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

CRIMINAL APPEAL NO. AAU 109 of 2017
(High Court Action No: HAC 73 of 2014)

BETWEEN : **AIDAN ALEC HURTADO**

Appellant

AND : **THE STATE**

Respondent

Coram : **Chandra, RJA**

Counsel : **Mr A Singh for the Appellant**
Mr A Jack the Respondent

Date of Hearing : **23 January, 2019**

Date of Ruling : **24 May, 2019**

RULING

[1] The Appellant was charged for having unlawfully imported illicit drugs contrary to section 4 of the Illicit Drugs Control Act, 2004. He had between the 7th day to 10th of February 2014 at Nadi in the Western Division and in Suva in the Central division, imported 20.5042 kilograms of illicit drugs namely cocaine without lawful authority.

[2] On 21 June 2017 he was convicted and sentenced on 27th June 2014 to 13 years and 11 months imprisonment with a non-parole period of 11years and 11 months.

[3] On 29 June 2017 the Appellant filed a timely appeal setting out 5 grounds of appeal against conviction and2 grounds against sentence. On 9 March 2018 he filed further additional grounds of appeal and again on 24 September 2018 further additional grounds were filed.

[4] Written submissions have been filed on behalf of the Appellant on the following grounds of appeal against conviction and sentence.

[5] The grounds of appeal are:

Appeal against conviction:

1. That the learned Trial Judge erred in law when he allowed prosecution to recall their witness Salote Lawakeli without providing defence her statement in advance as to what her new evidence would be and thereby causing miscarriage of justice.

2. That the learned trial Judge erred in law and facts when he placed too much emphasis or weight in the evidence of Salote Lawakeli regarding inter airline agreement without any evidence or that he failed to consider that the Appellant had to change 4 airlines and 4 different boarding passes that could not sustain the original baggage tag.

3. That the Learned Trial Judge erred in law and facts when he failed to consider that when the Appellant initially checked in at Brazil his bag weight was 21 Kg (para 127 of the summing up) but when the bag reached Nadi it was 27 Kg (para 52 page 13 o the summing up).

4. That the Learned Trial Judge erred in law when he overturned the decision of the Majority of Assessors without any cogent reasons.

5. That the Learned Trial Judge erred in law regarding circumstantial evidence and or that he failed to apply the proper test for guilt of the Appellant in a circumstantial evidence case.

6. That the Learned Trial Judge erred in law when he failed to reject the confession that were not voluntary or were fabricated by Police Officers.

7. That the Learned Trial Judge erred in law when he failed to uphold that Prosecution witness's evidence was inconsistent and as such cannot be believed.

8. That the charges were defective in that the Appellant was charged for 20.5 Kg when in fact the illicit drugs produced in Court were 18 Kg and or that the purity test confirmed that only 89% of 20.5 Kg were illicit drugs.

9. That the Learned Trial Judge erred in law when he failed to properly consider the defence case in that there was no evidence that Accused knew or had knowledge that he had illicit drugs in his bag or physical possession the bag that had illicit drugs when it was brought as an unaccompanied luggage to Nadi contained illicit drugs.

Appeal against sentence

10. That the Learned Trial Judge erred in law when he failed to consider or give reasons as to why Appellant should not be fined rather than incarceration as the relevant act gives the option of fine or imprisonment.

11. That the learned Trial Judge erred in law when he acted upon a wrong principle: Allowed extraneous or irrelevant matters to guide or affect him; mistook the facts; and failed to consider some relevant considerations.

[6] The Appellant had left Sao Paulo Brazil on LAN Chilean Airline to Santiago, Chile on 5th February 2014. He had checked-in his bag in Sao Paulo in Sao Paulo on 5th February 2014. He was in transit in Sydney Airport. He had come to Nadi from Sydney on Fiji Airways Flight FJ 910 on the evening of 7th February 2014. He had to charge 4 airlines and had received 4 different boarding passes. Upon his arrival in Nadi he had made a complaint that his baggage did not arrive on Flight FJ 910. He had no tag for the bag when he made the complaint at the Nadi Airport. The bag of the Appellant was located as being listed in the on-hand baggage system of the Sydney Airport. The bag had reached Nadi on the 9th of February 2014. It was kept at the Custom Bond of Nadi International Airport during the night of 9th February 2014. Mr. Isei had been corresponding with the officers at Nadi

International airport on behalf of the Appellant regarding his bag on the 8th and 9th February 2014. He had given his consent to the Bio Security and Custom Officers at the Nadi International Airport to open and verify his bag on 9th February 2014. The bag of the Appellant was opened and checked on 10th February 2014. It contained 4 containers, packed with powdery substances. A preliminary test conducted by the custom Officer Mr. Amit had indicated that the said powdery substances contained Cocaine. The bag with its containers was sent to Nausori on 11th February 2014 under the control and surveillance of the Custom and Police Officers. The drugs and the bag were seized by the Police at the Nausori Airport on the 11th of February 2014. The drugs were tested at the Koronivia Research Centre and it was confirmed to be Cocaine. The purity of the cocaine in the 20.5 kg powdery substance had been 89%. The Appellant had stayed at Peninsula Hotel on 7th, 8th and 9th of February 2014. He had left the Peninsula Hotel in the night of 9th of February 2014 and checked into Sunset Town House apartment. He had met two men near the Civic Centre, Suva in the night of 10th of February 2014. He did not leave Fiji through Nadi International Airport on the14th of February as scheduled in his e-ticket. He decided to stay longer. According to witnesses his English was broken English.

[7] The first ground of appeal is based on a question of law and therefore leave is not required.

[8] The second ground of appeal is a mixed question of fact and law. It involves the consideration of the existence of arrangements between airlines regarding interlining of baggage. It would appear that the learned trial Judge had relied on the evidence of Ms. Salote who had assumed that there was no interline agreement with the Fiji Airways and the Lan Chilean Airline when the Appellant checked in at the airport in Brazil.

[9] This position therefore would necessitate the consideration of the evidence of witnesses who spoke of interlining arrangements between airlines. That would be possible only by looking at the entirety of the evidence led at the trial.

[10] In those circumstances I would leave this ground of appeal to be considered by the Full Court.

[11] The Third ground of appeal relates to the consideration of the weight of the bag by the learned Trial Judge.

[12] It was the evidence of the Appellant that when he checked-in the bag in Brazil it weighed 21 Kg. It was only this evidence that was available to support the position of the Appellant whereas when the bag had arrived in Nadi it weighed 27 Kg. The Appellant had not produced any evidence to support his position such as producing the bag tag or any other evidence to show what he asserted was the weight of the bag.

[13] The learned trial Judge referred to the position that the Appellant had stated in his evidence that the bag had weighed 21Kg when he checked in, in his summing up at paragraph 127 and therefore it cannot be said as urged in this ground that the learned trial Judge had not referred to this factor. This ground is not arguable.

[14] The 4th ground of appeal is that the learned Trial Judge had not given cogent reasons when he overturned the unanimous opinion of the Assessors that the Appellant was not guilty.

[15] In a criminal trial with Assessors before a High Court, the trial Judge is the final arbiter regarding the guilt of the defendant. S.237 of the Criminal Procedure Act 2009 recognises that a Judge has the power and authority to disagree with the majority opinion of the Assessors. This position has been considered in several cases in Fiji which have been cited by both parties.

[16] The crucial issue is as regards the nature of the reasons given by the Judge in disagreeing with the opinion of the assessors. The Judge must give cogent reasons and they must be clearly stated. They must be capable of withstanding critical examination in the light of the whole of the evidence presented at the trial. **Setevano v The State** [1991] FJA 3.

[17] The submissions on behalf of the Appellant refer to the fact that the learned trial Judge has stated that the opinion of the Assessors was not perverse and that contrary to that decision the learned Trial Judge had taken a decision to disagree with the opinion of the assessors.

[18] The fact that the learned trial Judge referred to the opinion as not being perverse does not mean that the learned trial Judge has to abide by that opinion. He on his own as the final arbiter can consider the evidence and come to a contrary decision, which is what occurred in this case.

[19] The submissions on behalf of the Appellant urge that this is a question of law whereas it is disputed by Counsel for the Respondent who submits that it is not a matter of law alone and is a matter which is a mixed question of fact and law.

[20] The learned trial Judge while disagreeing with the opinion of the Assessors has dealt with the evidence in an exhaustive judgment in reaching his conclusion regarding the guilt of the Appellant. This may appear to be sufficient to satisfy the test of cogency. However, due to the complexity of the evidence in the case I would consider it to be arguable as to whether there was sufficient reason for the learned trial Judge to disagree with the opinion of the Assessors.

[21] The fifth ground of appeal is to the effect that the learned Trial Judge erred in law regarding circumstantial evidence and or that he failed to apply the proper test for guilt of the Appellant in a circumstantial evidence case.

[22] The case against the Appellant was virtually based on circumstantial evidence. This ground of appeal involves a question of law and the Respondent has conceded so. Leave is therefore not required.

[23] The 6th ground of appeal is that learned trial Judge erred in law when he failed to reject the confession that were not voluntary or were fabricated by Police Officers.

[24] The Appellant had challenged the admissibility of his confession on the basis of it not being voluntary and it being fabricated. After a voir dire inquiry the learned trial Judge allowed the confession to be admitted.

[25] The Appellant had stated that he had been assaulted and that he was not very conversant in English although he was interviewed in English which he did not understand. Some of the witnesses also had stated in their evidence that the Appellant's English was not good and that he had spoken in broken English.

[26] In the light of the fact that the Assessors had unanimously opined that the Appellant was not guilty which may have been on the basis that they considered his confession to be fabricated or not being voluntary, and the fact that the Appellant's understanding of the English language was put in issue, I would consider this ground to be arguable.

[27] In ground 7 the position taken up is that the learned Trial Judge erred in law when he failed to uphold that the Prosecution witnesses evidence was inconsistent and as such cannot be believed.

[28] The submissions highlight the inconsistencies in the evidence of the Police Officers regarding the finding of the passport of the Appellant and regarding the movement of the drugs after they were discovered, and also in the evidence of Salote and Isei Matatolu.

[29] The learned trial Judge had in his summing up referred to these inconsistencies and directed them regarding the consideration of inconsistencies. In view of this position I do not consider this ground to be arguable.

[30] The eighth ground of appeal refers to a defect in the charge based on the weight of the drugs. The charge referred to 20.5 Kg and the purity test confirmed that only 89% of 20.5 Kg was cocaine.

[31] In a charge as referred to in section 58(b) of the Criminal Procedure Act 2009, what is required is that information must be, "as are necessary for giving reasonable information as to the nature of the offence charged".

[32] This would give the Appellant reasonable information as to the nature of the offence that he was charged with.

[33] The contention on behalf of the Appellant is that since the sentence that would be given would depend on the weight of the drugs involved that there should have been an amendment to the charge when the actual weight was discovered.

[34] In view of the fact that weight of the drugs is also a factor that is taken into account when sentencing I would consider this ground to be arguable.

[35] The 9th ground is on the basis that the Appellant had no knowledge that he had illicit drugs in his bag which arrived unaccompanied to Nadi.

[36] It was the contention of the Appellant that he had no knowledge that his baggage had illicit drugs. The evidence to establish such knowledge was placed before Court in the form of

circumstantial evidence which the learned trial Judge had dealt with in his judgment in paragraphs 12 to 48 when arriving at his conclusion that the Appellant had such knowledge.

[37] The Appellant had in his evidence stated that he had himself packed the bag, that it weighed 21 kg at the check-in in Brazil. He had also stated that the lock in the bag had been changed. There was no dispute that the bag belonged to the Appellant which had some his clothes and personal things.

[38] The bag was not examined at Nadi in the Appellant's presence although he had given his consent for it to be checked by the Bio Security division at the Nadi Airport when the bag arrived from Sydney.

[39] Taking into account all these factors I would consider this ground to be arguable.

[40] Ground 10 which relates to sentence, is to the effect that the Appellant should have been fined and not incarcerated.

[41] The offence with which the Appellant was charged with carries a maximum penalty of life imprisonment or fine not exceeding $1,000,000 or both. The contention that in the present case, only a fine should have been imposed has no basis and is not arguable.

[42] The 11th ground which also relates to sentence is to the effect that the learned trial Judge acted upon a wrong principle, allowed extraneous or irrelevant matters to guide or affect him, mistook the facts, and failed to consider some relevant considerations.

[43] The learned trial Judge had made some observations when sentencing the Appellant regarding the manner in which the large quantity of illicit drugs had been brought in a sophisticated manner which were not irrelevant when sentencing the Appellant. The factors that were taken into account by the learned trial Judge were relevant and justified the imposition of the final sentence. This ground is therefore not arguable.

Orders of Court:

1. *Grounds 1 and 5 are questions of law and therefore do not require leave.*

2. *Leave to appeal against conviction is granted in respect of grounds 2,4,6,8 and 9 only.*

3. *Leave to appeal against sentence is refused.*

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Hon. Justice Suresh Chandra
RESIDENT JUSTICE OF APPEAL