IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL NO. AAU0054, 0059, 0062 of 2016
[High Court Case No. HAC 126 of 2015)

BETWEEN	:	**1. JOSEPH ABOURIZK** **2. JOSESEMURIWAQA** ***Appellants***
AND	:	**THE STATE** ***Respondent***
Before	:	**Hon. Mr Justice Daniel Goundar**
Counsel:		**Mr M Thangaraj SC & Ms M Muir for the 1st Appellant** **Mr M Anthony for the 2nd Appellant** **Mr Lee J Burney & Mr S Babitu for the Respondent**
Date of Hearing	:	**5 December 2017**
Date of Ruling	:	**8 May 2018**

RULING

[1] The appellants were jointly charged with unlawful possession of an illicit drug contrary to section 5 (a) of the Illicit Drugs Control Act 2004. After a defended hearing in the High Court at Lautoka, the appellants were convicted of the charge and sentenced to 14 years' imprisonment with a non-parole period of 12 years. They seek leave to appeal against both conviction and sentence. The State seeks leave to cross-appeal sentence. Appellant Abourizk also applied for bail pending appeal. That application was abandoned at the leave hearing.

[2] The appeals are governed by section 21 of the Court of Appeal Act. Section 21 states:

> *21 (1) A person convicted on a trial held before the High Court may appeal under this Part to the Court of Appeal –*
>
> *(a) Against his or her conviction on any ground of appeal which involves a question of law alone;*
>
> *(b) with the leave of the Court of Appeal or upon the certificate of the Judge who tried him or her that it is a fit case for appeal against his or her conviction on any ground of appeal which involves a question of fact alone or a question of mixed law and fact or any other ground which appears to the Court to be a sufficient ground of appeal; and*
>
> *(c) with the leave of the Court of Appeal against the sentence passed on his or her conviction unless the sentence is one fixed by law.*
>
> *(2) The State on a trial held before the High Court may appeal under this Part to the Court of Appeal -*
>
> *(a) ...*
> *(b) ...*
> *(c) with the leave of the Court of Appeal against the sentence passed on the conviction of any person unless the sentence is one fixed by law.*

[3] On a question of law alone, the appeal may proceed as of right. On questions of mixed law and fact, or fact alone, leave is required. Leave is also required to appeal against sentence. Section 35 of the Court of Appeal Act gives a single justice of appeal power to grant leave.

[4] At trial, the prosecution led evidence that after a covert surveillance, police intercepted and discovered cocaine inside a suitcase in the boot of the vehicle driven by appellant Muriwaqa. Appellant Abourizk was a passenger in the vehicle. The appellants did not dispute that the substance found in the vehicle was cocaine, an illicit drug. The physical element was not in dispute. The fault element was in dispute. The appellants claimed

that they did not know that they were in possession of cocaine. The assessors' unanimous opinion was that both appellants were not guilty. The learned trial judge did not accept that opinion. In a written judgment, the learned trial judge convicted the appellants.

[5] All parties have made detailed written and oral submissions. At the leave stage it not necessary to repeat every submission made by the parties. If the appeal is reasonably arguable, leave should be granted.

[6] The appellants' grounds of appeal are:

1. That the learned trial judge erred in law by shifting the persuasive burden to the Accused, contrary to sections 57 and 59 Crimes Decree.
2. That the learned trial judge erred in law by failing to correctly apply the test for guilt of Accused persons in a circumstantial case.
3. That the learned trial judge incorrectly applied the test for custody and control of a vehicle.
4. That the learned trial judge erred in law and fact in conclusion at [31 – 32J] that Simon could not be involved in the transportation of the drugs in question.
5. That the learned trial judge erred in fact by misrepresenting the agreed facts.
6. That the learned trial judge erred in fact and law by misdirecting the assessors' panel on reliability and credibility at [SU97].
7. That the learned trial judge assessed the credibility of ASP Neiko without any reference to any of the matters relied upon by the Accused as to why he was an unreliable witness.
8. That the learned trial judge erred in fact by concluding that it was to the detriment of the Accused's defence that learned counsel failed to cross-examine ASP Neiko on whether HM 046 turned into the First Landing Resort before it entered the gravel road.

9. That the learned trial judge erred in law and fact by failing to consider the misconduct of ASP Neiko and Maciu.

[7] The State's grounds of appeal are:

1. That the learned High Court judge erred in law and in principle when he wrongly considered a tariff for Cannabis Sativa for Cocaine.
2. That the learned High Court judge erred in law and in principle when he took a starting point that was low after comparing the quality of the Cocaine and the weight of the Cocaine.
3. That the learned High Court judge erred in law and in principle in failing to reflect the very large quantity of Cocaine in arriving at an overall sentence of 14 years' imprisonment which fails to adequately reflect the manifest need for deterrent sentences of this type of serious offending.
4. That the learned High Court judge erred in law and in principle when he sentenced the two Respondents to a term of imprisonment that was manifestly low and lenient.

[8] In his judgment, the learned trial judge relied upon the presumption of possession created by section 32 of the Illicit Drugs Control Act to convict both appellants. The appellants' contention is that section 32 creates an evidential burden and not a reverse onus as indicated by the learned trial judge in paragraphs 22 and 24 of the judgment. In paragraph 22, the learned trial judge said that the onus was on the appellants to prove contrary or rebut the presumption of possession. In paragraph 24, the learned trial judge said that if appellant Abourizk's evidence was to be believed, then the evidence could be taken to support their defence.

[9] It is trite law that subject to any statutory exception, the prosecution carries the burden to prove the guilt of an accused. This principle is often described as the golden thread of the English common law (*Woolmington v The Director of Public Prosecutions* [1935] AC 462) and is codified in the Crimes Act 2009. Section 57 of the Crimes Act states that the prosecution bears a legal burden of proving every element of the offence

charged or disproving any matter in relation to which the accused has discharged an evidential burden of proof imposed on the accused. Section 60 of the Crimes Act creates a legal burden of proof on an accused 'if and only if the law expressly-

(a) specifies that the burden of proof in relation to the matter in question is a legal burden; or

(b) requires the defendant to prove the matter; or

(c) creates a presumption that the matter exists unless the contrary is proved.

[10] The issue whether the burden of proof under section 32 of Illicit Drugs Control Act is an evidential burden and not a legal or persuasive burden of proof under section 60 (c) of the Crimes Act is a question of law alone.

[11] The second issue concerns the learned trial judge's reasons for disagreeing with the unanimous not guilty opinion of the assessors. The appellants' contention is that the learned trial judge came to inconsistent conclusions in his judgment. The learned trial judge concluded in paragraph 3 of the judgment that the assessors' verdict was not perverse and that it was open for them to reach such conclusion based on the evidence presented during the trial. In paragraph 37 of the judgment, the learned trial judge concluded that there was cogent reason to disagree with the assessors' unanimous verdict, which he had earlier found not to be perverse. The issue whether the learned trial judge had embellished the test under section 237 of Criminal Procedure Act 2009 for not agreeing with the opinions of the assessors is a question of law alone.

[12] The remaining grounds raise questions of mixed law and fact. The main litigation issue at the trial was the fault element. The ultimate question is whether it was open on the evidence for the trial judge to be satisfied beyond a reasonable doubt that both appellants knew that they had an illicit substance in their possession. It is an arguable issue for the Full Court to consider, having regard to all the evidence led at the trial.

[13] The maximum penalty prescribed for possession of an illicit drug is life imprisonment. There is no established tariff for the offence of possession of cocaine. In *Lata v State* [2017] FJCA 56; AAU0037.2013 (26 May 2017, the offender was convicted of possession of 1.9 kg of cocaine after trial and sentenced to 18 years' imprisonment. The Court of Appeal reduced the sentence to 15 years' imprisonment. In the present case, the appellants were convicted of possession of a far large quantity of cocaine (49.9kg). But the sentence is less than the sentence that was imposed in *Lata*. The appellants and the State are alleging numerous errors in the exercise of the sentencing discretion, which I find are arguable.

Orders

[1] *The appellants are granted leave to appeal against both conviction and sentence.*

[2] *The State is granted leave to cross-appeal sentence.*

COURT OF APPEAL FIJI

.....

Hon. Mr Justice Daniel Goundar
JUSTICE OF APPEAL

Solicitors:

Siwatibau & Sloan for the 1st Appellant
AC Lawyers for the 2nd Appellant
Office of the Director of Public Prosecutions for the State