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

Criminal Appeal Nos. AAU 0054 of 2016
AAU 0059 of 2016
AAU 0062 of 2016
(High Court Case No. HAC 126 of 2015)

BETWEEN : **1. JOSEPH ABOURIZK**

2. JOSESE MURIWAQA

Appellants

AND : **THE STATE**

Respondent

Coram : **Gamalath, JA**
Prematilaka, JA
Bandara, JA

Counsel : **Mr. M. Thangaraj with Mr. A. K. Singh and Mr. W. Korn for the 1st Appellant**
Mr. M. Anthony for the 2nd Appellant
Mr. L.J. Burney with Mr. S. Babitu and Ms. S. Tivao for the Respondent
Mr. S. K. Waqainabete for the Legal Aid Commission.

Date of Hearing : **16 May 2019**

Date of Ruling : **7 June 2019**

JUDGMENT

Gamalath, JA

[1] The trite law dictates that in considering the culpability of an accused person, the paramount duty of a court of law is to consider whether, on the whole, the evidence led in a trial has the strength to meet the standard of proof cast upon the prosecution to prove the case beyond any reasonable doubt. If the weight attached to a set of evidence in its totality is unsatisfactory, saddled with irreconcilable inconsistencies, improbabilities or any other inherent, incurable weakness, such infirmities should enure to the benefit of the accused person. These legal propositions need no elaboration. A trial judge dealing with evidence of a case should carefully examine the weight to be attached to such infirmities. If there are infirmities perceivable having regard to the evidence, a trial judge is duty bound to examine them carefully and to evaluate them for the purpose of determining their final effect on the credibility of the relevant evidence. This is a mandatory requirement for it is only through a process akin to that, that the weight to be attached to evidence could be determined. In a judgement, there should be a clear reflection of proof that a trial judge has diligently focus his attention on to this important aspect of judging. In other words it is incumbent upon a trial judge to make reference to such infirmities. The impact of such infirmities on the totality of evidence should have a reflection on the judgement. In the same manner, whenever persons are jointly charged for an alleged commission of any offence, the case against each culprit should be considered severally and distinctly. These basic principles of law play a pivotal role in determining this appeal against the conviction of the two appellants, who stood trial in the High Court of Lautoka, for having in their possession 49.9 kg of cocaine and on conviction sentenced to 14 years imprisonment. There is a cross appeal by the State against the sentence of imprisonment whereby the State invites the Court to lay down guideline principles on sentencing on the offence of possession of cocaine under section 5 of the Illicit Drugs Control Act, 2004.

[2] I shall now refer briefly to the salient parts of the evidence;

1. *The main witness for the prosecution ASP Serupepeli Neiko's evidence reveals that consequent to an information received through a phone call on 12 July 2015 that a drugs related transaction was going to take place on the following day, the 13 July 2015, he and a team of police officers surveyed the area in which it was expected to happen. For transport purposes, the police used a civilian vehicle so that an effective covert surveillance could be carried out. Whilst waiting at Lautoka, to monitor the movement of a private vehicle bearing the registration number HM046,[HM046], the details of which were communicated via a mobile phone, the police spotted HM046 being driven on the highway and started to follow it at a close range.*

2. *HM046 left the city area, entering Natabua junction. From there it proceeded towards Nadi and turned towards Viseisei village. Having gone towards Anchorage Resort, it proceeded towards Marina and after passing Vuda Marina, it went down a narrow gravel road which had a wooden bridge. After travelling down the gravel road for a distance, HM046 having reached an impasse due to a truck load of harvested sugarcane, wanted to turn back to find the exit way through the same gravel road. In the process HM046 was reversed towards a 'mocemoce' tree that was standing on the side of the road. Having reversed, it was parked on the gravel road. The evidence of ASP Neiko was that the two appellants, having alighted from the car, went behind the car and threw out of its boot some bags such as suitcases .According to ASP Neiko, from where he was still sitting in his vehicle, he had seen the two appellants hurriedly repacking some parcels into the two bags in the boot. Thereafter, the appellants returned to HM046 and wanted to drive back along the gravel road. They requested ASP Neiko to reverse his vehicle, clearing their passage.ASP Neiko reversed his vehicle until it reached the point where wooden bridge situated and stopped his vehicle .Since this is a narrow road, HM046 has also to be stopped. According to ASP Neiko, thereafter he had carried out the*

inspection of the boot of HM046, in which he found the parcels containing 49. 9 kilograms of cocaine.

The first appellant who elected to testify at the trial did not deny the detection of cocaine in the boot of HM046.According to his evidence, the bags belonged to one Simon, a Canadian who ran a yacht service. The first appellant ,a visiting Australian met Simon in a restaurant a couple of days before the detection of drugs.(These matters will be discuss in detail later) Simon had promised to take the appellants on a free boat ride in that morning. It was Simon's bags that the police found in the boot of HM046 and as such the appellants had no knowledge of the contents in it. The second appellant associated him-self with the evidence of the first appellant. Thus, they protested their innocence. The admissibility of their caution interview was ruled out after the voir dire inquiry. Although the first appellant revealed to the investigators about Simon, as he was being questioned on the gravel road itself, I find that the investigating officers had been totally unenthusiastic in verifying the information. Throughout the trial the appellants were consistent that the drugs belonged to Simon.

In the final analysis of facts relating to the case, the sustainability of the conviction against the appellants depends solely on the issue of whose version to believe, in the sense ,between the competing two versions of facts coming from the testimony of ASP Neiko on the one hand and on the other hand the evidence of the first appellant in which he denied having any knowledge on the presence of drugs in the boot of HM046, whose version is it that should prevail over the other in terms of credibility is the matter in issue."

[3] A critical analysis of the evidence;

Having regard to the evidence of the main witness for the prosecution, ASP Neiko, I must pause here to state, that the exact positioning of HM046 after it was parked on the gravel road is difficult to gauge.

[4] This difficulty could have been averted, if the prosecution had presented in evidence a sketch plan depicting the important positions of the location. However, in the absence of a sketch plan, one has to depend solely on the evidence of ASP Neiko to conjure up the picture of the scene of crime .Since the evidence of ASP Neiko lacks precision and clarity on this matter, I find it difficult to gain a clear picture as to how ASP Neiko was able to observe the unfolding events at the back of HM046, where the appellants were said to have been busy in repacking the parcels containing drugs into two bags. The appellants contested the truth of this evidence.

[5] According to ASP Neiko, he had seen two men alighting from the parked HM046; accordingly , while an "I –taukei man got down from the side of the driver's seat, the other man with fair complexion got down from the side of the front passenger seat". Further, according to ASP Neiko, while the two vehicles were parked on the gravel road there was a distance of about two meters between them.

[6] At this point , once again I must state I have difficulties in understanding ASP Neiko's evidence, particularly in relation to the manner in which HM046 was parked, in the sense, whether the two vehicles were facing each other or whether HM046 was parked in such a manner so that the police may have observed it from a lateral angle. The significance of the inferences that could be drawn out of this aspect of ASP Neilo's evidence is vital in determining the credibility of his evidence regarding the observation of the movements of the two appellants that he claimed to have made from the distance of two meters. In other words, whether ASP Neiko is credible in his evidence that he saw the two appellants busy in repacking the drugs in the boot of the car is depended on the fact whether or not he could have seen the rear of HM034, from the angle towards which his vehicle was facing HM046. As can be gathered from his evidence, he had still been sitting in his car, whilst observing the activities of the two appellants, who were busy at the back of HM046, with an open cover of the car boot. As said earlier they had been busy in repacking the parcels of drugs into the two bags in the boot. In the circumstances, could he have observed the unfolding scenario from where he had been sitting is rather uncertain

and this difficulty could have been avoided had the prosecution presented in evidence a sketch plan of the scene. As such ASP Neiko's evidence on this issue remains unclear. As regards this matter what is important to the instant appeal is that this issue was strenuously contested by the Counsel for the first appellant. As I can gather from the line of cross examination, it is the contention of the defence that the prosecution's version that the appellants were seen repacking the parcels into two bags was a concoction. Nor had they ever threw away bags out of the boot of the car. Despite the serious issues raised by the defence with regard to this aspect of the credibility of the evidence of ASP Neiko, I find nothing in the Judgement to demonstrate that the judicial scrutiny was directed at this matter.

[7] According to ASP Neiko, the two appellants having got out of the vehicle, threw out some suitcases from the boot of the car. When asked whether he saw who threw out the suit cases, the witness was categorical that he could not see exactly who was throwing out the suitcases. Although, he could not see who was exactly involved in throwing out the suitcases, he had seen both appellants "re-packing items in to black bags". Later in his evidence, the prosecution has made some attempts to clarify the positioning of the two vehicles in relation to each other, and because of its factual significance to this appeal, I wish to state the evidence of ASP Neiko verbatim;

"Mr Neiko: I saw that suitcases were thrown out of the boot of the car

Q: You stated that you saw suitcases thrown out of the boot of the car did you see who was throwing out the suitcases?
A: I could not see who was throwing out the suitcases, My Lord.
Q: What else did you see?
A: I saw the repacking into black bags.
Q: You stated repacking, what do you mean by repacking?
A: Re-packing of items, My Lord.
Q: Now that point who was repacking the items?

A: *Both of them, My Lord.*

Q: *What happened next after you saw the repacking?*

A: *The boot was closed and the 2 male individuals got back into the car.*

Q: *Now just a question officer, when your vehicle was stationary which direction was the car in which these 2 individuals are in which direction was it pointing towards?*

A: *Mr Lord if I may illustrate it was just parking right across it's like where the dock is from the other end of the room.*

A: *Since it has reversed from the gravel road it was down towards that tree, it was more like a right angle direction where I was looking.*

Q: *So Officer, from where you were looking the driver's seat was faced towards your vehicle?*

A: *Yes, My Lord.*

Judge: ***No, can you please specify that, see that you are sitting there in your car, can you point it out which direction in this court house.***

Mr Neiko: *Where the assessors are sitting, My Lord.*

Judge: ***Which direction the car was facing?***

Mr Neiko: *The front of the car was facing towards the gravel road and the back of the car was pointing towards the 'mocemoce'tree. (My emphasis)*

[8] As regards this portion of ASP Neiko's evidence, I get the picture that the two vehicles were facing each other while the appellants were said to be busy in repacking the drug parcels in to two bags in the boot. That makes it difficult, therefore, to believe to a certainty, that ASP had a clear view of the unfolding events at the back of HM046. ASP Neiko, had further stated in evidence that although he could not see which one of the two appellants threw the suitcases out of the boot of the car, he had seen both of them engaged

in repacking packages into the black bags. Thereafter, two of them had returned to the vehicle and sat on their respective seats, "meaning the i-taukei man in the driver's seat and the other one on the passenger seat". ASP Neiko had said in evidence that he was able to observe what went on in the back of HM046 from where he was still sitting in his vehicle. ASP Neiko further stated that thereafter he walked up to the appellants and introduced himself as a police officer. Although he claimed to have seen the repacking of the parcels, he had not made an immediate search in the boot to find out what exactly was there in the boot.

[9] Further, on being inquired as to what they were doing at that location, the first Appellant had replied that they were sightseeing. [pg. 386]. The Appellants wanted ASP Neiko to reverse his vehicle so that HM046 could drive on. Neiko stated that "I agreed to their request, our vehicle reversed and that car came out from where it was parked". It is rather perplexing as to why ASP Neiko did not immediately inspect the packages which he claimed to have seen being're-packed' by both appellants into some black bags in the boot. This confusion is compounded by the fact that according to him, he had been giving pursuit to a vehicle that was said to be used in drugs peddling. Be that as it may, he had acceded to the request of the appellants and reversed his vehicle on to the wooden bridge. HM046 had driven forward and stopped closer to his vehicle. It was then only ASP Neiko asked the appellants to get out of the vehicle for him to carry out an inspection in the boot. In the evidence of ASP Neiko, one cannot find any answers to these uncertainties.

[10] ASP Neiko found the packages of cocaine in the car-boot, forming the basis for the allegation of joint possession of cocaine. ASP Neiko's evidence was subject to a vigorous cross examination by the counsel for the 1st Appellant. Although ASP Neiko claimed that he saw the appellants engaged in re-packing the parcels, he admitted in his cross-examination that no steps were taken to examine the parcels for finger prints comparison. Further in the cross examination, ASP Neiko had the following to state: -

"Q:	*Now at the scene when you asked Mr Abourizk what he was doing there he said he was looking at land for an area to buy, didn't he.*
Mr Neiko:	*Yes, My Lord.*
Q:	*And there was lots of land in that area for sale and in fact still is?*
Mr Neiko:	*Ye, My Lord.*
Q:	*When the crown prosecutor asks you that earlier today what did he say you said sightseeing didn't you?*
Mr Neiko:	*Yes, My Lord.*
Q:	*You left out the very important part to the answer which is he was looking for land in the area for sale?*
Mr Neiko:	*Yes, My Lord.*
Q:	*You left it out because it doesn't help you, that's why you left it out of your answer didn't you?*
Mr Neiko:	*I did not mean to leave that answer My Lord.*
Q:	*You are questioning him about what he was doing there right?*
Mr Neiko:	*Yes, My Lord*
Q:	*That before you asked that question you had seen the 2 of them repacking parcels right?*
Mr Neiko:	*Yes, My Lord*
Q:	*and you claimed this is after being given information about a drug exchange?*
Mr Neiko:	*Yes, My Lord*
Q:	*See if you had not seen any repacking at that point in time you would not need to give them their right would you, you told us you gave them their rights after the preliminary drug test right?*

Mr Neiko:	*Yes, My Lord*
Q:	*Let's assume that you had not seen any repacking there would be no requirement of you to give Mr Abourizk his right before you asked him what you doing here?*
Mr Neiko:	*No, My Lord*
Q:	*But what you were doing you say was questioning him after you saw potential drug activity.*
Mr Neiko:	*Yes My Lord*
Q:	*And that means before you ask that question if that's true you are required to question him and tell him that he does not need to answer your question is that true?*
Mr Neiko:	*That's correct My Lord.*
Q:	*And we know from your evidence that you did not give him his rights before asking him what he was doing there?*
Mr Neiko:	*Correct, My Lord."*

[11] Answering the cross-examination, ASP Neiko said that the official note books in which he kept records of the initial investigation had got destroyed during the recent cyclone. Consequently, in the preparation of his regular statements, upon which he relied on in refreshing his memory, there had been no means through which the accuracy could be determined. In other words, his evidence relating to the events at the scene where the vehicle was intercepted was based primarily and mainly on his memory of events alone. The counsel for the 1st Appellant suggested in the cross examination, it is a mandatory requirement that each police officer embarked on an investigation should carry with him a note book in which he is required to enter the events relating to the investigation, without delay.

[12] The witness admitted in the cross-examination that he had not entered any details in his statement about the exact position in which the "articles" were found in the car-boot. [pg 431]. Since none of the other officers who accompanied ASP Neiko had maintained any investigating notes at the scene, the defence alleged that they were denied the opportunity of having access to any first-hand information with regard to the actual happenings at the place of drugs detection.

[13] As I made reference earlier, ASP Neiko further admitted in the cross-examination that he never questioned the appellants as to what they were doing at the boot of the car, when he initially met them at the scene;

"Q:	*And you certainly did not say anything like "hey you two, what are you re-packing there, you did not ask any question about repacking, did you?*
A:	*No, My Lord. (pg. 447)".*

[14] During the course of the cross examination the witness had further admitted that in maintaining the records of investigation, he had overlooked to refer to many important matters, including the bags being thrown out of the boot of the car;

"Q:	*You are overlooking a lot of important things Officer aren't you in your statement?*
Mr Neiko:	*Yes, My Lord*
Q:	*You overlooked their rights correct?*
Mr Neiko:	*Yes, My Lord*
Q:	*You overlooked the bags being thrown out of the boot?*
Mr Neiko:	*Yes, My Lord*

Q: *You overlooked this important evidence of you being at the Westin?*

Mr Neiko: *That's correct, My Lord."*

[15] As transpired in the cross-examination, despite the directives contained in Force Standing Orders to ensure that a fingerprint expert's assistance should be sought in cases where such expert evidence could be used effectively to solve crimes, the witness ASP Neiko admitted that he had not followed such procedure in this investigation.

[16] ASP Neiko had admitted that although he was involved in a covert surveillance from the previous day to the day of detection, he had not made arrangements to carry a camera with him to be used for this investigation. He had the following answer to be given in relation to this matter, and the effect of the answer that may have been left in the minds of the assessors needs little imagination in this appeal.

"Q: *And because there are no surveillance records, because you did not have a camera, <u>you can say anything you want about what happened that day, can't you?</u>*

A: *Yes, My Lord. (pg 483)."(My emphasis).*

[17] Answering further to cross-examination ASP Neiko stated the following:

"Q: *First time they stopped was few seconds ahead of you on the railway road 2 meters in front? Yes, My Lord. That was the sixthtime.A couple of lines further along, they are 2 seconds in front of you, 2 meters ahead of you, that's the seventh time, and you are saying they got out and repackaged the parcels in front of someone that they don't even know. Answer – They did repack the parcel My Lord.*
Questions – in 2 seconds then they got back into the car. In 2 seconds they transferred 34 parcels, they got out of the car, transferred 34 parcels into another bag and then got back into the car, all in a few

seconds. Is that right, right, and right in front of you? Answer – Yes they did that right in front of me, My Lord. See, not only did you say it then but you claim all this happened in a few second, this transferring of the parcels. That's the evidence you gave the last time, isn't it?

Mr Neiko: *Yes, My Lord.*

Q: *Are you telling us the distance from me to His Lordship is 15 meters?*

Mr Neiko: *No, My Lord.*

Q: *And then I said you are sitting in the car with the driver and another man? Answer – yes, my Lord. These 2 people 2 meters in front of you, got out, they must have seen your car. Its right there, correct? Answer – Yes, My Lord. That's the ninth time of 2 meters. You agree there was no mention of anything other than 2 meters during all of your evidence on the 29th was there?*

Mr Neiko: *No, My Lord*

Q: *Do you agree with me?*

Mr Neiko: *Yes, My Lord*

Q: *Then I said so you're saying they went to the boot of the car. They transferred 50 kilos of drugs from one bag to another while you were watching them? Answer – Yes My Lord. See, you had never put any of these details in your statement, correct?*

Mr Neiko: *That is correct My Lord.*

Q: *So the first time that you were tested on this, this is the evidence you gave, correct?*

Mr Neiko: *That is correct, My Lord. (Page 491}*

Q: *Now, you say yesterday that you could not tell who was throwing the suit cases. Remember saying that yesterday to the Assessors and His Lordship?*

Mr Neiko: *Yes, My Lord*

Q: *What you are trying to do was to pretend that you were too far away to make up which two individual was which?*

Mr Neiko: *Yes, My Lord*

[18] Furthermore, ASP Neiko, particularly in regard to the issue of repacking stated the following, in the re-examination;

Re-Examination:

"Q: *Did you put in your statement what you saw about the repacking?*

A: *I did not put the details of the repacking, My Lord." (pg505).*

[19] Despite the contentious issues to which I have made reference above, it is rather perplexing that the learned Trial Judge, in the judgement had failed to consider any of these material in determining the testimonial trustworthiness of ASP Neiko's evidence. It seems as that the learned Trial Judge had not considered this aspect as important for he had placed a great reliance on the rebuttable presumption contained in section 32 of the Control of Illicit Drugs Act, 2004 for determining the culpability of the appellants. In relation to this matter, suffice it to state for now that in the light of the inconsistencies and improbabilities that the defence had raised at the trial, would it be safe to act on the evidence of ASP Neiko's evidence is a question that begs a clear answer, in the trial as well as in this appeal. As for the trial, if on the strength of the improbabilities and inconsistencies found in the testimony of ASP Neiko, his evidence was considered as untrustworthy, and further considered as incapable of being used to prove the case against the appellants beyond any reasonable doubt, would it have been safe for the learned Trial Judge to arrive at the conclusion to convict the appellants? As said earlier, in the Judgement, the learned Trial Judge had failed to make any references to these issues. In the light of such deficiencies, it behoves this Court to inquire whether it is still safe to sustain the conviction against the appellants who

maintained in their evidence that they had no hand in dealing with the parcels of cocaine found in the boot of the car.

[20] The second witness for the prosecution was one Inspector Maciu, the Chief Investigating Officer of the alleged crime. Apart from the evidence relating to the overall investigation that he carried out, he had been cross examined about one Simon, who according to the defence had placed the bags of cocaine in HM046. It has been the contention of the defence, that the involvement of Simon in the drugs transaction should have been probed into thoroughly for that would have exonerated the appellants from the alleged crime. It was the position taken up by the first appellant in his evidence, that the bags that were found in the boot with drugs belonged to Simon a Canadian, who interacted with him and promised to take him on a cruise. In response to the line of cross examination, Inspector Maciu admitted that both appellants had told him about one Simon and his connection with the bags containing cocaine. Simon had been staying at one place called First Landing Resort. Inspector Maciu's answers go as follows:-

"Q:	*That's not what I said. They told you they could take you to Firs Landing because Simon would be there now.*
Inspector Maciu:	*That's not true, My Lord.*
Q:	*Now, what investigations have you made about Simon or First Landing? Did you go there?*
Inspector Maciu:	*During our reconstruction, My Lord.*
Q:	*Who went? Did you go?*
Inspector Maciu:	*Yes, My Lord.*
Q:	*And you went, you claim the next day, the Tuesday?*
Inspector Maciu:	*Yes, My Lord*

Q:	*Now, you obviously went there and spoke to reception about a man from Canada or America, correct?*
Q:	*We only questioned some of the workers who were working outside the hotel.*
Q:	*Are you telling us that this critical part of the investigation, the person said to be the owner of the bag with the drugs in it, you did not even go to reception?*
Inspector Maciu:	*No, My Lord.*
Q:	*You're agreeing with me, are you?*
Inspector Maciu:	*Yes, My Lord.*
Q:	*Are you, well surely you spoke to the owner of First Landing, didn't you?*
Inspector Maciu:	*No, My Lord.*
Q:	*Your investigation into the owner of the bags with the drugs was limited to speaking to some workers at First Landing. Surely that's not correct, is it correct?*
Inspector Maciu:	*My Lord, the other team TCU was also involved in the investigation enquiring the identity of this Simon, My Lord.*

[21] It is note-worthy that the prosecution did not call any other witness involved in the investigation to testify. Inspector Maciu had admitted in evidence, that in the absence of any conclusive expert evidence, he was unable to state with certainty that the appellants had ever touched the drug parcels. Once again, I find that the learned Trial Judge had made no reference what so ever to these highly contentious issues in the Judgement. In my view, these were issues that should have been used effectively to consider whether the factual presumption contained in section 32 of the Illicit Drugs Control Act had been rebutted. Even without going that far, the primary question that should be asked is "has the learned

Trial Judge used these unsatisfactory evidence with many an improbabilities to consider the weight that could be attached safely to the overall case for the prosecution"?

The Evidence of the First Appellant

[22] In his evidence he explained his years of friendship with the 2nd appellant, who was a cousin of his friend in Sydney, one Saula. He had visited Fiji a couple of times before this incident. In July 2015, in the West Inn Hotel in Denarau, he met one Simon at the Golf Club, where the appellant had been watching the State of Origin game between New South Wales and Queensland. Simon struck up a conversation with him. Simon introduced himself as the owner of a yacht and that he runs a charted yacht service. Simon appeared "quite charismatic, well-educated and likeable", according to the first appellant. Simon had suggested that the appellant could take a boat trip with his wife for approximately about $1400 FJ. The appellant felt happy about the suggestion and exchanged their mobile phone numbers, and the appellant had saved Simon's number on his mobile, which the investigating officers had taken into their custody, upon his arrest. On 9 July 2015 the appellant's wife had arrived in Fiji from Australia. The appellant had booked a boat trip for his wife and him; however, on Sunday Simon called to say that due to a mechanical defect, the boat trip was cancelled. The following day the wife of the appellant returned to Australia. In the morning of the following Sunday Simon had rung him on the mobile and apologised for upsetting his plans to go on the boat trip with the wife and in order to compensate ,he had been offered a free boat trip .When he received the call, he was in the company of the second appellant. The appellant had asked Simon whether it would be all right to invite the second appellant on the trip and Simon had agreed to that. As instructed by Simon, the appellant had gone to First Landing Hotel and by that time the second appellant had already arrived at that place in HM046.

[23] Simon informed them that due to a mechanical defect in the boat, there will be a slight delay in going on the trip. Simon wanted a ride in HM046, ostensibly to meet his crew in the North. His boat was at the First Landing, next to Vuda Mariner. Having arrived at Ba

they stopped the car for Simon to speak to his three crew members. The appellant had taken photos of Simon with his crew and he claimed that the photographs were saved in his mobile, which the police had taken into custody. Simon had returned to the car and informed the appellants that his crew would be going ahead to fetch a marine radio and wanted the appellants to transport the crews' luggage into the boot in the appellants car. The appellant had agreed and accordingly Simon had placed one part of the luggage in the boot and the other part on the back seat.

[24] The appellant was categorical that at no stage either he or the second appellant touched any of the bags. Confirming the line of cross examination of ASP Neiko by his counsel, the appellant stated that the first thing ASP Neiko asked him when they met on the gravel road was whether he was from Canada, inferring that they were looking for a person from Canada. Simon had travelled with them to Ba for about 20 minutes. From there they had travelled to First Landing, where Simon got down at the car park. Simon had informed the appellants he was checking out of First Landing and thereafter he would be accompanying them to the yacht. Simon wanted some time at First Lading to check out. Until he was ready to re-join them, the appellants decided to drive around the area and thus ended up at Vuda point. They have never noticed any vehicle following them .The appellant denied that they threw out any suit cases from the car. That was the sum total of the evidence of the appellants.

[25] Reverting to the evidence of ASP Neiko again to examine his evidence with dispassion coupled with the degree of objectivity that it warrants, it leaves much to be desired as far as whether its credibility would pass muster. In the sense, if one may apply the test of probability to weigh the credibility of his evidence, would it be possible to believe his testimony without entertaining a certain degree of well-founded suspicion that the perpetrators carried out the repacking of parcels containing narcotic drugs, right in front of some unknown persons who were staying in a parked car whilst watching them from a close proximity of about two meters?. Further if his evidence should be believed, the inevitable question to be asked is why did not ASP Neiko arrested the appellants while

they were busy in repacking the parcels into two bags. After all it is his position he was giving pursuit to a vehicle that was said to be carrying drugs. If what ASP Neiko had said was true, it is improbable that he did not take prompt action to arrest the two persons allegedly involved in repacking the parcels of drugs into two bags. Amongst many other tests that are traditionally used as yardsticks to determine the credibility of the evidence of a witness, the test of probability is also an important yardstick used in determining the testimonial trustworthiness of the evidence of any witness. Further, ASP Neiko, during the cross-examination gave the following answers.

> *Q:* *Now you said yesterday that you could not tell who was throwing the suit cases.*
>
> *A:* *Yes My Lord.*
>
> *Q:* *What you are trying to do was to pretend that you were too far away to make up which two individuals was which? [Emphasis is mine].*
>
> *A:* *Yes, My Lord.*

[26] Even on the issue of the distance from where the appellant's vehicle was watched by the Police team, I find ASP Neiko's evidence is riddled with inconsistencies and prevarications. It is more so, when it comes to the crucial piece of evidence relating to the repacking of drug parcels, which he claimed to have seen clearly;

> "Q: Now, did you put in your statement what you saw in the repacking?
>
> A: No, My Lord.
>
> Q: My question is, did you put in your statement what you saw about the repacking?
>
> A: I did not put the details of the repacking, My Lord."

[27] These answers were given in re-examination. Especially, a crucial piece of information of this nature, which is directly relevant in determining the criminal responsibility of the offenders, should have been included in details in his statement, at least for the purpose of,

on the one hand to refresh his memory and on the other hand for the purpose of verifying the truthfulness of the evidence in terms of preserving the spirit of fair trial. There had been no effort taken by the prosecution to elicit a plausible explanation from the witness as to why he failed to enter this part of the events into his statement. In the circumstances, little effort is required to understand the unsatisfactory nature of his evidence.

[28] The prosecution suggested that the appellants were hired by Simon for the purpose of delivering the parcels of drugs. What could be inferred from this suggestion is that the prosecution has not completely ruled out the possibility of the involvement of Simon in the drugs transaction. The appellant did not accept the suggestion. The appellant, in re-examination stated that the first time he saw ASP Neiko's vehicle was whilst turning his vehicle round on the gravel road. It was parked a few metres away.

[29] At this point, if I may recall the answers of ASP Neiko in the cross-examination, towards the end of his testimony, ASP Neiko admitted that he reversed the car on the gravel road to accommodate the appellants to move forward. [Pgs. 496-497]. This was despite the fact that he had already seen the appellants hurriedly repacking some parcels into the bags in the boot.ASP Neiko further admitted that the appellants carried out the alleged repacking right in front of them, from a distance of about 2 meters. He said in evidence "that the appellants transferred the parcels from 2 bags into another bags, while I am watching from a distance of 2 meters away" [pg. 500].

[30] Even after seeing the repacking of the parcels, ASP Neiko had not thought it appropriate to administer the mandatory caution to the appellants. Nor had he questioned the appellants as to what were there in the car -boot. He had merely acceded to the request of the appellants to reverse his vehicle, in the sense that he was clearing the path of the appellants to move forward.

[31] As can be seen from his evidence, it was ASP Neiko's position that the appellants re-packed *the parcels into two bags within split seconds; [pg. 489]*

"Q: And the first time they stopped, was a few seconds ahead of you, on the railway road to meet us in front?

A: Yes my Lord.

Q: And you are saying they got out and repacked the parcels in front of someone that they don't even know?

A: They did repack the parcels my Lord.

Q: In 2 seconds then they got back into the car? In 2 seconds they transferred 34 parcels, they got out of the car, transferred 34 parcels into another bag and then got back into the car, all in a few seconds, is that right, in front of you?

A: Yes, they did that right in front of me, My Lord. [pg489]

[32] As against the totality of the evidence for the prosecution with certain clear improbabilities, I find the evidence given by the Appellant, with which the 2nd Appellant also had associated himself, is devoid of any material to vitiate its credibility. The appellant seemed to have stood his grounds firmly in his testimony in which he is protesting their innocence. However, I am mindful that as trite law dictates, on matters of this nature, the decision making process should be left in the hands of the triers of facts to make a determination, unless there is a manifest serious irregularity occurred; In **R. v Whitehead** (1929) 1 KB 99.

[33] The issue involved in here is that, there is no reference made by the learned Trial Judge about any of these issues in his Judgement. The main contention of the defence throughout the trial had been that the prosecution had presented a weak case based on improbable, inconsistent evidence and the evidence relating to the conduct of the investigation by ASP Neiko shows that the version of the appellants is creditworthy for a court to act upon to acquit the appellants.

The Assessors

[34] The 5 assessors opined unanimously that the appellants are not guilty. The learned Trial Judge disagreed with the unanimous opinion of the five assessors and overturned their opinion of assessors. I am mindful that in disagreeing with the unanimous opinion of the assessors, the learned trial Judge has to adduce cogent reasons and the dicta found in the case of **Johnson v State** [2013] FJCA 45; AAU90.2010 (30 May 2013) has to be considered as providing the guiding principles in disagreeing with the assessors opinion as stated at paragraphs 23 to 34 as follows:

> *"[23] The principles relating to the overturning a verdict of the Assessors by the trial Judge as set out in S.299 of the CPC were laid down by the Supreme Court in **Lautabui v State** [2009] FJSC 7; CAV0024.2008 (6 February 2009).*
>
> *"[28] S 299 of the CPC recognizes that a judge has the power and authority to disagree with the majority opinion of the Assessors. When the judge disagrees with the assessors his or her reasons are deemed to be the judgment of the Court. However, the judge's power and authority in this regard is subject to three important qualifications.*
>
> *[29] First, the case law makes it clear that the judge must pay careful attention to the opinion of the assessors and must have "cogent reasons" for differing from their opinion. The reasons must be founded on the weight of the evidence and must reflect the judge's views as to the credibility of witnesses: **Ram Bali v. Regina** [1960] FLR 80 at 83 (Fiji CA), affirmed **Ram Bali v. The Queen** (Privy Council Appeal No. 18 of 1961, 6 June 1962); **Shiu Prasad v. Reginam** [1972] 18 FLR 70, at 73 (Fiji CA). As stated by the Court of Appeal in **Setevano v. The State** [1991] FJA 3 at 5, the reasons of a trial judge: "must be cogent and they should be clearly stated. In our view they must also be capable of withstanding critical examination in the light of the whole of the evidence presented in the trial."*
>
> *[30] Secondly, although a judge is entitled to differ from even the unanimous opinion of the assesors, he or she must comply with the requirement of s.299 of the CPC to pronounce his or her reasons in open court. It was not disputed by the State that a failure to comply with the statutory requirement, whether because the reasons are inadequate or because they are not pronounced in open court, is sufficient, of itself, to warrant setting aside a conviction in a case where the judge overrides the opinion of the assessors.*

[31] The third point is related to the other two. A person convicted of a criminal offence in the High Court has a right of appeal on any ground which involves a question of law alone: Cap 12, s.21(a)(a). The convicted person may appeal to the Court of Appeal on any question of fact, provided he or she obtains the leave of the Court of Appeal or a certificate from the trial judge: s.21(1)(b). An appeal to the Court of Appeal (whether as of right or after a grant of leave or of a certificate) is by way of rehearing: ***Setevano v State*** *at 14. Thus, a decision by a trial judge to disagree with the assessors' opinion that the accused should be acquitted is subject to an appeal (albeit by leave) in the nature of a rehearing.*

[32] It follows that the reasons of the trial Judge in such a case will be scrutinised closely on appeal. It is important to appreciate that one of the principal rationales for requiring trial courts sitting without juries to give reasons for their decisions is "to enable the case properly and sufficiently to be laid before the ... appellate court": ***Pettit v. Dunkley*** *at 388. The reasons must be sufficient to fulfil that purpose.*

[33] The qualifications to the power and authority of a trial judge to override the opinion of the assessors are closely related because an appeal by way of rehearing on a question of fact presupposes that the judge's reasons expose the reasoning process by which he or she has concluded that the case against the accused has been proved beyond reasonable doubt. Unless this is done, the Court of Appeal may not be able to determine whether the judge erred in reaching that conclusion, much less whether he or she had "cogent reasons" for depriving the accused on the benefit of the assessors' opinion. Further, in the absence of a cogent reasoning process in the judgment, the accused will not know precisely why the assessors' opinion in his or her favour was not allowed to stand.

[34] In order to give judgment containing cogent reasons for disagreeing with the assessors, the judge must therefore do more than state his or her conclusions. At the least, in a case where the accused have given evidence, the reasons must explain why the judge has rejected their evidence on the critical factual issues. The explanation must record findings on the critical factual issues and analyse the evidence supporting those findings and justifying rejection of the accused's account of the relevant events. As the Court of Appeal observed in the present case, the analysis need not be elaborate. Indeed, depending on the nature of the case, it may be short. But the reasons must disclose the key elements in the evidence that led the judge to conclude that the prosecution had established beyond reasonable doubt all the elements of the offence."

[35] I have closely examined the judgement to uncover the reasons for the learned Trial Judge to have disagreed with the opinion of the assessors. As stated above, the trite law demands that in disagreeing with the opinion of the assessors, the learned Trial Judge should adduce cogent reasons.

[36] What then were the cogent reasons upon which the learned Trial Judge placed his reliance in disagreeing with the opinion of the assessors? It is my understanding that the reasons that were given are mainly and basically referable to certain factual matters arising out of the evidence and for the purpose of clarity, I shall now set out them as follows from paragraph 25 to 30 of the judgement;

> *"25.Having concluded that, I now turn onto determine whether the prosecution has proven beyond reasonable doubt that the two accused persons had the knowledge and the control of the illicit drugs that was found inside the bag and suitcases in HM 046.*
>
> *26.ASP Neiko in his evidence stated that he and his team stationed at Natabua junction and monitored for six hours the movement of vehicles going towards Nadi from Lautoka City area on the 13th of July 2015. They then noticed HM 046 coming from the Lautoka city and going towards Nadi. They then followed HM 046 until it turned into the gravel road and drove further about 500 meters and stopped at the railway cart. ASP Neiko did not state in his evidence that HM 046 went into First Landing Resort or stopped anywhere to drop off any person.*
>
> *27.ASP Neiko was extensively cross examined by the learned counsel of first accused person. He admitted in his cross examination that he gave evidence during the voir dire hearing and stated that he first saw HM 046 along the Queen's high way and followed it until it turned to the gravel road and stopped near the railway cart. In this instant case, ASP Neiko stated that he first saw HM 046 when it was passing the junction of Natabua and traveling towards Nadi. He explained the reasons for stating Queen's highway in the voir dire hearing. He said the junction of Natabua is also situated on the Queen's highway. Accordingly, I do not find any fundamental inconsistency affecting the credibility and reliability of the evidence of ASP Neiko in stating that he saw HM 046 when it was passing the junction of Natabuwa and then followed it.*
>
> *28.The evidence of ASP Neiko with regard to HM 046 entering into the gravel road and traveling down until it found the railway cart and stopped there was*

not disputed. It rather goes parallel with the evidence given by the first accused person. Hence, I find the evidence of ASP Neiko in relation to observing of HM 046 and then following HM046 until it came and stopped in the gravel road is credible and trustworthy.

29.Neither the learned counsel for the first accused nor the counsel for the second accused person cross examined ASP Neiko whether HM046 turned into the First Landing Resort before it entered into the said gravel road, or stop somewhere to drop off a person before it entered into the gravel road.

30.Based on the credibility of the evidence of ASP Neiko and the fact that he was not cross examined by the counsel of the two accused persons as to whether he saw HM 046 turning into the First Landing Resort and or stopping somewhere to drop off a person, I do not find the evidence given by the first accused person that he went to First Landing Resort and dropped Simon before entering into the gravel road as credible and reliable evidence."

[37] As regards this, it is important once again to refer to the evidence of ASP Neiko about the investigation he carried out about the movements of HM046. Is this evidence consistent is the most important question to ask in relation to this matter. ASP Neiko at the beginning of his evidence has stated that he started to monitor the movements of HM046 from Lautoka. (pg. 379). Then he said: "We followed the car My Lord after he left the city area".

"*Q: Now officer, how did you come into contact with this car, HM 046?*

A: The number of the car was communicated to me via mobile phone.

Q: Now you stated that you followed the car, after it left the city area. Can you tell us more about this?

A: we followed the car before it reached Natabua junction.

Q: What happened?

A: We kept on following the car, from then on My Lord.

Q: And where was this car headed towards?

A: it was headed towards Nadi, My Lord.

Q: In regards to following this car, tell us about what happened?

A: I informed the driver to maintain a distance from the car, HM046.

Q: What was the distance you inform the driver?

A: It was approximately 5 cars distance between HM046 and the vehicle which I was travelling in.

Q: Why you kept on following this car?

A: We kept on following until the car made a right turn to the road that goes to Viseisei village.

Q: What happened after that Officer?

A: The car made another right turn towards Anchorage Resort.

Q: And then what happened?

A: The car kept on going towards the Marina.

Q: How far were you from HM 046?

A: We were still maintaining the same distance.

Q: And what happened after that?

A: The car went past Vuda Marina and made a right turn onto a gravel road".

That is his position in the examination in chief.

[38] Now, when it comes for answering the cross examination I find this evidence is inconsistent with what he had stated earlier. In answering the cross examination he had stated as follows:-

"*Q: is it the case that you first saw the accused on the Queens highway about 1 km from the scene of the arrest?*

A: That is correct My Lord.

Q: And are you saying that you monitored them in that 1 km range for 6 hours?

A: No, My Lord.

Q: When I ask you a question on the 29th of March what you told us was that you first saw the vehicle along the Queens Highway about 1 km from the ultimate destination and then you told us, you have followed him onto the railway road. That is what you told us. Isn't it?

A: That is correct, My Lord.

Q: And if that version is correct, you're only monitoring them for minutes.

A: No, My Lord.

Q: Alright let's go to what you said. This is page 13 bottom of the page. I ask
you some questions on the 2nd day. Where did you first see the vehicle? Along the Queens Highway was your answer. Is that still your evidence?
A: yes My Lord.
Q: is that near the junction you were telling us yesterday?
A: Yes my Lord.
Q: ok. And then I said well how far from the ultimate destination? And then you said around 1 km. Is that still your evidence?
A: Yes, My Lord.
Q: and then I said so you saw them by chance. Remember what you answer for that Question?
A: I cannot recall my Lord.
Q: Did you monitor them for 6 hours? From a distance of 4 cars?
A: No, My Lord".

[39] Surprisingly, these answers have gone into the record with no objection being raised by the prosecution. In the same vein, there has been no attempt to have this inconsistencies clarified during the course of the re-examination of the witness. One cannot be unmindful of the fact that although the learned Trial Judge is the ultimate trier on facts, that the assessors who were drawn from the community must have been fully conscious of the geographical lay out relating to the area in which the detection was said to have taken place. The distance from Lautoka to the final destination in which the arrest took place was far exceeding just one kilo meter and I have no doubt that the assessors being members drawn from the community must have been attuned to that fact , throughout the trial.

[40] In relation to the proposition by the defence that this was a chance meeting of the vehicle of HM046 and the detection of the drugs was consequent to a random checking, the defence questioned ASP Neiko in the following manner:-

Q: at the scene you decided that this might be an offence involving a large amount of drugs. Is that right? After you have opened the bags?

A: Yes, My Lord.

[41] I find that on the whole, the prosecution evidence has been based on evidence riddled with inconsistencies and improbabilities. In the light of such contentious matters, the learned Trial Judge should have been more circumspective in examining the totality of the evidence lead in the trial. It is unclear from the judgment, the degree of importance that had been attached to the contentious issues contained in the evidence, especially for the purpose of determining where does the truth lie. The learned Trial Judge seemed to have disbelieved the version of the Appellants that there was one Simon involved in the drugs transaction as alleged by the Appellants. However, he seemed to have overlooked the fact if Simon's involvement was untrue, why did the Chief Inspector Maciu in his efforts to reconstruct the crime scene ever went in search of Simon to First Landing Resort, at all.

[42] In a trial, when the Judge is embarked on evaluating the evidence of a witness, it is important for him to make a reference to the inconsistencies, infirmities, contradictions, or omissions that are contained in the evidence of the witness and to make a clear pronouncement as to why despite such weaknesses, he is still inclined to believe the evidence. If the inconsistencies and infirmities are trivial in nature and could be ignored for they do not shake the credibility of the evidence in toto, then a Judge is free to ignore their effect and act upon the evidence and arrive at the conclusion that he wishes to draw from the evidence. On the other hand, if the infirmities or inconsistencies are serious, and serious enough to shake the very foundation of the credibility of the evidence of a witness, then it is the duty of the court to accrue to the benefit of the accused person the impact of such infirmities. There may also be instances where despite the existence of certain serious infirmities inherent in evidence, a court can, after adducing good reasons, ignore them and continue to act on the remaining evidence for their credibility. However, what is important eventually is that there should be a clear and unambiguous reflection of the rationale adopted by a court of law in evaluating the contradictions, omissions, improbabilities and any other infirmities relating to any evidence, for such matters play one of the pivotal roles in the determination of the ultimate credibility of any evidence. (See Prasad v State [2017] FJCA 112; AAU 105.2013 (14 September 2017). Further in relation to the manner in which the Appellate Court should be evaluating the evidence of a trial has been decided in

the case of **M v The Queen** [1994] HCA 63; [1994] 181 CLR 487. (See **Takiveikata v State** [2007] FJCA 45; AAU0065.2004 (25 June 2007); For present purposes it is enough to quote the headnote:

"Held by Mason C.J., Deane, Dawson, Toohey and Gaudron JJ.,

(1) that where, notwithstanding that there is evidence to sustain a verdict of guilty, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the court must ask whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. In answering that question the court must pay full regard to the fact that the jury is the body entrusted with the primary responsibility of determining guilt or innocence and the fact that the jury has had the benefit of having seen and heard the witnesses.

(2) That in most cases a doubt experienced by an appellate court as to the guilt of the accused will be one which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by an appellate court that it may conclude that no miscarriage of justice occurred. That is to say, when the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If the evidence contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the appellate court to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, it is bound to act and to set aside the verdict.

(3) Per Brennan J. An appellate court's function is to make its own assessment of the evidence, not for the purpose of concluding whether it entertains a doubt about the guilt of the person convicted, but for the purpose of determining whether the jury, acting reasonably, must have entertained a reasonable doubt as to guilt.

(4) Per McHugh J. The correct test for determining whether a verdict should be set aside on the ground that it is unreasonable is whether a reasonable jury must have had a reasonable doubt about the accused's guilt. The court must make an independent assessment of the evidence. However, before coming to the conclusion that a reasonable jury must have had a reasonable doubt about the accused's guilt, the court must give due weight to the advantages that the jury had in regard to the evidence and the atmosphere of the trial. If, after considering the evidence, the court concludes that a reasonable jury must have acquitted, the verdict is unreasonable even though there may be sufficient evidence in law to support the verdict."

[43] On the issue of the burden of proof I have carefully examined both the summing up and the judgement in this case and it is my observation that on the whole the learned Trial Judge had misdirected him-self on the issue of the burden of proof, The learned Trial Judge directed as follows in the judgment;

> *"If the prosecution proved beyond reasonable doubt that the two accused persons had in possession of such illicit drugs, the burden will then shift onto the two accused persons to prove that they had a lawful authority to bear such possession. However, the first and second accused persons did not adduce any evidence to establish that they had any lawful authority to have in possession of illicit drugs. Hence, the element of "without lawful authority" was not disputed during the course of the hearing."*

This indeed is an ex-facie erroneous premise for the appellants had been quite unequivocal in their defence that they ever had the possession of cocaine in their possession, be it lawful or unlawful possession. It was their position throughout the trial that the bags containing cocaine was put into the car boot by one Simon and thus they had absolutely no knowledge of their presence until the police found it. I have already dealt with that evidence extensively.

[44] Having regard to the above passage of the judgement , suffice it to state that if the prosecution had proved beyond any reasonable doubt that the possession was without any lawful authority , then the issue regarding the culpability should end, then and there. Whether or not the prosecution has proved the case beyond any reasonable doubt should be the final determination that a court should arrive at, having regard to the totality of the evidence in the trial. This error in the judgement in the instant case could be attributed to the fact that there had been a certain degree of compartmentalization of evidence by placing side by side meaning on one side the prosecution's evidence and on the other side the evidence of the appellant. That is certainly an error in assessing the evidence for implicit in it is the adoption of the criterion used in assessing the evidence on the basis of

preponderance of evidence ,where the standard of proof is lower than that of in a criminal trial.

[45] This error seems to have been repeated throughout the judgement. The reason for that could be attributed to the fact of over emphasis that has been given to the operation of the presumption that is contained in section 32 of the Illicit Drugs Act. As regards that matter, it is important to bear in mind that the dictates of law do not become operative in an abstract vacuum. Laws do not transform them-selves into animation unless there is a platform for their operation created by human intervention. The force of section 32 of the Illicit Drugs Act should also be considered in that light.

[46] The culmination of the error based on the wrongful assertion of the burden of proof can be seen through the tone of paragraph 21 of the judgement in which the learned Trial Judge had stated as follows;

> *"21. The first accused person in his evidence actually did not dispute the presence of suitcases and the bag in HM046. Furthermore, he did not adduce evidence to establish that neither he nor the second accused person were not in control of HM046.According to the evidence of the first accused person, both of them were in HM046 at the location where ASP Neiko approached them. In view of these evidence and the agreed facts, I am satisfied that the prosecution has successfully proved beyond reasonable doubt that,*
>
> *a) the suitcases and the travelling bags were found inside HM046*
> *b) the bag and one of the suitcases found inside HM046 had 34 wrapped parcels,*
> *c) Those 34 wrapped parcels were illicit drugs, namely Cocaine.*
> *d) HM 046 was under the control of the first and second accused persons*.

Having said, the learned Trial Judge concluded that "accordingly, the prosecution has successfully established the presumption of possession as stipulated under section 32 of

the Illicit Drugs Control Act. Hence, the onus is now shifted on the two accused persons to prove contrary or rebut the presumption of possession."

[47] In reality the above facts of (a) to (d) are based entirely on matters that the appellants have not disputed in the trial against them. In other words, the learned Trial Judge had reiterated the obvious, undisputed facts relating to the case and there was never any contention about the factual basis upon which those matters were perceived.

[48] The real contentious issues lie elsewhere for it is the argument of the appellants at the trial that the case for the prosecution is not built upon strong and credible evidence and thus the unsustainability of the conviction. In other words, the pith and substance of the defence had been to ask in simple terms whether it is safe to find the appellants guilty, solely based on such unsatisfactory, shaky evidence .I have in the preceding paragraphs discussed at length the nature of the evidence adduced by the prosecution with a special emphasis being given to ASP Niko's evidence. As against the evidence of the prosecution, the first appellant had also offered his own version of the story in which, putting it in a nut shell, he had said one Simon had placed the bags in the car and the appellants had no knowledge about what contained in them. As pointed out earlier, the evidence of ASP Neiko was not the best kind of evidence that one would expect to be used in determining the guilt or otherwise of a person facing a criminal charge. Its credibility has been tainted with many inconsistencies and improbabilities.

[49] However, neither in the summing up nor in the judgment, I can find any critical analysis of the evidence of the prosecution in general or the evidence of ASP Neiko in particular. The usual yardstick for the purpose of this determination is based on the following guiding principles;

> *(a) that taken as whole one believes the evidence for the prosecution beyond any reasonable doubt, then the accused is guilty. In the same way if the defence evidence is believed, then the*

case for the prosecution should fail. Here the standard of proof is different and it is to be decided on a balance of probability.

(b) that if the evidence adduced by the defence is rejected for its credibility and considered as incapable of creating a reasonable doubt on the case for the prosecution; that does not on its own would be considered as capable of proving the prosecution case, for still the need is to consider whether the evidence for the prosecution can be believed on its own beyond any reasonable doubt. If it is not so, the doubt should enure to the benefit of the accused person.

(c) The other situation is where there is a reasonable doubt about the credibility of the evidence for the defence. In the sense, one neither believes nor disbelieves the evidence of defence. That in effect means the case for the prosecution has not been proved beyond any reasonable doubt and the benefit of such a situation should also be accrued to the benefit of the accused person.

[50] Part 4 of the Illicit Drugs Control Act, 2004, dealing with Evidentiary Matters, speaks of "Factual presumption relating to possession of illicit drugs" under section 32 states:

"Where in any prosecution under this Act it is proved that any illicit drug controlled chemical or controlled equipment was on or in any premises, craft, vehicle or animal under the control of the accused, it shall be presumed, until the contrary is proved, that the accused was in possession of such illicit drug, controlled chemical or controlled equipment. "

[51] Pipson on Evidence at para 6 to para 18 at page 136 dealing with the difference between presumption of law and presumption of fact state as follows:-

"6-18. Presumptions of law differ from presumptions of fact in the following respects:

(a) Presumptions of law derive their force from law, while presumptions of fact derive their force from common sense and logic. However, many of the former have intrinsic logical weight, being indeed derived from the latter, yet there are others which have none. Thus, after a person has been absent for six years and 364 days there can be no presumption of death, yet the addition of one more day's absence will enable the presumption to be applied.

(b) A presumption of law applies to a class the conditions of which are fixed and uniform; a presumption of fact applies to individual cases, the conditions of which are inconsistent and fluctuating. Thus, the presumption of death arises whenever seven years' unexplained absence is proved; but when it is necessary to establish the time of the death more precisely, the question must be decided on the evidence adduced in each specific case.

(c) Presumptions of law are made by the court, and in the absence of opposing evidence are conclusive for the party in whose favor they operate and for the purpose for which they operate; presumptions of fact result in inferences drawn by the tribunal of fact, who may disregard them, however cogent.

In practice, however, these distinctions are by no means easy to apply; and the line of demarcation, even when visible, is often overlooked. A presumption which is regarded by some judges and text writers as one of law is treated by others as one of fact, or of mixed law and fact; indeed, the same judges have not infrequently place the same presumption in different categories at different times."

[52] Section 32 of the Illicit Drugs Control Act 2004, defines the section as containing a factual presumption, which can be rebutted by an accused person by adducing evidence to create a reasonable doubt on the prosecution's case. As the learned Author explained in the citation above *"presumption of facts applies to individual cases, the conditions of which are inconsistent and fluctuating; presumption of fact results in inferences drawn by the tribunal of fact, who made this disregard them however cogent"*.

[53] In the absence of a detailed discussion on the inconsistencies, improbabilities, and other deficiencies clearly perceivable through the evidence adduced in the prosecution's case on a whole, could it be possible to justify the rejection of the evidence adduced for the purpose of rebutting a factual presumption, is a serious question to raise when one is

required to make a conclusion on the justifiability of a Judgment. As I have already highlighted in the preceding paragraphs, in rejecting the evidence of the 1st Appellant, the learned Trial Judge had failed to consider the evidence on the whole, and to explain why he was more inclined to believe the case for the prosecution, notwithstanding the existence of the serious inconsistencies and improbabilities that loom largely over the testimonial trustworthiness of the prosecution's case.

[54] This non direction on the serious improbabilities and inconsistencies in the case for the prosecution is tantamount to a misdirection and I am therefore, of the opinion that the conviction cannot be supported having regard to the totality of the evidence in this case. Further, in the light of the unsatisfactory nature of the evidence adduced by the prosecution, I do not consider this as a fit case where the application of the proviso could be used to purge the defects intrinsical to the prosecution's case. In this backdrop, the cross appeal filed by the State could be taken up for consideration on another occasion, where the circumstances would justify such a consideration.

[55] In the circumstances I hold that the conviction should be set aside and the appeal should be allowed.

Prematilaka, JA

[56] I had the benefit of reading in draft the judgment of my brother Gamalath, JA and respectfully I am unable to agree with the reasons and the conclusions therein. My judgment in this appeal is as follows.

[57] This appeal arises from the conviction of the appellants on a single count of Unlawful Possession of Illicit Drugs, contrary to Section 5(a) of the Illicit Drugs Control Act 2004. The particulars of the offence were as follows

'Joseph Nayef Abourizk and Josese Muriwaqa on the 13th day of 2015, at Lautoka in the Western Division, without lawful authority, were found in possession of illicit drugs weighing 49.9 kilograms.'

[58] After trial, the five assessors expressed opinions that the appellants were not guilty of the said count. The learned High Court Judge disagreed with their opinion and convicted the appellants in the judgment delivered on 22 April 2016. On 29 April 2016 the learned judge imposed a sentence of 14 years of imprisonment with a non-parole period of 12 years.

Preliminary observations

[59] The appellant timely sought leave to appeal against the said conviction and sentence. The State applied for leave to appeal against the sentence. The single Judge of this court in the leave to appeal ruling dated 08 May 2018 summarised the appellant's grounds of appeal as follows.

1. *That the learned trial judge erred in law by shifting the persuasive burden to the Accused, contrary to sections 57 and 59 Crimes Act.*

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.*

[60] The grounds of appeal urged by the State at the leave to appeal hearing were as follows.

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.*

[61] Goundar, JA sitting as the single Judge of the Court of Appeal *inter alia* had said in the leave to appeal ruling;

> *'[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.' (emphasis added)*

[62] Having discussed section 57 and 59 of the Crimes Act, the Ruling has the proceeded to state that 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. Thus, it required no leave to go before the full court.

[63] The single Judge further held in relation to the trial judge's reasons for disagreeing with unanimous not guilty opinion of the assessors that 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.

[64] As for the rest of the grounds of appeal, the single Judge had remarked that they raised questions of mixed law and fact and the main litigation issue at the trial was the fault element and that it was arguable before the full court, having regard to all the evidence, as to 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.

[65] Goundar, JA also found in relation to the ground of appeal against the sentence, where he had granted leave to appeal against the sentence by both the appellants and the State, that it was arguable whether the trial judge had committed error in the exercise of the sentencing discretion and stated that

> *'[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 evidence at the trial in brief

[66] The prosecution alleged that the two accused were having in their possession 49.9kg of illicit drugs, namely Cocaine. They were found in a car bearing the registration number HM 046 ('HM046') at a location close to Vuda Point, Lautoka where only the two appellants were inside the vehicle. The police have found 34 parcels wrapped with plastic wrappers and masking tapes inside a travelling bag and a suitcase found inside the boot of HM 046. At the trial the two appellants had not challenged that the suitcases and a bag were in the HM 046. According to ASP Neiko, he had found some suitcases and a traveling bag inside the boot of HM046 when he had approached and searched the car. He had then found 20 parcels wrapped with plastic wrappers and masking tapes in the travelling bag and 14 more parcels inside one of the suitcases found in HM 046. While giving evidence in court, he had identified the bag and suitcase together with those 34 parcels.

[67] The first and second appellants on their part had admitted in the agreed facts that they were known to each other and had been traveling in HM046 since 07 July 2015. They had further agreed that they were travelling in HM 046 on 13 July 2015. The second appellant had been the driver of HM046 and the first appellant had been the passenger when the police approached them at Vuda Point.

[68] The first appellant had testified at the trial. The second appellant had not given evidence at the trial. No other witnesses too had been summoned on behalf of the appellants. The 01st appellant had said that he met one Simon at Denarau Golf Club. Simon had told him that he owned a boat and he chartered it for trips. The first appellant had then booked a trip for himself and his wife on Saturday but Simon had informed him in the morning that he had to cancel the trip. The first appellant's wife had left Fiji on Sunday. Simon had again called him on next Monday and informed him that he could still go on the boat trip with his wife. Having heard that the wife of the first appellant had already left, Simon had offered him a free boat trip on Monday. The first appellant had gone to First Landing Resort with the second appellant to meet Simon to take the free boat trip. Again,

Simon has told them there was a mechanical problem in the boat and had taken them to Ba. According to the first appellant, in Ba, Simon had asked them to take the baggages of his crew in HM046 as they can go to the boat and make it ready until the crew returned with the correct marine radio. First appellant had returned to Vuda Point with the second appellant and Simon. They had dropped Simon at First Landing Resort, who wanted 15 minutes for him to check out from the Resort. Simon had asked the two appellants to go to Vuda Marina, which was situated right next to the Resort and that he would meet them there. The two appellants instead of going there had turned to the left side of the Resort and gone along a narrow gravel road to see lands for sale. When they saw a railway cart parked beside the gravel road they had realised that they could not go further. They turned their car back. At that point they saw the vehicle of ASP Neiko. ASP Neiko approached them and asked them what they were doing at this location. According to the evidence given by the first appellant, the two accused persons claim that they had no knowledge of or knew nothing of the existence of drugs in the bag and suitcases as they belonged to Simon.

[69] ASP Neiko in his evidence had stated that acting on a tip off over the phone, he and his team positioned themselves at Natabua junction along Queen's highway and monitored for six hours the movement of vehicles going towards Nadi from Lautoka City area on 13 July 2015. However, they had no surveillance camera with them to take photographs. The police party was in a private vehicle and ASP Nick was wearing casual wear. They had then noticed HM 046 coming from the Lautoka city and going towards Nadi and the team had followed HM 046 until it turned onto the gravel road and drove further about 500 meters and stopped at the railway cart. ASP Neiko had not spoken of him having observed HM 046 going into First Landing Resort or stopping anywhere to drop off any person as claimed by the 01st appellant. Neither had such a scenario been suggested to him under cross-examination. Thus, the evidence of ASP Neiko with regard to HM 046 entering into the gravel road and traveling down until it found the railway cart and stopped there appears to have stood unchallenged.

[70] In paragraph 21 and 22 of the judgment the trial judge states as follows

> *21. 'The first accused person in his evidence actually did not dispute the presence of suitcases and the bag in HM046. Furthermore, he did not adduce evidence to establish that neither he nor the second accused person were not in control of HM046. According to the evidence of the first accused person, both of them were in HM 046 at the location where ASP Neiko approached them. In view of these evidence and the agreed facts, I am satisfied that the prosecution has successful proven beyond reasonable doubt that;*
> *a. The Suitcases and the travelling bag were found inside HM 046,*
> *b. The bag and one of the Suitcases found inside HM 046, had 34 wrapped parcels,*
> *c. Those 34 wrapped parcels were illicit drugs, namely, Cocaine,*
> *d. HM 046 was under the control of the first and second accused persons.*
> *22. Accordingly, the prosecution has successfully established the presumption of possession as stipulated under Section 32 of the Illicit Drugs Control Act. Hence, the onus is now shifted on the two accused persons to prove contrary or rebut the presumption of possession.'*

[71] My brother Gamalath, JA too has agreed that the matters stated under (a) to (d) under paragraph 21 of the impugned judgment are based entirely on undisputed facts or matters that the appellants have not challenged at the trial and as against that, the appellants' position had been that he had no knowledge of what the bags said to have been placed by one Simon in HM 046 contained. Further, Gamalath, JA too has agreed that the appellant's position at the trial had been that the bags containing Cocaine were put into the car boot by Simon, a Canadian and that the illicit drugs belonged to Simon. Needless to state that ownership of articles is of little relevance when an accused is charged under section 5 of the Illicit Drugs Control Act 2004 based on possession of such prohibited articles.

[72] Section 32 of the Illicit Drugs Control Act 2004 states

> **'***Factual presumption relating to possession of illicit drugs*
>
> *Where in any prosecution under this Act it is proved that any illicit drug, controlled chemical or controlled equipment was on or in any premises, craft, vehicle or animal under the control of the accused, it shall be presumed, until the contrary is proved, that the accused was in possession of such illicit drug, controlled chemical or controlled equipment.***'**

[73] It is clear that the burden of proof on an accused when the presumption under section 32 of the Illicit Drugs Control Act 2004 becomes operative is a legal burden in terms of section 60(c) of the Crimes Act due the specific words 'until the contrary is proved' found in section 32. The word 'unless' in section 60(c) of the Crimes Act and the word 'until' in section 32 of the Illicit Drugs Control Act 2004 have the same meaning here. Legal burden means the burden of proving the existence of the matter (vide section 57 (3) of the Crimes Act) and the legal burden must be discharged on a balance of probabilities (vide section 61 of the Crimes Act).

[74] To that extent the trial judge had erred in law in treating the burden on the appellants as an evidential burden under section 59(1) of the Crimes Act when the presumption under section 32 of the Illicit Drugs Control Act 2004 becomes applicable. However, this error has prejudiced the prosecution and not the appellants. However, there was an evidential burden on the appellant to show, if that be the case, that they had lawful authority to possess the quantity of Cocaine concerned, as the prosecution cannot be expected to prove the negative and that fact was exclusively within the knowledge of the appellants. The appellant did not discharge this burden and in fact, they could not have done so without first admitting that they knowingly had in their possession the prohibited drug. Given their defense of lack of knowledge of the presence of Cocaine in the bag and suitcase in the boot of the car, the element of 'without authority' in section 5(a) of the Illicit Drugs Control Act 2004 should be taken as proven when the physical presence of the bag and suitcase containing Cocaine in the boot was admitted. The ground of appeal based on an error on the burden of proof is, therefore, rejected.

[75] Given the above evidence of the prosecution, it is clear that the prosecution had proven that 34 wrapped parcels were in HM 046, those parcels contained illicit drugs, namely Cocaine and they were under the control of the appellants**.** ***In*** **Koroivuki v State** AAU0018 of 2010: 5 March 2013 [2013] FJCA 15 the Court of Appeal said of possession as follow.

> *'The Illicit Drugs Control Act 2004 does not define the word "possession". In absence of a statutory definition, the Court can be guided by the English common*

*law definition of the word "possession". Possession is proven if the accused intentionally had the drugs in his physical custody or control to the exclusion of others, except anyone who was acting in concert with him in the alleged offence (**Lambert** [2002] 2 AC 545). Possession is also proven if the accused intentionally had the substance in some place to which he either alone or jointly with some other person acting in concert with him had access and might go to get physically or control it (**Lambert,** supra).'*

[76] However, section 4 of the Crimes Act, though not exhaustive, interprets what the words "possession", "be in possession of" or "have in possession" include and in my view, any English common law definition of possession should be adopted keeping section 4 also in mind and in a way not inconsistent with section 4. Section 4 of the Crimes Act also defines what joint possession is. In that context, it is my humble view that the additional element of 'extra beneficial factors' recognized in English common law as part of joint possession is not found in section 4 of the Crimes Act and therefore should not be regarded as part of the concept of joint possession in Fiji as stated in **Mohammed v State** AAU0092 of 2011: 12 December 2014 [2014] FJCA 216.

[77] Therefore, quite independent of the common law definition of possession, in the instant case the factual presumption relating to possession of illicit drugs under section 32 of the Illicit Drugs Control Act 2004 read with section 4 of the Crimes Act should be applied and it should therefore be presumed that the appellants were jointly in possession of that quantity of Cocaine. The burden of proving the contrary was on the appellants. However, given the position taken up by the first appellant in his evidence it is clear that they were not challenging the physical possession of 49.9 kg of Cocaine. According to the first appellant's evidence the appellants were admittedly aware of the presence of the suitcases and bags in HM 046 but had no knowledge of the contents therein. In other words, the appellants' real challenge was to the fault element of the offence which they stood charged with.

Relevant provisions of law

[78] Section 5 of the Illicit Drugs Control Act 2004 states as follows

> *'Any person who without lawful authority*
>
> *(a) acquires, supplies, possesses, produces, manufactures, cultivates, uses or administers an illicit drug; or*
> *(b) engages in any dealing with any other person for the transfer, transport, supply, use, manufacture, offer, sale, import or export of an illicit drug;*
>
> *commits an offence and is liable on conviction to a fine not exceeding $1,000,000 or imprisonment for life or both.'*

Elements of the offences created by section 05 of the Illicit Drugs Control Act 2004

[79] Section 13 (1) of the Crimes Act states that an offence consists of physical elements and fault elements. Fault element in some jurisdictions is called the mental element or *mens rea*. Therefore, any given offence could have more than one physical element and more than one fault element. According to section 13(2), the law that creates a particular offence could provide that there is no fault element for one or more physical elements of that offence. Similarly the law that creates an offence could also provide different fault elements for different physical elements [*vide* section 13(3)] of that offence. Thus, unless the law creating an offence specifically provides otherwise as anticipated in sections 13(2), every such offence must be taken to consist of physical as well as fault elements. For a person to be found guilty of committing an offence physical element/s and fault element/s have to be proved (vide section 14). Thus, the mere absence of a specific reference to a fault element in an offence does not mean or presupposes the lack of a fault element/s in that offence unless the law creating that offence specifically rules out such a fault element.

Strict liability

[80] There is another class of offences recognized by the Crimes Act. The law creating a particular offence could provide that an offence should be a strict liability offence in which event there are no fault elements for any of the physical elements of such a strict liability offence [*vide* section 24(1)(a)]. The law creating an offence may also provide that strict liability applies to a particular physical element of that offence [*vide* section 24(1) and (2)] in which event there are no fault elements for that physical element [*vide* section 24(2) (a)]. Thus, there can be two types of strict liability offences.

Absolute liability

[81] Section 25 deals with offences of absolute liability which are similar to the two types of strict liability offences under section 24 except that the defense of mistake of fact under section 35 is unavailable in the two types of absolute liability offences whereas mistake of fact as a defense is available in respect of strict liability offences.

[82] It appears that the offences referred to in section 13(2) could either become strict liability offences or absolute liability offences depending on how the law creating the offence may provide.

Offences that do not specify fault elements

[83] There are other offences where the law creating those offences do not rule out fault elements but do not specify fault elements either and thus, are silent as to the required fault elements. In other words, those offences have no fault elements inbuilt in the definition of the offences. However, it would be wrong to assume that those offences have no fault elements. It is to deal with such offences that Crimes Act, 2009 has promulgated section 23.

[84] Section 23 (1) and (2) declare that

> *'If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.'*
> *[section 23(1)]*
>
> *'If the law creating the offence does not specify a fault element for a physical element that consists of circumstance or a result, recklessness is the fault element for that physical element.'*
> *[section 23(2)]*

[85] The physical elements of an offence are (a) conduct or (b) a result of conduct or (c) a circumstance in which conduct, or a result of conduct, occurs [*vide* section 15(1)]. '*Conduct'* means an act or an omission to perform an act or a state of affairs and *'engage in conduct'* means (a) do an act or (b) omit to perform an act [*vide* section 15(2)].

[86] In my view, the offences created by section 05 of the Illicit Drugs Control Act 2004 do not specify fault elements and do not specifically rule out fault elements either. Further they are not strict or absolute offences. Therefore those offences created by section 05 are in the category of offences envisaged by section 23 of the Crimes Act. The physical elements for those offences are, of course, clearly the acts set out under section 05(a) and 05(b). Thus, the answer to the question whether the physical element/s in those offences consist only of conduct or a result of conduct or a circumstance would determine what the fault element/s in those offences created under section 05 are. In other words, it has to be determined whether the offences created by section 05 of the Illicit Drugs Control Act 2004 come under sections 23(1) or 23(2) of the Crimes Act in order to identify the corresponding fault elements.

[87] For the purpose this appeal, I shall mainly focus on the act of possession. Is possession a mere conduct, a result of conduct or a circumstance? It is my considered view that possession constituting the physical act of the offence denotes not merely a conduct or a result of conduct but a circumstance as set out in section 15(1)(c) inasmuch as possession is concerned with a relationship between a person and property which gives the person

control over it. Possession could be of two types: 'actual'/'de facto' or 'constructive'/'legal'. Section 4 of the Crimes Act seems to recognise both types of possession.

[88] Section 4 of the Crimes Act states that "possession", "be in possession of" or "have in possession" includes —

> *(a) not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person;*
>
> *(b) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them*

[89] However, needless to state that section 4 is not exhaustive of the interpretation of 'possession' but states what it *inter alia* includes.

[90] The word circumstance is not defined in the Crimes Act, 2009. It has been defined in the Cambridge English Dictionary as *'a fact or event that makes a situation the way it is'* and as *'a fact or condition connected with or relevant to an event or action'* by the Oxford English Dictionary. Merriam-Webster Dictionary describes it as '*a condition, fact, or event accompanying, conditioning, or determining another: an essential or inevitable concomitant'*. Webster's New World Dictionary describes a circumstance as *'a fact or event accompanying another, either incidentally or as an essential condition or determining factor.'*
Therefore, I am inclined to conclude that possession is a circumstance rather than a mere conduct or a result of conduct.

[91] Therefore, since section 05 of the Illicit Drugs Control Act 2004 (i.e. the law creating the offence) does not specify a fault element for the physical element of possession section 23(2) would become applicable and recklessness becomes the fault element for the

physical element of possession. This is the same with all other acts described under section 05(a) and 5(b) of the Illicit Drugs Control Act 2004, though not applicable in this case.

[92] Section 14 states *inter alia* that in order for a person to be found guilty of committing an offence the existence of the physical element and the required fault element in respect of that physical element must be proved (by the prosecution). Fault elements of an offence could be intention, knowledge, recklessness or negligence unless the law creating the offence may specify any other fault element [*vide* section 18(1) and 18(2)]. Therefore, I conclude that the prosecution in cases where accused are charged under section 05 (a) and 5(b) of the Illicit Drugs Control Act 2004 has to establish (i) the relevant physical act/s described therein and (ii) recklessness on the part of the accused as defined in section 21 (1).

[93] Section 21(1) states that

'A person is reckless with respect to a circumstance if -
(a) he or she is aware of a substantial risk that the circumstance exists or will exit; and
(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.'

[94] When recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element [*vide* section 21(4)]. Therefore, in cases under section 05 (a) and 5(b) of the Illicit Drugs Control Act 2004 the fault element would be established if the prosecution proves intention, knowledge or recklessness as defined in sections 19, 20 or 21 respectively. The presence of any one or more of the three fault elements namely intention, knowledge or recklessness would be sufficient to prove the fault element of the offences under section 05 (a) and 5(b) of the Illicit Drugs Control Act 2004.

[95] Section 19 and 20 are as follows.

'Intention

19. — (1) A person has intention with respect to conduct if he or she means to engage in that conduct.

(2) A person has intention with respect to a circumstance if he or she believes that it exists or will exist.

(3) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.

Knowledge

20. A person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events.

[96] It can be safely inferred from section 4 of the Crime Act that knowledge is part of the concept of possession in Fiji. In **Lata v State** AAU0037 of 2013: 26 May 2017 [2017] FJCA 56 Gounder, JA held that both knowledge and intention are fault elements of possession having regard to section 4 of the Crimes Act and common law judicial pronouncements and elaborated it as follows

*'[30] **Lord Hope** in the House of Lords in **Lambert [2002] 2 AC 545**, stated that "there are two elements to possession. There is a physical element, and there is the mental element." The physical element involves proof that the thing is in the custody of the accused or subject to his control. The facts of this case show and the Appellant herself accepts that she had constructive possession of the bag containing the illicit drugs on the 13th of June 2010, which satisfies the actus reus element of the offence. In the absence of a definition of 'possession' in the Illicit Drugs Control Act guidance can obtained from the Crimes Act 2009 as regards 'possession'. As per the **definition of possession in the Crimes Act 2009** 'Possession' includes "not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person;...". In **Korovuki v State [2013] FJCA 15 AAU 0018.2010** the Court of Appeal adopted a similar approach by stating: "Possession is proven if the accused*

intentionally had the drugs in his physical custody or control to the exclusion of others...". ***.*** *The offence of unlawful possession necessarily requires proof of the requisite mental or fault element before a conviction can be entered.*

[31] The law separates the physical element of possession (the corpus) from the mental element (the animus possidendi), i.e. the intention to possess. ***The fault element of possession is knowledge and intention****. A person has knowledge of something if he or she is aware that it exists or will exist in the ordinary course of events.* ***There are circumstances in which the requisite knowledge may be imputed.*** *Knowledge includes deliberately shutting one's eyes to the truth. Mere knowledge of the presence of illicit drugs cannot be equated with control.* ***A person has intention with respect to possession if he or she means to engage himself or herself in possessing the substance****. It is therefore implicit that in every case of possession, a person must know of the existence of the thing which he or she has or controls, although it may not be apparent whether a person knew of the quality of the thing in question. A person will not be liable if he neither believed, nor suspected, nor had any reason to suspect that the substance was an illicit drug.* ***Lord Scarman remarked in Boyesen [1982] 2 A.E.R 161*** *adopting the description of possession given by* ***Lord Wilberforce in Warner v Metropolitan Police Commissioner [1969] 2 AC 256*** *said: "The question to which an answer is required...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, in my opinion, be invited to consider all the circumstances...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, he had at the time of receipt or thereafter up to the moment when he is found with it..." I would venture out to say the manner in which the substance was dealt with by the accused, after it has been received, like in this case, would also be indicative of the intention of the person who received it.*

[97] As already held above, it is my considered view that in addition to intention and knowledge, recklessness too is part of the fault element of possession under section 05 (a) of the Illicit Drugs Control Act 2004 in Fiji. This is the same with all other offences under section 05 (a) and 5(b) of the Illicit Drugs Control Act 2004. Therefore, the concept of fault elements under section 05 (a) and 5(b) of the Illicit Drugs Control Act 2004 assumes a wider scope than the fault elements identified in common law.

[98] With regard to the evidence concerning the appellant's possession of the quantity in issue the trial judge in his judgment has said as follows. As already pointed out earlier the fact of possession was not a matter of contention and the evidence of the 01st appellant had reinforced the factual presumption of possession in section 32 of the Illicit Drugs Control Act 2004. The 01st appellant had not sought to rebut the factual presumption of possession under section 32 and in any event his evidence was not capable of displacing that presumption by discharging the legal burden on a balance of probabilities.

28. 'The evidence of ASP Neiko with regard to HM 046 entering into the gravel road and traveling down until it found the railway cart and stopped there was not disputed. It rather goes parallel with the evidence given by the first accused person. Hence, I find the evidence of ASP Neiko in relation to observing of HM 046 and then following HM046 until it came and stopped in the gravel road is credible and trustworthy.

[99] On the fault element the trial judge had addressed himself as follows.

34. 'The existence of knowledge and intention could be inferred from the facts that are considered as proven. Drawing of inference is a process which allows to draw a further conclusion of the existence of a fact from evidence which is considered as reliable and proven. The conclusion or the inference must be the only and certain rational conclusion or inference of the guilt of the accused persons. If the evidence that you accepted or considered as reliable and proven, suggest you some other probable inferences or conclusions, which show the innocence of the accused or create a doubt as to the guilt of the accused, it is then not entitled to draw any inference or form any conclusion of guilt of the accused person.

35. The prosecution has proven beyond reasonable doubt that the first accused person is an Australian, visiting Fiji, knew the second accused person. They had been traveling in HM 046 since 7th of July 2015. They were found by ASP Neiko while they were driving along Queen's highway in HM046 from the direction of Lautoka City. He followed them until they entered into a gravel road and stopped after driving about 500 meters into the gravel road at a remote location. HM 046 did not stop anywhere or turn into the First Landing Resort to drop anyone. Then the police found suitcases and bag inside HM 046. They further found 34 wrapped parcels inside one of the suitcases and the bag. The parcels were tested and confirmed positively as illicit drugs namely Cocaine.

36. In view of these proven facts, I could draw a positive inference that the two accused persons had the knowledge of the existence of these illicit drugs in their joint control. I am satisfied, that the above proven evidence do not suggest any other probable inferences or conclusions showing the innocence of the two accused persons or creating reasonable doubts as to the guilt of the two accused persons. Accordingly, it is my considered opinion that prosecution has successfully proven beyond reasonable doubt that two accused persons were found in joint possession of illicit drugs namely Cocaine.

[100] As to why the trial judge had not believed the first appellant' version can be found in the following paragraphs

> *29. 'Neither the learned counsel for the first accused nor the counsel for the second accused person cross examined ASP Neiko whether HM046 turned into the First Landing Resort before it entered into the said gravel road, or stop somewhere to drop off a person before it entered into the gravel road.*
> *30. Based on the credibility of the evidence of ASP Neiko and the fact that he was not cross examined by the counsel of the two accused persons as to whether he saw HM 046 turning into the First Landing Resort and or stopping somewhere to drop off a person, I do not find the evidence given by the first accused person that he went to First Landing Resort and dropped Simon before entering into the gravel road as credible and reliable evidence.*
> *31. The learned counsel for the first accused person submitted during his closing address that Simon has manipulatively and surreptitiously involved the two accused persons in transportation of illicit drugs. If Simon had the intention to involve the two accused persons as drug mules in the transportation of million dollar worth illicit drugs, he must do so in order to transport the substance safely and also to conceal his identity from the law enforcement authorities, if the substance was detected by law enforcement authorities while transporting. If so, Simon should not have travelled with the two accused persons in HM 046 with these illicit drugs and leave it with the two accused persons while he went into the Resort to check out. Simon had not known first accused person apart from his meeting with the first accused person at the Denarau Golf Club. Hence, I do not find the evidence of the first accused person that Simon took them to Ba and asked them to bring the baggages in HM046 with Simon as credible, probable and truthful evidence.*
> *32. In view of the reasons discussed above, I refuse to accept the evidence given by the first accused person that the bag and suitcases found in HM046 belonged to a person by the name of Simon and he dropped Simon at the First Landing Resort before they entered into the said gravel road.*
> *33. Furthermore, I find the evidence given by the first accused person has not created any reasonable doubt on the evidence of ASP Neiko that he followed HM 046 from the Queen's highway until it came and stopped near the railway cart along the gravel road. Accordingly, I am satisfied that the prosecution has successfully proven beyond reasonable doubt that HM 046 was came along the Queen's highway from the direction of Lautoka City, towards Nadi and then came to this particular gravel road without stopping anywhere or turning to First Landing Resort to drop someone.*

[101] Thus, it is clear that the trial judge's conclusion that the prosecution had proved the fault element of the offence of possession of Cocaine under section 05 (a) of the Illicit Drugs Control Act 2004 is not based on the presumption under section 32 of the Illicit

Drugs Control Act 2004 which is any way a factual presumption only. He had arrived at that conclusion based on the evidence of the case.

[102] On the other hand, in addition to the above evidence that the trial judge had considered to conclude the fault element of the offence, I find that the evidence of ASP Neiko that he saw the appellants getting down from HM046, going behind it, throwing out some bags and suitcases from the boot of the car, thereafter hurriedly repacking some parcels into two black bags in the boot and then getting into to the vehicle to drive back, is also very much relevant and lend support to arrive at a finding of the presence of the fault element of possession namely that they had knowledge of what the bags contained. It is not necessary that they knew that they contained Cocaine. It is enough if they knew that the bags contained some prohibited or illicit drug. A charge of illegal possession of an illicit drug will be satisfied if the accused possessed a substance in the knowledge or belief that it was a prohibited narcotic drug, even as he may not have known its precise nature because it is practically very difficult to prove the accused's knowledge of the precise nature of the substance. The appellants had contested this evidence of ASP Neiko. There was no reason ASP Neiko to fabricate only this part of his evidence as everything else up to that point appears to be truthful when tested in the context of the 01st appellant's evidence. Though, the trial judge had not referred to this piece of evidence in the judgment, he had referred to it in the summing up in several paragraphs in full detail. According to section 237(5) of the Criminal Procedure Act the summing up too shall be part of the judgment and therefore it is not correct for the appellants to argue that the trial judge had not referred to the above piece of evidence in the judgment. The judgment consists not only of the judgment dated 22 April 2016 but also the summing up dated 20 April 2015 which is much more comprehensive, as it should be, than the judgment on 22 April. Judgment was to give cogent reasons for disagreeing with the assessors.

[103] However, I find that the trial judge had stated in the judgment that the assessors' opinions were not perverse but proceeded to give reasons for differing with the assessors' opinion. There is no legal requirement that the assessors' opinion should be perverse for the trial judge to disagree with it. The trial judge is required to give cogent reasons in writing

when he disagrees with the assessors and pronounced them in court [vide section 237(4) of the Criminal Procedure Act]. It is immaterial whether the assessors' opinion is perverse or not. To that extent the trial judge had overstated the requirement under section 237(4) of the Criminal Procedure Act. However, that again has not prejudiced the appellants.

Alleged 'inconsistencies', 'improbabilities' and 'deficiencies' of the evidence of ASP Neiko.

[104] ASP Neiko who was in a private vehicle and not in uniform had admittedly not seen which appellant threw away suitcases as he was at a right angle direction towards the boot of HM046 which had been parked across the gravel road while his vehicle was on the gravel road facing HM046. His location would have enabled the witness to see what the appellants did at the back of HM046 though not as clearly as he was looking directly at its boot. ASP Neiko's official notes on the incident had got destroyed during the cyclone Winston and therefore could not refresh his memory by referring to them at the trial. He was questioned about his statement where he admittedly had not made details of repacking of bags in his statement which does not necessarily mean that he had made no reference at all to the act of repacking in his statement. The fact that ASP Neiko had not mentioned of the throwing of bags and repacking in the *voir dire* inquiry could be easily understood as the whole purpose of the *voir dire* inquiry was to test the voluntariness of the cautions interviews and there was no necessity to lead evidence of all other details at the inquiry. The appellant's had no reason even to suspect that the vehicle that came from behind was a police vehicle or there were police officers in the vehicle. Thus, their conduct of throwing away some suitcases and repacking them into other bags is not so improbable as to be disbelieved. Even the 01st appellant admitted in evidence at the trial that ASP Neiko's vehicle was parked on the gravel road a few meters away when they saw it and when they tried to turn back. When approached by ASP Neiko, the 01st appellant had said that he was on sight-seeing tour. The exact distance between the two vehicles had changed throughout the pursuit. ASP Neiko was categorical that they had not monitored HM046 for 06 hours on the 01km road stretch but what he had said was that they detected the vehicle after 06 hour vigil on the main road. Thereafter they

followed it till it came to a halt on the gravel road. Similarly, not searching for finger prints on the bags is not a matter on which the whole prosecution case would collapse, for when ASP Neiko had witnessed the appellants doing what they were alleged to have done with his own eyes, not a great deal would have turned on finger prints evidence, if ever the surfaces of the bags were such as to be capable of retaining finger prints. Inspector Maciu too had observed the travelling bag and suitcase with the parcels containing Cocaine at the scene upon his arrival after being informed of the detection around 5.00 p.m. on the same day. There had been other suitcases with cloths and a few other items at the scene and ASP Neiko also had picked up three such suitcases initially thrown away. Similarly, the keys and padlocks given to Inspector Maciu by ASP Neiko appear to be those of other suitcases and not the bag and the suitcase containing Cocaine, for according to ASP Neiko they had no locks.

[105] With regard to alleged 'inconsistencies', 'improbabilities' and 'deficiencies' of the evidence of ASP Neiko, I am of the view that they are not so crucial to discredit his entire evidence. They do not shake the foundation of the prosecution case. Nor do they go to the root of the prosecution case. Some parts of his evidence are consistent with the 01st appellant's version. In evaluating such alleged infirmities one needs to keep in mind the words of wisdom contained in the following decisions of the Indian Supreme Court.

[106] **Bharwada Bhoginbhai Hirjibhai v. State of Gujarat** (1983) 3 SCC 217

> *'Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important "probabilities-factor" echoes in favour of the version narrated by the witnesses.'*

> *'A witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen……. The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another….. It is unrealistic to expect a witness to be a human tape-recorder ….. In regard to exact time of an incident, or the time duration of an occurrence, usually, people*

make their estimates by guess-work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person…. Ordinarily a witness cannot be expected to recall accurately the sequence of events which takes place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on ……. A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross- examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him — Perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment.'

[107] **State of UP v. M K Anthony** (1985) 1 SCC 505

'While appreciating the evidence of a witness the approach must be to ascertain whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, then the court should scrutinise the evidence more particularly to find out whether deficiencies, drawbacks and other infirmities pointed out in the evidence is against the general tenor of the evidence. Minor discrepancies on trivial matters not touching the core of the case should not be given undue importance. Even truthful witnesses may differ is some details unrelated to main incident because power of observation, retention and reproduction differ with individuals. Cross Examination is an unequal duel between a rustic and a refined lawyer.'

[108] **State of UP v. Naresh** (2011) 4 SCC 324

'In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and also make material improvement while deposing in the court, it is not safe to rely upon such evidence. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground to reject the evidence in its entirety.

[109] In my considered view, the alleged deficiencies in ASP Neiko's evidence do not make any reasonable person to disbelieve his evidence totally and reject them. Therefore, I am

not surprised that the trial Judge had acted upon his evidence despite those alleged infirmities. I have no reason to disturb the trial judge's finding to convict the appellants.

[110] In **Sahib v State** AAU0018u of 87s: 27 November 1992 [1992] FJCA 24 the Court of Appeal stated with regard to the approach the appellate court should adopt in an appeal in the light of section 23 of the Court of Appeal Act in the following words

> *'Authorities in England since the passing of the 1966 Act are based on the requirement that the Court shall consider whether the verdict is unsafe or unsatisfactory. That test has given a number of appeal decisions based on a wide ranging consideration of the evidence before the lower Court and the views of the appellate Court on it. We were urged to make it the basis of our consideration of the present case but section 23 does not allow us that liberty and the powers of this Court are limited by the statute that created it. The difference of approach between the two tests was concisely stated by Widgery LJ in the final passages of his judgment in R v Cooper (1968) 53 Cr. App. R 82.*
>
> *Having considered the evidence against this appellant as a whole, we cannot say the verdict was unreasonable. There was clearly evidence on which the verdict could be based. Neither can we, after reviewing the various discrepancies between the evidence of the prosecution eyewitnesses, the medical evidence, the written statements of the appellant and his and his brother's evidence, consider that there was a miscarriage of justice.*
>
> *It has been stated many times that the trial Court has the considerable advantage of having seen and heard the witnesses. It was in a better position to assess credibility and weight and we should not lightly interfere. There was undoubtedly evidence before the Court that, if accepted, would support such verdicts.*
>
> *We are not able to usurp the functions of the lower Court and substitute our own opinion.'*

[111] Therefore, having considered the evidence in this case, I am unable to conclude that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence [vide section 23(1)(a) of the Court of Appeal Act].

[112] Before parting with the appeal against the conviction, I shall deal with briefly the other grounds of appeal of mixed facts and law which, in my view, are also not sustainable. These complaints have not caused any substantial miscarriage of justice to the appellants.

[113] The case against the appellants was not based exclusively on circumstantial evidence but on the direct evidence of police officers and other circumstantial evidence. Having examined the summing up and the judgment, I cannot find any such crucial error as complained in the test of evaluating circumstantial evidence that had caused any substantial miscarriage of justice to the appellants.

[114] Similarly, the trial judge had not erred in the applicable test for custody and control of a vehicle and in any event when the presumption under section 32 of the Illicit Drugs Control Act, 2004 becomes applicable, custody and control of the car assumes little significance. Further, I am of the view that the aspects of custody and control have been proved beyond reasonable doubt on the prosecution evidence and on the appellants' admissions.

[115] The trial judge had every reason to come to the logical conclusions in paragraphs 31 and 32 of the judgment on the very doubtful existence of a man called Simon as narrated by the 01st appellant.

[116] The allegation that the trial judge had misrepresented the agreed facts is not borne out by the summing up and the judgment taken as a whole.

[117] Paragraph 97 should be read along with paragraph 98 of the summing up and they show that the trial judge had addressed the assessors fairly as to how they should approach the reliability and credibility of the appellant's defense of lack of knowledge *vis-à-vis* the fault element of the offence.

[118] Having examined the comprehensive summing up and the well-reasoned judgment, I am of the view that there is no merit in grounds of appeal 7, 8 and 9 urged before the single Judge. These matters have already been adequately dealt with earlier.

[119] Further, the trial judge had requested the counsel for any re-directions at the end of his summing up and counsel for the appellants pointed out no such non-directions, omissions on the facts or law. It is pertinent to add a final word on this aspect of the matter. The

appellate courts have from time and again commented upon the failure in not raising appropriate directions with the trial judge resulting in the appellate court not looking at the complaints against the summing-up based on such misdirection or non-directions favorably. Thus, the appellate courts would be slow to entertain such grounds of appeal. The Supreme Court said in **Raj v. State** CAV0003 of 2014:20 August 2014 [2014] FJSC 12 that raising of matters of appropriate directions with the trial judge is a useful function and by doing so counsel would not only act in their client's interest but also they would help in achieving a fair trial and the appellate courts will not look favourably on cases where counsel have held their seats, hoping for an appeal point, when issues in directions should have been raised with the judge. The Supreme Court once again reiterated this position in **Tuwai v State** CAV0013 of 2015: 26 August 2016 [2016] FJSC 35 and in **Alfaaz v State** CAV0009 of 2018: 30 August 2018 [2018] FJSC 17.

[120] Moreover, it is now well-established in Fiji that the decision on guilt or innocence is ultimately a matter for the presiding judge whereas the role of the assessors is to render opinions to assist the judge but they are not final deciders of fact, law or the verdict (vide **Prasad v The Queen** [1981] 1 A. E. R 319, **Noa Maya v. State** Criminal Petition No.CAV 009 of 2015: 23 October [2015 FJSC 30] and **Volau v State** AAU0011of 2013: 26 May 2017 [2017] FJCA 51). Therefore, complaints of non-directions or omissions should be looked at keeping that position in mind.

Appellant's appeal and the cross appeal against sentence and sentence guidelines.

[121] While the appellants challenge their sentence as being excessive and harsh, the State contends that the sentence of 14 years imposed on the appellants is inadequate and in addition seeks guidelines on sentencing tariff for Cocaine offences. All these matters could be conveniently considered and dealt with together.

[122] In seeking a guideline judgment in terms of section 06 of the Sentencing and Penalties Act the State had complied with section 08 of the Sentencing and Penalties Act.

Accordingly, the Legal Aid Commission had filed its observations by way of written submissions and its counsel was heard at the hearing of the appeal.

[123] It is clear from the sentencing decisions of the past on Cocaine offences that lack of guidelines has led to some degree of inconsistency in the approach of sentencing courts resulting in regular appeals to this Court against sentence. Therefore, the State is seeking a guideline judgment to sentencing on Cocaine offences in terms of sections 06, 07, 08 and 09 of the Sentencing and Penalties Act.

[124] Justice Goundar in **State v Balaggan HAC049 of 11: 4 June 2012 (2012) FJHC 1147** has emphasized the nature and the effect of Cocaine in the following manner.

> *"In the drugs world, cocaine is classified as the "rich man's speed". Cocaine is administered either by snorting or injecting. In R v Farlane [1992] 3 NZLR 424, Cooke P in delivering the judgment of the New Court of Appeal stated the effects of cocaine use at p.426:*
>
> *"An effect of the drug is rapid and intense but short-lived euphoria, which may be followed by a 'crack' with severe depressions and paranoia. In turn a craving for and psychological dependence on the drug may arise. Regular users face increased risks of heart attacks and strokes from bleeding into the brain resulting from high blood pressure. Among pregnant woman who use cocaine there is a high incidence of miscarriages and their babies may have cocaine related disorders. Hallucinations, as of insects crawling under the skin, occur in heavy users."*
>
> *Further on at p.426, Cooke P went on to say:*
>
> *"Addicts spend heavily to obtain their weekly supplies and sometimes are driven to crime to support their habit. The high profits also attract criminal elements....In addition to the social dangers of increased cocaine use, there is the cost to the community of detection and enforcement measures."*

[125] In **Lata v The State** AAU0037 of 2013: 26 May 2017 [2017] FJCA 56 whilst leaving the issue of giving a guideline judgment to be considered on another occasion due to a technical reason, the Court of Appeal provided helpful guidance on the factors to be considered in sentencing in Cocaine cases. They are as follows.

a. *'the type of offence committed, namely, whether it is, importation, exportation, acquiring, offering, supplying, transferring, transporting, using, manufacturing, using or possessing,*
b. *quantity,*
c. *purity and market value, where it has been an issue raised at the trial,*
d. *planning, organisation, sophistication and the methods adopted to avoid detection,*
e. *Vulnerability of Fiji becoming a hub for traffickers as stated in State V Muskan Balaggan (ibid),*
f. *whether the drug was intended for the local market,*
g. *the purpose of offending, whether commercial or for individual use (There were 4 parcels inside the bag. We are aware that 4 other parcels were taken out of the bag and 2 were given to Jai Roko and 2 were sent by Pacific Transport to Suva by the Appellant.),*
h. *the role played by the accused; whether 'leading,' 'significant but not leading', or 'lesser',*
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.*

[126] In ***Lata*** the accused 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. However, the Court of Appeal in ***Lata*** suggested that persons convicted of the offence of possession of heroin and cocaine, which from the evidence is clear is not for their personal consumption, but for commercial purposes, should be dealt with severely, with a starting point of 12 years as a minimum with an upward or downward adjustment dependent on the circumstances of the offence and of the accused.

[127] In **State v Nikolic** HAC115 of 2018[LTK]: 8 March 2019 [2019] FJHC 167 Gounder, HCJ, having considered several sentencing decisions delivered in the past, in imposing sentences on an accused convicted of two charges of importing an illicit drug (Cocaine) and one charge of possessing arms and ammunition without a licence, observed as follows.

> *'[16] Although there are not many, the approach to sentencing in cocaine cases is not consistent. And for that reason it not possible to identify an appropriate tariff for the offence. There is no established tariff or a guideline judgment for this offence. While quantity and purity of the illicit drug are relevant considerations, the sentencing discretion must be guided by all other relevant considerations such as the objective features of the offence and the subjective features of the offender.*

'[17] The approach to sentencing in cases of methamphetamine is consistent. For methamphetamine, the courts are following the New Zealand guidelines set by the New Zealand Court of Appeal in R v Fatu [2006] 2 NZLR 72. The courts in Fiji have adopted those guidelines saying the same maximum penalty of life imprisonment is applicable in both jurisdictions (State v Vakula [2017] FJHC 963; HAC247.2016S (11 August 2017), State v Nand [2018] FJHC 499; HAR03.2017 (12 June 2018), State v Sukanakoniferedi - Sentence [2019] FJHC 115; HAC129.2014 (22 February 2019)). The guidelines suggest four bands based on quantities as follows:

(i) Band one – low level importing (less than 5g) – two years six months' to four years six months' imprisonment.
(ii) Band two – importing commercial quantities, (5g to 250g) – three years' six months' to ten years' imprisonment.
(iii) Band three – importing large commercial quantities (250g to 500g) – nine years' to 13 years' imprisonment.
(iv) Band four – importing large commercial quantities (500g or more) – 12 years' to life imprisonment.

'[21] To maintain consistency in the approach to sentencing I adopt the New Zealand guidelines for importation of methamphetamine for importation of cocaine with some caution that the guidelines are only a yardstick. To determine a just punishment, regard must be made not only to the objective seriousness your offence, but also to the seriousness of your actual act.'

[128] Thus, in ***Nikolic*** a sentence of 23 years of imprisonment was imposed on the accused for importation of 12.9 kg of Cocaine with a non-parole period of 18 years.

[129] The offence of possession of illicit drugs contrary to section 5(a) of the Illicit Drugs Control Act 2004 carries a maximum penalty of life imprisonment. Illicit Drugs Control Act 2004 does not distinguish between different classes of drugs. Nor does it differentiate between 'possession', 'manufacture', 'cultivation' and 'supply'. Temo JA, admitted this position in **Sulua v State** AAU0093 of 2008: 31 May 2012 [2012] which is a guideline judgment in cannabis offences, and stated that

'Section 5(a) of the Illicit Drugs Control Act 2004 treated the verbs "acquires, supplies, possesses, produces, manufactures, cultivates, uses or administers an illicit drug" equally. All the verbs are treated equally. In other words, all the offending verbs or offending actions are treated equally. "Supplies, possesses, manufactures and cultivates" are treated equally, and none of the offending actions are given any higher or lower standing, as far as section 5(a) of the Illicit

Drugs Control Act 2004 was concerned. It follows that the penalties applicable to possession, must also apply to the offending verbs of "acquire, supplies, produces, manufactures, cultivates, uses or administers". That is the will of Parliament, as expressed in the words of section 5(a) of the Illicit Drugs Control Act 2004. Consequently, the four categories mentioned above, apply to each of the verbs mentioned in section 5(a) of the 2004 Act mentioned above. The weight of the particular illicit drug will determine which category the case falls under, and the applicable penalty that will apply. It is also suggested that, the application of the four categories mentioned in paragraph 115 hereof to section 5(a) of the Illicit Drugs Control Act 2004, be extended to the offending verbs or offending actions in section 5(b) of the Illicit Drugs Control Act 2004. This will introduce some measure of consistency in how sentences are passed for offendings against section 5(a) and 5(b) of the Illicit Drugs Control Act 2004. This will enhance the objective and purpose of the 2004 Act, as highlighted in paragraph 111 hereof.

'Categories numbers 1 to 4 merely sets the tariff for the sentence, given the weight of the illicit drugs involved. The actual sentence will depend on the aggravating and mitigating factors, in the particular circumstances of the case, and it may well fall below or above the set tariff.'

[130] However, for the purpose of sentencing it is only logical for the courts to be able to make necessary distinctions among different types of illicit drugs. ***Sulua*** has already stated that its guidelines would apply to all physical acts referred to in section 5(a) of the Illicit Drugs Control Act 2004. But, those guidelines are only for cannabis offences and not adequate to deal with more dangerous and destructive illicit drugs such as cocaine, heroin and methamphetamine.

[131] However, in my view, when the statute does not spell out in detail the matters that should be taken into account by a sentencing judge, it is helpful to achieve a certain degree of consistency in imposing sentencing across similar offences and offender as long as the guidelines are not employed to constrain the legitimate exercise of sentencing discretion.

[132] There are several approaches in setting guidelines for drug offences. One can be based on the quantity and another could be the nature of the illicit drug. Third could depend on different prohibited acts in relation to such drugs. The list is not exhaustive. A

combination of one or more approaches is also possible as they are not necessarily mutually exclusive.

Australia

[133] In the case of **Adams v The Queen** (2008) 234 CLR 143, quantity based legislative approach appears to have been preferred to judicially constructed harm based approach.

> *"In fixing the trafficable and commercial quantities of heroin and MDMA respectively, and applying the same maximum penalties to the quantities so fixed, Parliament has made its own judgment as to an appropriate penal response to involvement in the trade in illicit drugs. The idea that sentencing judges, in the application of that quantity-based system, should apply a judicially constructed harm based gradation of penalties (quite apart from the difficulty of establishing suitable factual foundation for such an approach) cuts across the legislative scheme.*"

[134] **R v Shi** [2004] NSWCCA 135 Wood CJ at CL, with whom Spigelman CJ and Simpson J agreed, emphasized that the attraction of a quantity based sentencing regime was its deterrent effect upon all players within the drugs trade:

> *"Fourthly, insufficient consideration was given to the weight and purity of the drug involved in this instance; to the well-recognised principle that the culpability of those who engage, at any level, in drug supply networks is significant, and that deterrent sentences are necessary, since absent the involvement of couriers, warehousemen and so on, these networks, whether established for the purposes of importation or subsequent distribution, would simply collapse."*

[135] However, the above approach has not been unequivocal and the offender's role too has been stressed in sentencing. For example in **Wong and Leung** (2001) 207 CLR 584 the High Court has said that

> *'These are reasons enough for concluding that the Court of Criminal Appeal was in error in attributing chief importance to the weight of narcotic in fixing sentences for the offence. …… The selection of weight of narcotics as the chief factor to be taken into account in fixing a sentence represents a departure from fundamental principle.*

[136] In **R v. Olbrich** (1999) 199 CLR 270, the High Court had stressed the importance of determining what the offender did; *i.e.* his role

England and Wales

[137] The Sentencing Council's Definitive Guideline is based on the offences created by the Misuse of Drugs Act 1971. This, unlike the position in Fiji, prescribes different maximum penalties for various offences of possession, supply, cultivation, etc. based on different 'classes' of controlled drugs. Simple possession of a Class A (most harmful or hard drugs) controlled drug carries a maximum of 7 years, whereas supplying or possession with intent to supply Class A drugs carries a maximum of life imprisonment.

[138] This approach requires the English judges to consider the degree of culpability of a particular offender within the chain and the amount of illicit drugs he was found with ('harm'). Four categories of harm and three categories of culpability are identified. For example for the same amount of drugs, an accused with a 'leading role' may be placed at a tariff much higher than an accused with a 'lesser role'. The proper working of this system needs highly developed investigation mechanism which lesser developed countries could ill afford. The tariff in general also appears to be more lenient to act as real deterrence to prospective offenders targeting more vulnerable countries. In my view, the UK approach does not suit Fiji at this point of time.

New Zealand

[139] **R v Fatu** [2006] 2 NZLR, 72 to 86 the Court of Appeal established the following guidelines for sentencing of the **supply** of methamphetamine based on quantity;

> **"…** *(a) Band one – low-level supply (less than 5g) – two years' to four years imprisonment.*
>
> *(b) Band two – supplying commercial quantities (5g to 250g) – three years to nine years imprisonment.*

(c) Band three – supplying large commercial quantities (250g to 500g) – eight years to 11 years imprisonment.

(d) Band four – supplying very large commercial quantities (500g or more) – ten years to life imprisonment.

*7. In cases involving the **importation** of methamphetamine, the sentence guidelines were as follows:*

"…(a) Band one – low-level importing (less than 5g) – two years 6 months to four years six months imprisonment.

(b) Band two –importing commercial quantities (5g to 250g) – three years to six months to ten years imprisonment.

(c) Band three – importing large commercial quantities (250g to 500g) – 9 years to 13 years imprisonment.

(d) Band four – importing very large commercial quantities (500g or more) – 12 years to life imprisonment.

The indication, in cases where small quantities of methamphetamine have been imported for personal consumption, it is open to sentencing Judges to treat band one as not applicable. We emphasise that these are otherwise applicable to all who import methamphetamine, including those whose roles areas mules. Obviously the more significant the role of the offender in any importation, the closer the appropriate sentence will be to the top end of the relevant sentencing band …" (page 81)

*8. In cases involving the **manufacturing** of methamphetamine, the sentence guidelines were as follows:*

"… (a) Band one – not applicable for reasons given in para (42).

(b) Band two –manufacturing up to 250g – 04 years to 11 years' imprisonment.

(c) Band three – manufacturing large commercial quantities (250g – 500g) – 10 years' to 15 years' imprisonment.

(d) Band four – manufacturing very large commercial quantities (500g or more) – 13 years' to life imprisonment."

[140] In ***Fatu*** the Court of Appeal also said

> '*We emphasise that these are starting points, before taking into account aggravating and mitigating factors relating to the offender (as opposed to the offending). We also note that supply in small quantities where there is no commerciality and no other aggravating features may call for starting points less than those indicated as appropriate for band one …".*

[141] Although the above guidelines were given for methamphetamine, its application has been adopted for cocaine cases. In **R v Dixon** [2017] NZHC 920 (9 May 2017) the sentencing court stated as follows.

> *'[31] This constitutes guidance for Class A drug offending, although I am aware as just discussed, of the Court's caution that it was intended to apply only to methamphetamine offending. However, as there is no tariff case for the importation of cocaine, the sentencing bands are instructive. There is public interest in this matter and I describe them as follows:*
>
> - *Band 1 – low-level importation (less than 5 grams) – two and a half to four and a half years imprisonment.*
> - *Band 2 –importing commercial quantities (5g to 250g) – three and a half to ten years imprisonment.*
> - *Band 3 – importing large commercial quantities (250g to 500g) – 9 years to 13 years imprisonment.*
> - *Band 4 – importing very large commercial quantities (of 500 grams or more), 12 years to life imprisonment.*
>
> *[32] Cocaine is not treated as any more, or less evil, than any other Class A drugs. I have no evidence to draw a distinction. While sentences for large scale cocaine importation are less frequent than for methamphetamine, they reflect the same determination to deter the importation of drugs for commercial dealing, denounce such offending, and there is a fundamental element in those respects, and in the sentences imposed, of protection of the public. The notion that cocaine is a party drug which somehow carries less sting in its effect and the way the law should approach it, must be put aside.*
>
> *[33] While there are differences between the different drugs within Class A, and drug offending in terms of quantity, potency and effect on the human body and brain, and on society, there is no basis for me to apply a different tariff for importation of cocaine in particular.***"**

[142] In **State v Vakula** HAC 247 of 2016S: 11 August 2017 [2017] FJHC 963 Temo J, adopted ***Fatu*** guidelines as an interim measure for Methamphetamine.

> *"13. In my view, given the above, as an interim measure, we need to adopt the sentencing guidelines expounded in R v Fatu (supra) above. Methamphetamine, as an illicit drug, is new to Fiji. However, the New Zealand courts had been dealing with this problem for a while, and it was only fair in the public interest, that we learn from their experience and adopt their sentencing guidelines in Fiji, pending a review in the future by our Superior Courts."*

[143] In **State v Nikolic**, Goundar J applied the ***Fatu*** guidelines to a case involving the importation of cocaine and stated:

> *"[21] To maintain consistency in the approach to sentencing I adopt the New Zealand guidelines for importation of methamphetamine for importation of cocaine with some caution that the guidelines are only a yardstick. To determine a just punishment, regard must be made not only to the objective seriousness of your offence, but also to the seriousness of your actual act."*

[144] The State has submitted that Fiji needs a structured, judicial-led approach to sentencing for hard drug offences and it should be primarily based on quantity rather than the role of individual offenders so as to deter offenders at all levels of illicit drugs operations and band 4 in New Zealand tariff scheme may be far too wide and therefore the introduction of another band in between would be useful for trial courts.

[145] Having considered all the material available and judicial pronouncements in Fiji and in other jurisdictions, I set the following guidelines for tariff in sentences for all hard/major drugs (such as Cocaine, Heroin, and Methamphetamine etc.). These guidelines may apply across all acts identified under section 5(a) and 5(b) of the Illicit Drugs Control Act 2004 subject to relevant provisions of law, mitigating and aggravating circumstances and sentencing discretion in individual cases.

<u>Category 01</u>: – Up to 05g – 02 ½ years to 04 ½ years' imprisonment.

<u>Category 02:</u> – More than 05g up to 250g - 03 ½ years to 10 years' imprisonment.

<u>Category 03</u>:– More than 250g up to 500g - 09 years to 16 years' imprisonment.

<u>Category 04</u>:– More than 500g up to 01kg – 15 years to 22 years' imprisonment.

<u>Category 05</u> – More than 01kg - 20 years to life imprisonment

[146] In my view, the sentencing court should consider an appropriate fine in addition to the imprisonment as permitted under section 05 of the Illicit Drugs Control Act 2004 depending on the quantity involved, nature of the act and the degree of involvement of the accused.

<u>Sentence appeal by the Appellants</u>

[147] The trial judge had stated in his sentencing order dated 29 April 2016 as follows.

> *'6. In view of the significantly large quantity of the drugs found in possession of the accused persons, it appears that the drugs were not for their personal recreational purpose. It is obvious that it was not for the local market as Fiji is still not considered as a viable market for such illicit drugs. Fiji is not producing or manufacturing Cocaine. Hence it appears that this large amount of Cocaine was in transit from a foreign destination to another foreign destination.*
> *7. It is alarming to note that at present, the South Pacific Region including Fiji has been dramatically exposed to the phenomenon of illegal movements of precursor chemicals, hard narcotic drugs such as Cocaine and amphetamine type stimulants (ATS) in a frightening manner causing an unprecedented and destructive threat, both domestically and regionally.*
> *9. The geographical location, small populations, lack of sophisticated technology in Fiji facilitates the drug barons and transnational criminals to utilise this part of the globe as a transit hub in the process of transportation and trafficking of illegal substance.*
> *10. Apart from the risk of becoming a transit hub for the drug smugglers, the escalating infiltration of such illicit drugs in to the country undoubtedly creates a risk of spilling it over to the local market. The clam and peaceful population in this South Pacific Archipelago has not exposed to the use of hard psychotropic*

substance such as Cocaine. If such drugs spill over into the local market, that could undoubtedly create an unprecedented socio-economic and cultural desolation.'

[148] *Justice Gounder also remarked in* ***Balaggan*** *on an important aspect to be taken into account in the sentences as follows.*

> '*"When sentencing drug-smugglers, regard must be made to the circumstances that exist 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 the overseas market. So Fiji is just being used by the drug-smugglers as a transit point for the reasons I have mentioned. Any punishment for dealing in hard drugs must therefore reflect the vulnerability of Fiji becoming a hub for the international drug-smugglers".*

[149] Therefore, I do not find that there can be any serious criticism on the trial judge's remark on 'international component' as alleged by the appellants. Both the trial judge and Justice Gounder are well experienced and qualified to make the remarks they had made.

[150] With regard to the appellants' mitigation on their 'limited role' in the offence, the trial judge had said as follows.

> *'15. 'Bearing in mind the above mentioned sentencing approaches, I now turn on to discuss the level of culpability and harm of this offence in order to determine the starting point. I do not find any distinction between the roles played by the first and second accused persons in assessing the level of culpability and harm. It was proved that both of them acted in concert and found in joint possession of these illicit drugs.*
> *16. The prosecution proved that the two accused persons had transported these drugs in their vehicle HM 046 along the Queen's highway from the direction of Lautoka City and stopped at a remote location close to Vuda Point, Lautoka. There is no other evidence to determine the level of involvement of the two accused persons in handling or transportation of these drugs. Hence, I find that they have performed the role of carriers or drug mules'.*

[151] Given what the evidence had transpired at the trial, I do not find anything objectionable in these remarks of the trial judge either. However, the trial judge had gone onto state as follows.

> *17. 'However, the quantity found in their possession was significantly higher than that of the quantity of drugs found in the cases of* ***Balaggan (supra), Bravo (supra) and Roshini Lata (supra)****. Therefore the level of harm in this offence is remarkably high. Hence, it is perceptible that the starting point of this instant case is needed to be higher than that of the above discussed sentencing precedents. Therefore, it is my view that the starting point must be closer to the higher end of the tariff set down in* ***Sulua (supra)****. I accordingly select 13 years as the starting point.*
> *18. The drugs were concealed in wrapped parcels and packed inside a bag and a suitcase. The bag and the suitcase had then placed among few other suitcases in the boot of the vehicle HM 046. In view of the manner in which the drugs were concealed, it appears that this is a calculatedly planned concealment of drugs in order to avoid the detection or attention of law enforcement authorities.*
>
> *19. You both had no respect and regard to the law and order of this county. Mr.* ***Abourizk*** *you entered into this county pretending as a tourist visiting Fiji. On that ground you were allowed and welcomed by this country. Having committed this crime, you have breached the guest and host relationship, the trust and the friendliness extended to you by this country as a visitor.*
> *20. Mr. Muriwaqa, you failed to discharge your responsibility as a citizen of this country. You have breached the trust reposed in you by your own fellow countrymen and by dragging the lives of your own kith and kin into danger by committing this heinous and disgraceful crime. In committing this crime, both of you have risked the lives of the people and the country in exposing them to the venomous and sinister consequences of infiltration of illicit drugs in to the country. I consider these factors as aggravating circumstances of this offence.'*

[152] Thus, it is clear that the trial judge had erred when he said that in his sentencing discretion that he was selecting the starting point closer to the higher end of the tariff set down in ***Sulua*** which was the guideline judgment on cannabis offences and accordingly selected 13 years as the starting point. Having considered the aggravating factors the learned judge had added 03 years and reduced 02 years for the mitigating factors arriving at the final sentence of 14 years.

[153] In **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14 the Supreme Court said

'[19] It is clear that the Court of Appeal will approach an appeal against sentence using the principles set out in ***House v The King*** *[1936] HCA 40; (1936) 55 CLR 499 and adopted in* ***Kim Nam Bae v The State*** *Criminal Appeal No.AAU0015 at [2]. Appellate courts will interfere with a sentence if it is demonstrated that the trial judge made one of the following errors:*

(i) Acted upon a wrong principle;
(ii) Allowed extraneous or irrelevant matters to guide or affect him;
(iii) Mistook the facts;
(iv) Failed to take into account some relevant consideration.

[20] When considering the grounds of appeal against sentence, the above principles serve as an important yardstick to arrive at a conclusion whether the ground is arguable. This point is well supported by a decision on leave to appeal against sentence in ***Chirk King Yam v The State*** *Criminal Appeal No.AAU0095 of 2011 at [8]-[9]. In the present case, the learned judge's conclusion that the appellant had not shown his sentence was wrong in law was made in error. The test for leave is not whether the sentence is wrong in law. The test is whether the grounds of appeal against sentence are arguable points under the four principles of* ***Kim Nam Bae's*** *case.'*

[154] The appellants' arguments against the sentence imposed by the trial judge, in my view, do not fall into any of the categories set out in ***Naisua.*** Therefore, I reject the appellants' appeal against the sentence. It is not excessive and harsh. Neither does it breach the proportionality principle.

Appeal against the sentence by the State.

[155] As I have already held, the trial judge had acted upon a wrong principle in following the tariff prescribed in ***Sulua*** and ended up with a totally inadequate sentence of 14 years on the appellants. In **Togava v State** AAU0006u of 90s: 10 October 1990 [1990] FJCA 6 it was held that *' As was said by the Privy Council in* ***Au Pui - Quen v. Attorney General of Hong Kong (1979) 1 ALL E.R. 796*** *the interests of justice are not confined to the interests of the prosecution and the accused in a particular case. They include the interests of the public'*. Therefore, this court's intervention is called for in this instance. State's appeal against sentence is, therefore, allowed.

[156] This is a fit case for this court to act under section 23(3) of the Court of Appeal Act, for I think that a different sentence should have been passed. I have carefully considered the facts and circumstances of this case, its sentencing decision and the previous sentencing decisions cited by the State in its bundle of authorities; some of which have been cited in this judgment in arriving at the sentence that the trial judge ought to have passed on the appellants.

[157] Therefore, I would quash the sentence of 14 years of imprisonment passed at the trial and taking all matters and considerations into account pass a sentence of 25 years' imprisonment on both appellants in substitution therefore and they shall serve 20 years of imprisonment before becoming eligible for pardon.

[158] Therefore, I conclude that the appellants' appeal against conviction and sentence should stand dismissed and the State's appeal against sentence should be allowed.

Bandara, JA

[159] I have read in draft the judgments of Gamalath, JA and Prematilaka, JA and concur with reasons, conclusions and orders of Prematilaka, JA.

The Orders of the Court are (Gamalath JA dissenting):

1. *01st appellant's appeal against conviction is dismissed.*
2. *01st appellant's conviction is affirmed.*
3. *02nd appellant's appeal against conviction is dismissed.*
4. *02nd appellant's conviction is affirmed.*
5. *01st appellant's appeal against sentence is dismissed.*
6. *02nd appellant's appeal against sentence is dismissed.*
7. *State's appeal against sentence on both appellants is allowed.*
8. *Sentence of 14 years' imprisonment with a non-parole period of 12 years passed at the trial on the 01st appellant is quashed.*

9. *Sentence of 14 years' imprisonment with a non-parole period of 12 years passed at the trial on the 02nd appellant is quashed.*
10. *Sentence of 25 years' imprisonment is passed on the 01st appellant and he shall serve 20 years of imprisonment before becoming eligible for pardon.*
11. *Sentence of 25 years' imprisonment is passed on the 02nd appellant and he shall serve 20 years of imprisonment before becoming eligible for pardon.*
12. *The sentences of 25 years of imprisonment passed on the 01st and 02nd appellants shall be counted from 29 April 2016.*

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Hon. Justice S. Gamalath
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

.....

Hon. Justice C. Prematilaka
JUSTICE OF APPEAL

.....

Hon. Justice N. Bandara
JUSTICE OF APPEAL