

**IN THE COURT OF APPEAL, FIJI**  
**[On Appeal from the High Court]**

**CRIMINAL APPEAL NO. AAU 0021 of 2019**  
**[High Court at Suva Case No. HAC 115 of 2018 (LTK)]**

**BETWEEN** : **STATE** *Appellant*

**AND** : **YVETE DIANNE NIKOLIC** *Respondent*

**Coram** : **Prematilaka, ARJA**

**Counsel** : **Mr. L. J. Burney for the Appellant**  
: **Mr. R. Vananalagi for the Respondent**

**Date of Hearing** : **05 November 2021**

**Date of Ruling** : **08 November 2021**

**RULING**

[1] The respondent had been charged with another (her husband) in the High Court at Suva on one count of importing an illicit drug (cocaine) contrary to section 4(1) of the Illicit Drugs Control Act, 2004, one alternative count of possessing an illicit drug (cocaine) contrary to section 5(a) and 32 of the Illicit Drugs Control Act 2004, importing an illicit drug (cocaine and methamphetamine tablets) contrary to section 4(1) of the Illicit Drugs Control Act 2004, one alternative count of possessing an illicit drug (cocaine and methamphetamine tablets) contrary to section 5(a) and section 32 of the Illicit Drugs Control Act 2004 and one count of possessing arms and ammunition without holding an arms licence contrary to section 4 and section 42(2) of the Arms and Ammunition Act 2003.

[2] The information read as follows:

**STATEMENT OF OFFENCE**

**Importing an illicit drug:** *Contrary to section 4(1) of the Illicit Drugs Control Act, 2004.*

**PARTICULARS OF OFFENCE**

***YVETTE DIANNE NIKOLIC and JOHN GEOFFREY NIKOLIC***, on the 22<sup>nd</sup> day of June 2018, at Nadi in the Western Division, without lawful authority imported an illicit drug, namely, cocaine weighing 12.9 kilograms.

**COUNT 2**

**(Alternative to Count 1)**

**STATEMENT OF OFFENCE**

**Possessing an illicit drug:** *Contrary to section 5(a) and 32 of the Illicit Drugs Control Act 2004.*

**PARTICULARS OF OFFENCE**

***YVETTE DIANNE NIKOLIC and JOHN GEOFFREY NIKOLIC***, on the 22<sup>nd</sup> of June 2018, at Nadi in the Western Division, without lawful authority had in their possession an illicit drug, namely cocaine weighing 12.9 kilograms.

**COUNT 3**

**STATEMENT OF OFFENCE**

**Importing an illicit drug:** *Contrary to section 4(1) of the Illicit Drugs Control Act 2004.*

**PARTICULARS OF OFFENCE**

***YVETTE DIANNE NIKOLIC and JOHN GEOFFREY NIKOLIC***, on the 22<sup>nd</sup> day of June 2018, at Nadi in the Western Division, without lawful authority imported an illicit drug, namely cocaine and methamphetamine tablets weighing 34.4 grams.

**COUNT 4**

**(Alternative to Count 3)**

**STATEMENT OF OFFENCE**

**Possessing an illicit drug:** *Contrary to section 5(a) and section 32 of the Illicit Drugs Control Act 2004.*

**PARTICULARS OF OFFENCE**

***YVETT DIANNE NIKOLIC and JOHN GEOFFREY NIKOLIC***, on the 22<sup>nd</sup> day of June 2018, at Nadi in the Western Division, without lawful authority had in their possession an illicit drug, namely cocaine and methamphetamine tablets weighing 34.4 grams.

**COUNT 5**

**STATEMENT OF OFFENCE**

**Possessing arms and ammunition without holding an arms licence:** *Contrary to section 4 and section 42(2) of the Arms and Ammunition Act 2003.*

**PARTICULARS OF OFFENCE**

***YVETTE DIANNE NIKOLIC AND JOHN GEOFFREY NIKOLIC***, on the 22<sup>nd</sup> of June 2018, at Nadi in the Western Division, had in their possession arms and ammunition, namely 2 pistols and 112 rounds of ammunition without holding an arms licence.'

- [3] At the close of the prosecution case upon an application for no case to answer on behalf of the respondent pursuant to section 231(1) of the Criminal Procedure Act, the learned trial judge had in his 'Ruling on No Case to Answer' dated 18 February 2019 allowed the application and entered a finding of not guilty on all five charges against the respondent.
- [4] The appellant had lodged a timely notice of appeal against order of acquittal (13 March 2019) and filed written submissions on 25 November 2020. The respondent's lawyers had tendered her written submissions 02 November 2021.

[5] The learned trial judge had summarised the law that he followed and evidence in the impugned order of acquittal as follows:

*[1] This is an application for a no case to answer by the first accused pursuant to section 231(1) of the Criminal Procedure Act. Section 231(1) provides:*

*When the evidence of the witnesses for the prosecution has been concluded, and after hearing (if necessary) any arguments which the prosecution or the defence may desire to submit, the court shall record a finding of not guilty if it considers that there is no evidence that the accused person (or any one of several accused) committed the offence.*

*[3] The test for a no case to answer application in the High Court is settled. The test is whether there is some incriminating evidence, direct or circumstantial, on all the essential ingredients of the charged offence or offences (Sisa Kalisoqo v R Criminal Appeal No. 52 of 1984, State v Mosese Tuisawau Cr. App. 14/90, State v Woo Chin Chae [2000] HAC 023/99S).*

***Whether the first accused was complicit in the importation or possession of illicit drugs, or possession of arms and ammunition without a licence?***

*[17] Mr Gordon's next submission is that there is no evidence, direct or circumstantial, to prove that the first accused was complicit to the importation or possession of illicit drugs, or possession of arms and ammunition without a licence.*

*[18] The prosecution case is that the two accused acted together to commit the alleged drug offences. Where a criminal offence is committed by two or more persons, each of them may play a different part, but if they are acting together as part of a joint plan or agreement to commit the offence, they are each guilty. The essence of joint responsibility for a criminal offence is that each accused shared a common intention to commit the offence and played his or her part in it however great or small so as to achieve that aim.*

*[19] The prosecution case against the first accused is entirely based on circumstantial evidence. The question is whether there is some evidence from which an inference could be drawn that the first accused shared a common intention with the second accused to either import into Fiji or possess an illicit drug. The evidence upon which the prosecution is relying upon for that inference in summary is:*

- The vessel on which the drugs were found was owned and registered under the first accused's name.*
- The first accused is married to the second accused – they are a couple.*
- The particular route that the vessel took after departing Florida, USA and before arriving in Fiji.*
- The vessel was a temporary matrimonial home for the first accused when the drugs were found on board on 22 June 2018.*

[20] *None of these facts are disputed by the first accused. The evidence is that the drugs and the arms and ammunition were concealed in the different sections of the vessel in such a manner that were not visible to the naked eye. There is some evidence that the second accused knew about the concealment as some of the alleged drug was seized upon information given by him under caution to the customs boarder security officers. There is evidence of the conduct of the second accused when the seizure was made and the second accused was confronted with the discovery of the alleged drugs. But there is no evidence of the conduct of the first accused when the discovery of drugs and arms and ammunition were made on the vessel owned by her. She was not present at the scene and she was not confronted with the discovery.*

[21] *There is some evidence that she was distressed when her husband the second accused was allowed to speak to her after the drugs were discovered on the vessel. But the evidence of distress is linked to the predicament of her husband and not to her participation to the alleged offences. There is no direct nexus between her distressed condition and the discovery of drugs and arms found on the vessel owned by her. Her conduct after learning of the predicament of her husband is not an incriminating piece of evidence from which an inference could be drawn that she was complicit to the alleged offences.*

[22] *Similarly, the other evidence relied upon by the prosecution for an inference of guilt is not incriminating of her. She is the owner of the vessel but there is no evidence that she was in control of the vessel. The evidence led by the prosecution points to the second accused as the person who was in control of the vessel. The evidence is that the second accused was the captain or master of the vessel. What role, if any, the first accused had in the control of the vessel could have been proven by the three crew members that were on board at some stages of their journey before arriving at Port Denarau on 22 June 2018. But the prosecution did not call the crew members as witnesses for the reasons best known to them.*

[23] *Apart from owning the vessel and accompanying her husband on a journey, which are not disputed by the first accused, there is no evidence that she was in control of the vessel together with her husband from which an inference could be drawn that both were acting with the common intention to import or possess drugs, or possess arms and ammunition without a licence.*

[24] *Further, there is no incriminating and reliable evidence for an inference of common intention based on the route that the vessel took before arriving in Fiji. The fact that she is married to the second accused or had been on board travelling with him for about four months before arriving in Fiji is not incriminating of her for an inference that she is a participant to the crimes that he is accused of.*

[25] *As a result, the court makes a finding that there is no incriminating, direct or circumstantial evidence, against the first accused on all five charges to put her to her defence. There was a further question of law argued in relation to the charge of possession of arms and ammunition without a licence. Mr Gordon contended that the crew or passengers of any vessel or aircraft are exempted from holding arms licence by the operation of section 5(1) (e) of the Arms and Ammunition Act. Mr Gordon also contended that on the facts of this case, an appropriate charge was failure to declare and deliver the arms and ammunition to a Customs Officer contrary to 5(3) of the Arms and Ammunition Act. Since this Court has come to a finding that there is no evidence that the first accused was in possession of arms and ammunition, it is not necessary to make a determination that she was exempted from holding an arms licence.*

[6] The sole ground of appeal is as follows:

**Ground 1**

*THAT the Learned Trial Judge erred in law in finding that there was no case to answer against the Respondent.'*

[7] In terms of section 21(2) (a) of the Court of Appeal Act, the State may appeal against an acquittal without leave on a question of law alone and with leave on any ground of appeal which involves a question of fact alone or of mixed law and fact under section 21(2) (b). The test for leave to appeal is '**reasonable prospect of success**' (see **Caucu v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019) in order to distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 and **Naisua v State** [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.

**01<sup>st</sup> ground of appeal**

[8] The appellant argues that this sole ground of appeal involves a question of law only and therefore, leave to appeal is not required to appeal to the Court of Appeal. The

State heavily relies on the Fiji Supreme Court decision in Verma v State [2015] FJSC 29; CAV0019.2014 (23 October 2015) to assert that a determination of a submission of no case to answer does involve a question of law only.

- [9] In Verma, the Magistrate had rejected a submission that the accused (Verma) had no case to answer. Verma then elected not to give evidence, and in due course the Magistrate convicted him and sentenced. He appealed against his conviction and sentence to the High Court. The appeal against conviction was dismissed, but the High Court judge allowed the appeal against sentence, and reduced Verma's sentence. Verma then appealed to the Court of Appeal against the dismissal of his appeal against conviction which was dismissed by a single judge of the Court of Appeal on the basis that none of the grounds of appeal involved a question of law only. The issue which arose in the Supreme Court was whether any of the grounds of appeal on which Verma wanted to rely on in the Court of Appeal involved a question of law only. One of the grounds was that the judge in the High Court had been wrong to rule that the Magistrate had not erred when he had refused to uphold the submission that Verma had no case to answer.
- [10] The Supreme Court considered section 178 of the Criminal Procedure Act, 2009 which addresses the function of the Magistrates court at the close of the prosecution's case.
- [11] As opposed to section 178 of the Criminal Procedure Act, 2009, though not relevant to the issue before court the Supreme Court cited section 231(1) of the Criminal Procedure Act, 2009 which applies to trials in the High Court and made the following observations at paragraph 14:

*The latter provision, which is not the relevant one for present purposes, has been held to cover the situation where there has been no evidence to prove an essential element of the offence with which the defendant has been charged. The weight of authority in Fiji suggests that it is not wide enough to cover the situation where the evidence is just so weak that the defendant cannot reasonably be convicted on the strength of it. That is to be contrasted with the provision which relates to trials in the magistrates' court, which is the relevant provision for present purposes. There is little authority on how that provision should be applied. The locus classicus for the view that a submission of no case to answer can be*

made in both situations is ***R v Galbraith*** [1981] 1 WLR 1039, though in England there are no statutory provisions similar to sections 178 or 231(1)'

[12] Section 231(1) Criminal Procedure Act, 2009 states that:

*'When the evidence of the witnesses for the prosecution has been concluded, and after hearing (if necessary) any arguments which the prosecution or the defence may desire to submit, the court shall record a finding of not guilty if it considers that there is no evidence that the accused person (or any one of several accused) committed the offence.'*

[13] The Supreme Court proceeded to state further in relation to the two situations contemplated in ***R v Galbraith*** (*supra*):

*'15. The submission of no case to answer made on Verma's behalf addressed both situations. First, it was contended that there had been no evidence to prove essential elements of both offences..... Secondly, it was contended, in effect, that the evidence was so weak that the magistrate, properly directing himself, could not reasonably convict Verma on either charge...'*

[14] What is most relevant to this appeal can be found among the remarks at paragraph 16 of the Supreme Court judgment:

*'16. This is neither the time nor the place for us to say what is the true test to be applied in Fiji as to when a submission of no case to answer will succeed in a trial proceeding in the magistrates' court, nor for us to say whether we agree with the High Court judge's conclusion or not. The only question for us is whether this ground of appeal involves a question of law only. We think that a determination of a submission of no case to answer does involve a question of law only. It involves considering whether the evidence called by the prosecution is or is not capable of amounting to proof of guilt..... Either way, the question is whether the evidence is capable of amounting to proof of guilt, and whether the evidence is capable of amounting to proof of guilt is a question of law only. Indeed, the fact that a submission of no case to answer involves the determination of a question of law only was regarded as axiomatic in ***R v Abbott*** [1955] 2 QB 497, in which at p 505 Lord Goddard CJ referred to the determination of a submission of no case to answer as a "decision in point of law". By the same token, in ***R v Garside*** (1967) 52 Cr App R 85, Winn LJ at p 89 described a submission of no case to answer as a "point of law". Similarly, in ***R v Cockley*** [1984] Crim L R 429, the court assumed that the wrongful rejection of a submission of no case to answer would mean that "the judge had been wrong in law." These cases all led the Court of Appeal in Fiji*

*in The State v Mosese Tuisawau (Criminal Appeal No 14 of 1990) to say, without apparent disapproval, that "[i]t has been held that where a submission of no case to answer is made at the close of the prosecution case it calls for a decision of a question of law". (emphasis mine)'*

[15] The Supreme Court allowed Verma's appeal and quashed the decision of the single judge of the Court of Appeal to dismiss Verma's appeal to the Court of Appeal under section 35(2) of the Court of Appeal Act in respect of the Magistrate's refusal to uphold the submission of no case to answer and remitted the appeal to the Full Court of Appeal for it to determine the appeal on its merits.

[16] While firmly declaring that a determination of a submission of no case to answer does involve a question of law only, the Supreme Court has stated that such a decision involves considering whether the evidence called by the prosecution is or is not capable of amounting to proof of guilt and in turn whether the evidence is capable of amounting to proof of guilt is a question of law only. The Supreme Court has also indicated what may *inter alia* amount to incapability of the evidence to amount to proof of guilt in both situations covered by Galbraith as follows:

*'16. ....The incapability of the evidence to amount to proof of guilt may arise in a number of different ways. It may arise because there is no evidence that an offence has been committed at all. Or it may arise because there is no evidence that the offence, though committed, was committed by the defendant. Those would be examples of the first situation covered by Galbraith. On the other hand, it may arise because such evidence as the prosecution called was too weak, inconsistent, vague or implausible for any sensible person to rely on it. That would be an example of the second situation covered by Galbraith.'*

[17] Nevertheless, the Supreme Court has not admittedly laid down any authoritative threshold test to be applied in order to determine whether an application for no case to answer should be allowed or not; in any event not with regard to section 231 (1) of the Criminal Procedure Act, 2009.

[18] Therefore, still the binding provision of statutory law relating that issue appears to be that the court is required to record a finding of not guilty if it considers that **there is no evidence** that the accused person (or any one of several accused) committed the

offence, at the close of the prosecution case. Prima facie this seems to cover only the first situation covered by Galbraith. Whether ‘no evidence’ rule should be extended to cover the second situation covered by Galbraith is a matter for future deliberations by the Court of Appeal or the Supreme Court.

[19] The respondent’s counsel submitted that the Supreme Court in Verma was only considering the application of section 178 of the Criminal Procedure Act, 2009 and therefore its pronouncement that a determination of a submission of no case to answer does involve a question of law only, should not apply to the current appeal and not be considered a binding statement of the law in so far as section 231(1) of the Criminal Procedure Act, 2009 is concerned. In other words what the respondent’s counsel suggested was that the remarks of the Supreme Court particularly relating to section 231(1) of the Criminal Procedure Act, 2009 should not be treated as part of *ratio decidendi* but only as *obiter dicta* of the Supreme Court judgment. However, I think, that these are matters (being important issues of law) that should be best left to the full court of the Court of Appeal to deliberate or for the Supreme Court to clarify on another occasion.

[20] Similarly, whether the observation made by the Supreme Court that a determination of a submission of no case to answer involves a question of law only considering whether the evidence called by the prosecution is or is not capable of amounting to proof of guilt, was in effect setting out or at least implying the kind of test to be applied under section 231(1) of the Criminal Procedure Act, 2009 is also a matter for the full court to determine. In addition, to what extent Galbraith should apply to or guide the application of section 231(1) of the Criminal Procedure Act, 2009 in the light of the fact that as stated in Verma in England there are no statutory provisions similar to sections 178 or 231(1) of the Criminal Procedure Act, 2009 is also matter for future judicial deliberations.

[21] Since, the Supreme Court’s pronouncement that a determination of a submission of no case to answer does involve a question of law only, has been made as a general statement of the law, I am bound by it on the doctrine of judicial precedence/*stare decisis*.

- [22] Therefore, I am compelled to determine that the sole ground of law involves a question of law alone and no leave to appeal is required.
- [23] The respondent's counsel admitted that the decisions cited by the learned trial judge (Criminal Appeal No. 52 of 1984, **State v Mosese Tuisawau** Cr. App. 14/90, **State v Woo Chin Chae** [2000] HAC 023/99S) to support the test that he was applying to determine the no case to answer application by the respondent namely '*whether there is some incriminating evidence, direct or circumstantial, on all the essential ingredients of the charged offence or offences*' had not been decided under section 231(1) of the Criminal Procedure Act, 2009.
- [24] Therefore, whether it is still the true threshold test under section 231(1) of the Criminal Procedure Act, 2009 is also a question of law to be considered by the full court.
- [25] The appellant has submitted that the appropriate test for no case to answer may differ depending on whether the evidence led against the accused is direct or circumstantial. However, the decisions in Australia suggest that the same test is to be applied to deciding a submission of no case to answer in a case depending upon circumstantial evidence as in a case depending upon direct evidence, although the manner of its application will be different (see **The Queen v Bilick and Starke** (1984) 36 SASR 321 at 335 and 337).
- [26] Upon a survey of Australian decisions the following judgments seem most relevant to the matter in issue. King CJ said in **The Queen v Bilick and Starke** (supra):

*"... The question of law is whether on the evidence as it stands the defendant could lawfully be convicted. He could lawfully be convicted on that evidence only if it is capable of producing in the minds of a reasonable jury satisfaction beyond reasonable doubt. ...*

*The same test is to be applied to deciding a submission of no case to answer in a case depending upon circumstantial evidence as in a case depending upon direct evidence, although the manner of its application will be different. The question to be answered by the trial judge is whether there is evidence with respect to every element of the offence charged which, if accepted, could prove that element beyond reasonable doubt. Where there is direct evidence of the actus reus and*

*that evidence is capable of supporting an inference of mens rea, there is a case to answer except in the extreme case, as perhaps of testimony which is manifestly self-contradictory or the product of a disorderly mind, envisaged by the Privy Council, in which the direct 'evidence' is so incredible as to amount to no evidence. Where the case is a circumstantial or partly circumstantial case and therefore depends on inferences, the question may be expanded so that it becomes: On the assumption that all the evidence of primary fact considered at its strongest from the point of view of the case for the prosecution, is accurate, and on the further assumption that all inferences most favourable to the prosecution which are reasonably open, are drawn, is the evidence capable of producing in the mind of a reasonable person satisfaction, beyond reasonable doubt, of the guilt of the accused? That, as it seems to me, was the question which the learned trial Judge was required to answer in deciding on the submission of no case to answer." (my emphasis).*"

- [27] In **Questions of Law Reserved on Acquittal** (No 2 of 1993) (1993) 61 SASR 1 at 5, King CJ identified the role of the trial Judge faced with a submission of no case to answer in a case involving circumstantial evidence in the following terms:

*"It follows from the principles as formulated in Bilick ... in connection with circumstantial cases, that it is not the function of the judge in considering a submission of no case to choose between inferences were are reasonably open to the jury. He must decide upon the basis that the jury will draw such of the inferences which are reasonably open, as are most favourable to the prosecution. It is not his concern that any verdict of guilty might be set aside by the Court of Criminal Appeal as unsafe. Neither is it any part of his function to decide whether any possible hypotheses consistent with innocence are reasonably open on the evidence ... . He is concerned only with whether a reasonable mind could reach a conclusion of guilty beyond reasonable doubt and therefore exclude any competing hypothesis as not reasonably open on the evidence."* (my emphasis).

- [28] In **Doney v The Queen** (1990) 171 CLR 207 at 214 – 215, the High Court said:

*"It follows that, if there is evidence (even if tenuous or inherently weak or vague) which can be taken into account by the jury in its deliberations and that evidence is capable of supporting a verdict of guilty, the matter must be left to the jury for its decision. Or, to put the matter in more usual terms, a verdict of not guilty may be directed only if there is a defect in the evidence such that, taken at its highest, it will not sustain a verdict of guilty"* (my emphasis).

[29] In **Ledua v State** [2018] FJCA 96; AAU0071.2015 (25 June 2018) once again Calanchini P had identified what can be regarded as a question of law in relation to a decision on an application for enlargement of time in the High Court. See also **Naisua v State** [2013] FJSC 14; CAV0010.2013 (20 November 2013), **Morgan v Lal** [2018] FJCA 181; ABU132.2017 (23 October 2018) and **Turaga v State** [2016] FJCA 87; AAU002.2014 (15 July 2016) for some examples of questions law.

*[5] .....Put another way, the issue is whether the learned High Court Judge has applied the correct test for determining the application for an enlargement of time rather than whether he has applied the test correctly. In my opinion the first question involves question of law only and the second involves a question of mixed law and fact.'*

[30] Since the Supreme Court had held in **Verma** that a ground of appeal whether a determination of a submission of no case to answer does involve a question of law only, the first task of the full court would be to determine whether the learned trial judge had applied the correct test for the application for no case to answer. If so, whether that test had been applied correctly. The latter will inevitably involve examining the evidence available against the respondent.

[31] However, at this stage on a perusal of the impugned order dated 18 February 2019 it appears that the trial judge had analyzed the evidence thoroughly and held that the respondent was neither in control of the vessel nor was sharing a common intention with the 02<sup>nd</sup> accused to import into Fiji or possess an illicit drug. Accordingly, the trial judge had made a finding that there was **no incriminating, direct or circumstantial evidence**, against the appellant on all five charges to put her to her defense. Thus, the trial judge despite having initially stated the relevant test as *'whether there is some incriminating evidence, direct or circumstantial, on all the essential ingredients of the charged offence or offences'* seems to have satisfied himself to a much higher standard of *'no evidence'* as contemplated in section 231 of the of the Criminal Procedure Act, 2009 before allowing the application for no case to answer.

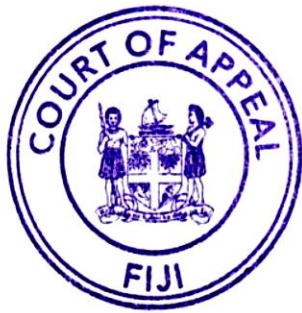
[32] The appellant has also submitted that the State relied on the respondent's joint control of the vessel in order to enliven the statutory presumption pursuant to section 32 of the Illicit Drugs Control Act, 2004. However, in order to trigger the presumption

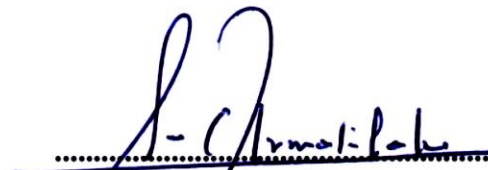
under section 32 there must be a factual foundation of joint control of the vessel. The learned trial judge had examined this very aspect in detail at paragraphs 22-24 of the impugned Ruling on no case to answer and determined that there was no evidence that the respondent was in control of the vessel despite the admission that she was the owner of it. The trial judge had also decided that it was her husband, the 02<sup>nd</sup> accused was in control of the vessel.

- [33] The appellant has not submitted that these findings of fact were erroneous in the light of the prosecution evidence.
- [34] If the full court were to decide that the threshold test should be different to what the trial judge had stated and/or applied then the task would be to lay down the appropriate test and determine on evidence whether the case as presented by the prosecution had passed that test. This also would invariably involve examining evidence.
- [35] To what extent an appellate court could and should interfere with findings of fact by a trial judge, would also be a relevant consideration before the full court.
- [36] Thus, although a determination of a submission of no case to answer has been held to involve a question of law only it is clear that this issue cannot be resolved without necessarily examining facts and evidence.
- [37] Similarly, what cannot also be forgotten is that unlike in Australia and UK, in Fiji the judge is the sole judge of fact in respect of guilt, and the assessors are there only to offer their opinions, based on their views of the facts and it is the judge who ultimately decides whether the accused is guilty or not [(vide **Rokonabete v State** [2006] FJCA 85; AAU0048.2005S (22 March 2006), **Noa Maya v. The State** [2015] FJSC 30; CAV 009 of 2015 (23 October 2015) and **Rokopeta v State** [2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26 August 2016)]. Should this not have a significant impact on the threshold test of no case to answer applied by a trial judge in his or her decision not to call for the defence based on evidence led by the prosecution thereby withdrawing the case from the assessors?

**Order**

1. The notice of appeal filed by the appellant may proceed to the Full Court on the question of law set out under the sole ground of appeal.



  
.....  
**Hon. Mr. Justice C. Prematilaka**  
**ACTING RESIDENT JUSTICE OF APPEAL**