

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

**CRIMINAL APPEAL NO. AAU0091 of 2013**  
**(High Court HAC49 of 2011)**

**BETWEEN** : **ELTON XHEMALI**  
*Appellant*

**AND** : **THE STATE**  
*Respondent*

**Coram** : **Calanchini P**  
**Chandra JA**  
**Gamalath JA**

**Counsel** : **Mr F. Vosarogo for the Appellant**  
**Mr M. D. Korovou for the Respondent**

**Date of Hearing** : **9 May 2018**

**Date of Judgment** : **1 June 2018**

**JUDGMENT**

**Calanchini P**

[1] I agree that the appeal against both conviction and sentence should be dismissed.

**Chandra JA**

[2] I agree with the reasoning and conclusion of Gamalath JA.

**Gamalath JA**

- [3] At the outset of the hearing of this appeal the learned Counsel for the Appellant informed this Court that the only ground of appeal upon which he places reliance is the one against the sentence and accordingly, the Court, after having followed the withdrawal procedure allowed the appellant to withdraw his ground of appeal against conviction. The withdrawal was voluntary and unequivocal. Consequently, the only ground that this Court should consider presently is whether there is any merit to the submissions of the learned Counsel for the Appellant who strenuously urged that the sentence imposed by the learned High Court Judge was manifestly excessive and harsh.

According to the Indictment preferred at the High Court of Lautoka, the appellant Elton Xhemali and one Muskan Balaggan were charged under the following two counts;

**Count One**

*Statement of Offence*

**Engaging in the Transportation of Illicit Drugs:** *Contrary to Section 5(b) of the Illicit Drugs Act, 2004.*

*Particulars of Offence*

***Muskan Balaggan*** on the 26<sup>th</sup> day of January 2011 at Nadi in the Western Division, without lawful authority engaged in dealing with Elton Xhemali for the transportation of 512.6 grams of pure cocaine from the Hexagon Hotel to the Nadi International Airport.

**Count Two**

*Statement of Offence*

**Engaging in the Supply of Illicit Drugs:** *Contrary to Section 5(b) of the Illicit Drugs Act, 2004.*

*Particulars of Offence*

***Elton Xhemali*** on the 26<sup>th</sup> day of January 2011 at Nadi in the Western Division, without lawful authority engaged in dealing with Muskan Balaggan for the transportation of 512.6 grams of pure cocaine from the Hexagon Hotel to the Nadi International Airport.

- [4] It is common ground in the appeal that the facts are not in dispute and briefly, the facts are as follows;

*“According to the evidence at the trial the Appellant Elton Xhemali and Muskan Balaggan, both foreign nationals met with each other at Hexagon Hotel at Martintar, on 24 January 2011. All the evidence available would show that this was a prearranged meeting. Further, according to the prosecution evidence that both the appellant and Muskan made arrangements to book in to two rooms which were almost adjacent to each other. According to one of the prosecution witnesses, Saiban Bibi, on 25 January 2011 both Elton and Muskan were seen in the same room. On 26 January 2011 both had checked out together and left the hotel at the same time in two different taxis. On a tip off received by the police, both the appellant and Muskan were detained at the Air Port. Their luggage was searched and in the luggage of Muskan was found her clothes, laced with Cocaine. The method that had been used to impregnate the clothes was extremely sophisticated. On an analysis that was carried out in a laboratory in Australia it was established that the substance found with the clothes of Muskan were pure Cocaine and there was 521.6 grammes of pure Cocaine soaked in clothes. Muskan’s caution statement was admitted in evidence. The evidence against the appellant was purely circumstantial.”*

- [5] After trial of both Elton Xhemali and Muskan Balaggan, the learned Trial Judge convicted the appellant and Muskan Balaggan as charged and in delivering the sentencing judgment the Learned Judge gave the following reasons: Referring to the appellant the Learned Trial Judge had the following to state;

*“[21] I use 10 years imprisonment as my starting point based on an objective seriousness of the offence of an attempt to export cocaine.*

*[22] I increase the sentence by 4 years to take into account the aggravating features. I make a downward adjustment by 2 years to reflect the offenders’ previous good character and personal circumstances.*

*[23] In this case, Balaggan has spent time in custody on remand from 26 January 2011 (date of arrest) to 11 February 2011 (date bail granted) and from 19 August 2011 (date bail revoked) to 29 September 2011 (date Balaggan became a serving prisoner in another case). Balaggan’s total remand period is two months. Xhemali has been in custody on remand since 26 January 2011. His total remand period is 16 months. I take these into account. The disparity in sentences will be*

*due to the different length of remand periods applicable to the offenders.*

[24] *On each count I sentence Balaggan to 11½ years imprisonment with a non-parole period of 9 years, to be served concurrently. Balaggan is serving a sentence of 18 months imprisonment for an offence that she committed while she was on bail in this case. That sentence was imposed on 29 September 2011. If I make her pre-existing sentence concurrent, her total sentence for two separate offences would be almost the same as the sentence imposed on Xhemali for one offence. After taking into account his remand period it would be wrong in principle and also unfair to Xhemali, if Balaggan's pre-existing sentence is made concurrent. In my judgment, a total term of 13 years imprisonment for two separate offences does not offend the totality principle. The sentence in this case is to be served consecutively with the pre-existing sentence.*

[25] *For an attempt to export an illicit drug as convicted on count 1, sentence Xhemali to 10 years imprisonment with a non-parole period of 8 years."*

- [6] In arriving at the final sentence on the count of "attempt to export Cocaine", the learned High Court Judge had taken 10 years imprisonment as his starting point, and according to the learned High Court Judge "the starting point was based on the objective seriousness of the offence of an attempt to export cocaine".
- [7] From the reasons adduced by the learned Sentencing Judge it is quite discernible that he had given due recognition to the distinction that is required to be maintained in terms of the degree of criminality between the appellant and Muskan Balaggan.
- [8] Both the appellant and Muskan Balaggan appealed against the conviction and sentence. The leave to appeal application of the appellant was heard before the Single Judge on 21 January 2015 and the Ruling was handed down on 19 March 2015.
- [9] The learned Single Judge allowed the appellant's application for extension of time to file leave to appeal and ruled that "the appeal of the Applicant should be listed along with the appeal of the co-accused Muskan Balaggan for argument before the Court of Appeal. (emphasis added)

[10] However, due to some unascertainable reasons this Ruling of the learned Single Judge had not been carried out and consequently, Muskan Balaggan's appeal was taken up for hearing separately on 27 May 2016.

[11] In the Court of Appeal, Muskan Balaggan's conviction and sentence were affirmed. Against that Judgment Muskan Balaggan appealed to the Supreme Court and the decision of the Supreme Court is now reported in **Balaggan v. State** [2016] FJSC 47; CAV0022.2016 (4 November 2016).

[12] As borne out by the Judgment of the Supreme Court, amongst the principal grounds of appeal there was a ground raised to canvas the legality of the sentence of imprisonment imposed on Muskan Balaggan;

*"(ii) The Court of Appeal erred in law in failing to hold that the learned Trial Judge had erred in law when;*

*(a) Handed down a sentence to your Petitioner which was manifestly harsh and excessive and wrong in principle having regard to all circumstances of the case; (emphasis added)*

*(b) Failed to give your Petitioner any order of prospects of rehabilitation, hardship, immaturity.*

*(c) Failed to consider the young age of your petitioner and her future as a young person when sentencing."*

[13] In dealing with the appeal against the sentence, the Supreme Court was not persuaded by the submissions of the learned Counsel made on behalf of Muskan Balaggan that the sentence was harsh and manifestly excessive; (emphasis added).

[14] The Supreme Court has acknowledged the fact that in so far as the imposition of sentences on convicts for narcotic drugs related offences are concerned, there is a scarcity of guideline decisions to follow.

[15] I find that in paragraph 38 of the Supreme Court decision a reiteration of the observations made by the learned High Court Judge in his sentencing judgment;

*"(16) 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. Sentencing guideline cases from other jurisdictions are not helpful because they have different sentencing regimes. But one principle is common in the English, Australian and New Zealand cases, that is, those who deal in hard drugs in substantial quantities must expect to be punished harshly."*

[16] In paragraph [17] of the Sentencing Judgment of the High Court further states that,

*"When sentencing drug smugglers regard must be made to the circumstances that exists in Fiji. Fiji does not have a sophisticated intelligence service to detect drug-smuggling. Our boarder security measures are not apt to deal with sophisticated drug-smuggling. Unless there is a tip off, it is easy to sneak in and out hard drugs. In all cases, the hard drugs were for overseas market. So Fiji is just being used by the drug smugglers as a transit point for reasons I have mentioned. Any punishment for dealing in hard drug must therefore reflect the vulnerability of Fiji becoming a hub for the international drug smugglers".*

[17] It is clear that by echoing the above reasoning given by the learned sentencing Judge the Supreme Court has adopted the above view as its own.

[18] The Supreme Court finally held that there were no merits to the ground of appeal against the sentence imposed in the High Court. Thus, the Sentence of imprisonment imposed on Muskan Balaggan was confirmed.

[19] In this appeal, as referred to earlier, the sole ground of appeal is based on the fact that the sentence was manifestly excessive, harsh and wrong in principle having regard to all the circumstances of the case. This was the same ground on which Muskan Balaggan sought to canvass the sentence imposed by the High Court, unsuccessfully. The sentence of the High Court was affirmed by the Court of Appeal and finally affirmed by the Supreme Court as well.

[20] At the hearing of this appeal, the learned Counsel for the Appellant in support of his argument relied on the decision of this Court in **Roshni Lata v. The State** Criminal Appeal AAU 0037 of 2013, High Court HAC 0083 of 2010/ Lautoka (26 May 2017).

[21] Briefly, the facts in the case was that the Appellant Roshni Lata was convicted for unlawful possession of 1990.4 grams of cocaine contrary to section 5(a) of the Illicit

Drugs Control Act, 2014, and a sentence of 18 years imprisonment with a non-parole period of 16 years imposed on her by the High Court at Lautoka.

[22] In her appeal against the sentence the appellant Lata had raised the following grounds:

- "(1) The Learned Trial Judge failed to consider the tariff in the two more serious cases which he referred to concerning importation of Cocaine as compared to the case before him concerning possession simpliciter, thereby imposing a sentence that was manifestly harsh and excessive.*
- (2) The Learned Trial Judge erroneously took collective social harm as an excessive important factor thereby increasing the starting point substantially thereby causing a miscarriage of justice.*
- (3) The Learned Trial Judge erroneously stated that the offence of possessing drugs was more serious than murder as in murder one life is lost whereas in supply of drugs many lives are lost.*
- (4) The Learned Trial Judge failed to consider that the prosecution had not provided the purity of the drug and as such he was in error to assume that it was of a high purity and thereby failed to give the Appellant any benefit of the fact that it could have been of low purity as the certificate stated no more than it was positive for cocaine.*
- (5) The Learned Trial Judge failed to give the Appellant any credit to her pre-sentence custody.*
- (6) The Sentencing imposed by the Learned Trial Judge was manifestly excessive having regards to all the circumstances of the case." (verbatim)*

[23] In the Court of Appeal it was held that "the following factors would have a bearing on an upward or downward adjustment to a sentence, in cases involving possession of cocaine and heroin;

- "a) the type of offence committed, namely, whether it is importation, exportation, acquiring, offering, supplying, using, manufacturing or possessing.*
- b) quantity.*
- c) purity and market value, where it has been an issue raised at the trial.*
- d) planning, organization, sophistication, and the methods adopted to avoid detection,*

- e) *vulnerability of Fiji becoming a hub for traffickers as stated in Muskan Balaggan (ibid),*
- f) *whether the drug was intended for the local market,*
- g) *the purpose of offending ,whether commercial or for individual use .*
- h) *the role played by the accused; whether “leading”, significant but not leading or less*
- i) *willingness of the accused to co-operate with the authorities*
- j) *whether the accused pleaded guilty and if so at what stage of the proceedings.”*

- [24] In the case of Lata, I find that the *dicta* of the High Court decision in Muskan Balaggan playing a prominent role, in the sense, that the Court of Appeal had followed the rationale in Balaggan’s decision in arriving at the head sentence of 14 years and 11 months. That was at a time when the Court of Appeal did not have the benefit of the Supreme Court decision in Balaggan’s case, where the Supreme Court, while affirming the total sentence of imprisonment held that the complaint against the sentence of imprisonment in Balaggan’s case that it was “manifestly excessive and harsh” does not hold water.
- [25] Herein, I wish to place a special emphasis on another matter to which the Learned High Court Judge had alluded in his sentencing in the case of Elton Xhemali. In his decision the Learned Trial Judge had correctly pointed out the need to maintain a balance between the sentence imposed on Elton and the sentence of imprisonment imposed on Balaggan, in the sense, the need to avoid any circumstances through which the disparity of sentences could occur. (emphasis added).
- [26] Further, it is pertinent to observe that in the case of Lata, the only consideration that the Court had in quantifying the final sentence was not based on only the weight of Cocaine involved in the crime. In the cited criterion laid down (*ibid*) in Lata, there is a specific reference made to the aggravating factors such as “planning, organization, sophistication, and the method adopted to avoid detection”
- [27] As it was revealed in the evidence of the case of Elton and Balaggan, the facts come on all fours with the above criterion for the sophistication with which the attempted exportation of cocaine was designed would provide ample basis to conclude that the



appellant's sentence of imprisonment is justifiable. As a matter of fact in my view, the decision in Lata is not helpful to advance the proposition in favor of the appellant in this appeal.

**Conclusion**

[22] In the circumstances I am unable to hold with the submissions made by the learned counsel for the Appellant that the sentence is manifestly excessive and harsh. I find that to decide it differently would be paving way for disparity in sentencing.

**Orders of the Court**

- (i) *Application to abandon the appeal against conviction is granted.*
- (ii) *Appeal against conviction is dismissed.*
- (iii) *Appeal against sentence is dismissed.*

*W. Calanchini*

Hon. Justice W. D. Calanchini  
**PRESIDENT, COURT OF APPEAL**



*S. Chandra*

Hon. Justice S. Chandra  
**JUSTICE OF APPEAL**

*S. Gamalath*

Hon. Justice S. Gamalath  
**JUSTICE OF APPEAL**