noticed on the clothes inside her bag. When asked about the contents, she had stated that the bag belonged to the 2nd accused. The 2nd accused had denied any knowledge of the bag. The Police had thereafter taken photographs of the contents of the 1st accused's bag and crystal like deposits on the clothes had been noted and the clothes had been unusually stiff. Thereafter the 1st accused was escorted from the airport to the border police station, detained and thereafter arrested. When the clothes in the bag had been chemically tested in Australia, it was revealed that the substance on the clothes was cocaine. The quantity of cocaine that was found was a minimum of 521.6 grams of pure cocaine.

7. The Appellant submitted that the grounds of appeal raise questions of law only. In terms of section 21(1) of the Court of Appeals Act, if the grounds of appeal are questions of law, leave is not required. It is only if they contain questions of mixed fact and law that leave is required.

8. The first ground of appeal is as regards the Appellant's right to Counsel. Counsel who represented her was disqualified by the learned trial Judge after the dates for the *voir dire* and trial had been set. The Appellant had not engaged Counsel during a period of about nine weeks that was available to her to retain Counsel and represented herself. The learned trial Judge refused an adjournment when requested by the Appellant on the basis that adequate time had been given for her to retain Counsel.

9. The Appellant had been on remand and it has been submitted that though there is no absolute right to Counsel that she should have been given the adjournment that she requested and that the denial of that application amounted to denying the Appellant the right to have a counsel which would be a question of law.

10. Right to counsel is not an absolute right as has been laid down in several decisions. The question of whether an accused should have been permitted an opportunity to retain Counsel would amount to a denial of such a right would depend on the circumstances of each and every case. The question that arises here is whether there was a possibility that the accused was adversely prejudiced by the lack of representation. **Asesela Drotini v State** [2006] Cr. App. AAU0001.2005, 24 March 2006. In determining this question, the nature and strength of the case of the State and the defence that is taken, has to be considered.

11. In determining whether Ground 1 raises a question of law, I would also take into account, grounds 2, 3, 5, 6 and 11 which all relate to the Appellant being unrepresented. Ground 2 relates to the disallowing of an application for adjournment when the State filed fresh information. Ground 3 relates to the fact of the Appellant not getting a fair trial as a result of being unrepresented due to the learned trial Judge disqualifying Counsel. Ground 5

relates to the fact of the learned trial Judge failing to assist the Appellant who was unrepresented and was facing a serious charge in a complex case involving cross-examination of expert witnesses. Ground 6 and 11 are repetitions of ground 1.

12. These grounds would require a consideration of the entire record in the case from its very commencement. At this stage the entire record is not available and in such circumstances I would consider that it would be best if the consideration of grounds 1, 2, 3, 5, 6 and 11 are left to the Full Court and I would grant leave to appeal as these matters are arguable.

13. Ground 4 relates to the filing of the 2nd charge as an additional charge. It has been submitted that here is duplicity in framing such a charge. When considering the two counts, they are different charges attracting different provisions, namely sections 4 and 9 for the first count and section 5(a) for the second count, of the Illicit Drugs Control Act. I do not see any merit in this ground.

14. The seventh ground is that although the learned trial Judge had directed that the prosecution had to prove intention, he had erred in law in not directing the assessors as to the *mens rea* required for possession and the requisite knowledge required to prove the charge.

15. The learned trial Judge had in his summing up at paragraphs [34] and [35] dealt with intention and the required *mens rea* and the requisite knowledge that was necessary. The learned Judge in his summing up directed the Assessors on the circumstances relating to the discovery of the drugs as well as the conduct of the Appellant from the time that she booked in at the hotel up to the time that the contents of her bag were checked at the Airport. The attendant circumstances were relevant in determining whether she had the requisite *mens rea* and the knowledge regarding the drugs that she was attempting to take with her.

16. The manner in which intention should be considered regarding possession can be ascertained from the dictum of Lord Wilberforce in **Warner v Metropolitan Police Commissioner** (1969) 2 AC 256 at p.410 where it was said:

> *"The question, to which an answer is required, and in the end a jury must answer it, is whether in the circumstances the accused should be held to have possession of the substance rather than mere control. In order to decide between these two the jury should be invited to consider all the circumstances ...: the 'modes or events' by which the custody commences and the legal incident in which it is held. By these I mean, relating them to typical situations, that they must consider the manner and circumstances in which the substance, or something which contains it, has been received, what knowledge or means of knowledge or guilty knowledge as to the presence of the substance, or as to the nature of what has been received, the accused had at the time of receipt or thereafter up to the moment when he is found with it, his legal relation to the substance or package (including his right of access to it). On such matters as these ....they must make the decision whether, in addition to physical control, he has, or ought to have imputed to him, the intention to possess, or knowledge that he does possess, what is in fact a prohibited substance. If he has this intention or knowledge, it is not additionally necessary that he should know the nature of the substance."*

17. Evidence relating to the entirety of the circumstances relating to the detection of the drug in the bag of the Appellant, commencing from her departure from Australia which she stated was under threat, her entry into Fiji from Australia which she had done for the purpose of bringing a bag that would be given to her in Fiji, up to the time that she attempted to leave Fiji were before the Assessors and the learned trial Judge in his summing up referred to them when he directed them on the requisite elements of the offences that she was charged with. In those circumstances I do not see any misdirection by the learned trial Judge as urged by the Appellant regarding the requisite *mens rea* for the offences concerned. This ground is therefore not arguable.

18. Appeal ground Eight refers to the summing up of the learned trial Judge regarding law relating to duress. In the written submissions the Appellant has set out as to how the trial Judge should have put the law to the Assessors. The manner in which a trial Judge sums up a particular aspect of the law to the Assessors depends on that particular Judge. Different Judges adopt different styles in summing up aspects of law to the Assessors. What is important is not only the manner in which it is done but also whether it contains the necessary requirements relating to the law and how it should be considered. I do not see any defect in the manner in which the learned trial Judge has dealt with the law relating duress in his summing up.

19. The learned trial Judge has in his summing up dealt with the law relating to duress in paragraphs [37] to [40]. The Appellant while taking up the defence of duress, denied having committed any offence by stating that she did not know about the contents of the bag. The trial Judge had in all fairness to the Appellant dealt with the aspect of duress despite the fact that the Appellant had also taken up the position that she was not aware of the contents of the bag. Therefore I do not see any merit in this ground.

20. In ground 9 the Appellant has taken up the position that the learned trial Judge erred in law in dealing with the evidence of confession and has suggested the manner in which such directions should have been given. As stated in paragraph 18, it is not only the manner in which the directions are made that is important, the content of such directions are also important. If the directions contain what is required by law it would be sufficient.

21. The learned trial Judge has adequately dealt with the evidence regarding confession in paragraphs 44 to 47 of the summing up and therefore I see no reason to rule it as being inadequate. Leave to appeal on this ground is refused.

22. Ground 10 relates to pre-trial matters referring to Sections 20 and 24 of the Criminal Procedure Decree 2009 and Clause 13(1)(f) of the Constitution of Fiji. These provisions relate to the producing of an accused person before a Magistrate. As to the relevance of

these provisions in relation to the appeal of the Appellant has not be clearly set out on behalf of the Appellant and therefore cannot be considered for the purpose of granting leave.

23. Ground 12 refers to the learned trial judge failing to sum up the defence case to the Assessors. In the written submissions it is stated that although the learned Trial Judge was right in his statement in paragraph 48 of the summing up, that the defence case has not been put in a balanced manner.

24. The learned trial Judge had in his summing up dealt with the defences taken up on behalf of the Appellant and dealt with the law relating to them adequately and has dealt with the defence case objectively and in a balanced manner. Therefore this ground has no merit and fails.

**Appeal against Sentence**

25. The grounds of appeal 1 to 5 against sentence taken up on behalf of the Appellant are on the basis that the sentence imposed on the Appellant is harsh and excessive.

26. The Appellant states that the Court should have considered the guidelines set out in **Sulua's** case. That case dealt with cannabis whereas the present case is one which involved cocaine. The case that has dealt with cocaine in Fiji is the case of **State v Bravo** FJHC 172; HAC 145.2007L(12 August 2008). There a 46 year old woman was sentenced to 8 years imprisonment for importing 2Kg of cocaine.

27. Under the Illicit Drugs Control Act 2004, the maximum penalty for an attempt to export cocaine is 14 years imprisonment or a fine of $500,000.00 or both.

28. There are no sentencing guideline cases regarding cases involving the drug, cocaine in Fiji. In those circumstances, as to whether the sentence imposed is excessive is arguable and I grant leave on that ground regarding the sentence.

*Orders of Court*

(1) Leave to appeal is granted on grounds 1, 2, 3, 5, 6 and 11 of the grounds of appeal against conviction.

(2) Leave to appeal is granted on grounds 1 to 5 of the grounds of appeal against sentence.

**Hon. Mr. Justice Chandra**
**RESIDENT JUSTICE OF APPEAL**