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

CRIMINAL APPEAL NO. AAU 014 of 2020
[In the High Court at Lautoka case No. HAC 116 of 2015]

BETWEEN	:	**SOSICENI TOA**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Appellant in person**
	:	**Mr. L. J. Burney for the Respondent**
Date of Hearing	:	**10 August 2022**
Date of Ruling	:	**12 August 2022**

RULING

[1] The appellant had been charged in the High Court at Lautoka with a single count of ATTEMPTED UNLAWFUL IMPORTATION OF ILLICIT DRUGS namely methamphetamine weighing approximately 20.3kg between 09 July 2015 and the 13 July 2015 contrary to section 4 (1) and section 9 of the Illicit Drugs Control Act, 2004 and another count of ATTEMPTED UNLAWFUL IMPORTATION OF ILLICIT DRUGS namely methamphetamine weighing approximately 79.3kg between the 17 May 2015 and 25 July 2015 contrary to section 4 (1) and section 9 of the Illicit Drugs Control Act, 2004.

[2] Following a unanimous decision of 05 assessors that the appellant was guilty of the first but not the second of the two counts, the trial judge convicted the appellant on the first count but acquitted him of the second and sentenced the appellant on 31

January 2020 to 09 years, 02 months and 14 days of imprisonment with a non-parole period of 08 years.

[3] The appellant's appeal against conviction and sentence is timely. He, however, filed a Form 3 to abandon the sentence appeal on the day of the leave to appeal hearing. Both parties had tendered written submissions for the leave to appeal hearing.

[4] In terms of section 21(1) (b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. For a timely appeal, the test for leave to appeal against conviction is **'reasonable prospect of success'** [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) that will 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 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[5] The grounds of appeal urged on behalf of the appellant against conviction are as follows:

> *Ground 1*
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> *THAT the precisely, the Learned Trial Judge erred in law and in fact, when only considering the nine prosecution's witnesses' testimonies under-oath, as circumstantial evidence proven before the lay assessors. Thus, without a proper material of direct evidence of expert qualified drug analyser from the USA chemical and south west laboratory fully clarify and proof in the trial court, that it was really methamphetamine? Being intercepted by authorities at Los Angeles airport. In failure of adequately directing assessors on witness Naiko's evidence had seriously caused a grave miscarriage of justice in the consignment replaced with sand, which prejudicial evidence to the appellant.*
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> *Ground 2*
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> *THAT also, the trial judged had highly failed to properly guide and assist the assessors on how to evaluate or the agreed facts and sworn evidences of the*

appellant in that the learned defense counsel whom surely instructed the appellant in his above evidence, while he had every right to reply on his lawyer.

[6] The facts of the case had been summarized by the trial judge in the sentencing order as follows:

> *'2. The brief facts were as follows:-*
>
> *The accused between 9th July, 2015 and the 13th July, 2015 together with some persons unknown attempted to import into Fiji illicit drugs namely methamphetamine weighing approximately 20.3 kg without lawful authority.*
>
> *The accused ordered an industrial pressure cooker from Mexico with packets of methamphetamine concealed in it. At the Los Angeles Airport the consignment was intercepted by the US Customs and Border Protection Officers where the contents were tested which was positive to the illicit drugs methamphetamine, here the contents were replaced with sand.*
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> 3. *The consignment was then subjected to international control delivery monitored by the law enforcement agencies. The Fiji Police Force was alerted and they were aware of the consignment, after the consignment arrived at the Nadi Airport the accused on 13th July, 2015 collected the consignment, loaded it in his car and then rushed out of the airport.*
>
> 4. *The police officers gave chase in a car but were unable to stop the accused this alerted the accused who was able to hide the consignment in a sugar cane field to avoid detection by the police. According to the analyst report the purity level of the illicit drugs were 97.4%.*
>
> 5. *The accused was later arrested by police and upon investigation the consignment was located.'*

[7] The appellant, who holds an Australian passport and whose family lives in Australia, had given evidence at the trial and taken up the position that though he ordered the industrial pressure cooker in question, he did not know that there were prohibited drugs inside it. At the same time he seems to have alluded that he imported it under 'duress'.

01st ground of appeal

[8] The appellant's complaint is that the prosecution did not lead evidence to show that what was found inside the pressure cooker was in fact a prohibited drug *i.e.* methamphetamine.

[9] There has not been any challenge to the identity of the pressure cooker in the sense that there was no dispute that what the appellant cleared at Nadi Airport was in fact the industrial pressure cooker that he ordered from Maxico. The appellant had been the consignee. He has admitted in his written submissions that the prosecution had led a report from South West laboratory in USA dated 17 July 2015 and 20 July 2015 and marked it as exhibit No.12 presumably confirming that contents found inside the cooker was methamphetamine. It is quite possible for this report to have these dates though the detection itself took place on 09 July 2015. The laboratory test would have been performed after on the spot test of the contents by US officials.

[10] The trial judge had said at paragraph 19 of the summing-up as follows:

> *'…… Also as a matter of law, I must direct you that methamphetamine is an illicit drug and in this trial there is no dispute that the drugs were methamphetamine and the respective weight of the drugs were as per the information filed which is part of the amended admitted facts.'*

[11] He had repeated the same in the judgment at paragraph 111 as follows:

> '*There is no dispute that there was 20.3 kg of methamphetamine concealed in the pleasure cooker which was replaced at Los Angeles Airport with sand. The dispute is whether the accused had the intention of importing illicit drugs into Fiji.'*

[12] The appellant, his counsel, prosecuting counsel and the trial judge had agreed to take the following as uncontested facts ('Agreed Facts'):

> *First Consignment*
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> *8. THAT in July, 2015, the accused was expecting a pressure cooker worth USD$500 and weighing 68.5kilograms.*

9. *THAT on the 10 th of July, 2015, DHL Express LAX forwarded a manifest document master airway bill number 26030158866 and airway bill 3537441003 to Amitesh Atish Kumar, Customs Clerk at DHL Express, Nadi Airport.*

10. *THAT the description of item on this airway bill was a pressure cooker worth USD$500, weighing 68.5kilograms.*

11. *THAT this consignment originated from Mexico, transited through Los Angeles Airport,USA with final destination to be Fiji.*

12. *THAT as per airway bill 3537441003, the supplier for this consignment was: - Marcan Comercia Intl SA DE CV AV Chichen IIZA.510 Region 97, Tel: 987058346, 77530, Benito Juarez, Quintana Roo Mexico.*

13. *THAT as per airway bill 3537441003 the consignee for this consignment was attention to Sosiceni Toa and addresses as: - Denarau State, LTE 27 Riverside Road, Nadi, Fiji, Ph: 7077009.*

14. *THAT this consignment was intercepted by Customs Officials in Los Angeles, USA.*

15. *THAT upon examination and extraction of the pressure cooker by the Customs Officials in Los Angeles, USA, white substance was found.*

16. *THAT the white substance was tested by Sylvia Tarin-Brousseau, the Forensic Chemist of the Department of Justice, Drugs Enforcement Administration (DEA) which tested positive for Methamphetamine Hydrochloride weighing 20.3kg.*

17. *THAT control delivery was activated from Los Angeles, USA to Fiji whereby Customs officers replaced all the white substance with sand in exactly the same plastic and weight.*

18. *THAT the accused was advised by Amitesh Atish Kumar, Customs Clerk at DHL Express, Nadi that a consignment addressed to him has arrived at their office at Nadi Airport.*

19. *THAT the accused went to DHL Express, Nadi Airport with Paula Baravilala Seru.*

20. *THAT the accused presented his Tax Identification No. 200778404, paid FJD$312.53 as per tax invoice D00157631, signed the delivery sheet and collected this consignment as per airway bill 3537441003.*

21. *THAT in respect of this first consignment, the following document is admitted by consent between the Prosecutions and Defence:* ***a)*** *Record of Interview Notes of Sosiceni Toa dated 13th July 2015* ***b)*** *Fiji Revenue and Customs Authority Single Administrative Document* ***c)*** *DHL Express Official Receipt*

No. NR 10183 ***d)*** *Copy of Sosiceni Toa's FRCA & FNPF card with TIN No. 200778404* ***e)*** *Delivery Sheet dated 13th July 2015* ***f)*** *Waybill No. 3537441003* ***g)*** *Fiji Airways Air Cargo Transfer Manifest dated 11th July 2015* ***h)*** *Passport Copy No. N3144262* ***i)*** *Travel History for Sosiceni Toa* ***j)*** *U.S. Department of Justice – Chemical Analysis Report.*

[13] It appears that the appellant has admitted the same in his cautioned interview which was also part of the admitted facts.

[14] Thus, it is clear that the appellant had mounted no challenge to the fact that what was found inside the industrial pressure cooker that he ordered was in fact methamphetamine. It was common ground.

[15] The appellant has also submitted under this ground of appeal that he lacked intention to import a prohibited drug into Fiji or had no knowledge that there was methamphetamine inside it. He argues that circumstantial evidence available was not enough to draw such an inference.

[16] Lack of intention or knowledge was his real defense at the trial and by taking up this position he tries to negate the fault element of the offence of importation.

[17] In my view, importation is a result of conduct or a circumstance in which conduct, or a result of conduct occurs as stated in section 15(1) (b) and (c) of the Crimes Act, 2009 and not a mere conduct as set out in section 15(1)(a). '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)]. 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 importation which is the result of conduct or a circumstance in which conduct or the result of conduct occurs, as opposed to mere conduct, section 23(2) of the Crimes Act, 2004 would become applicable and recklessness becomes the fault element for the physical element of importation. In terms of section 21(4) of the Crimes Act, when recklessness is the fault element, proof of intention (section 19), knowledge (section 20) or recklessness [section 21(1) and (2)] will satisfy the fault element of recklessness. Thus, in a case where an accused is

charged with importation of an illicit drug under section 5 of the Illicit Drugs Control Act 2004, the prosecution can prove either intention or knowledge or recklessness as the fault element. In other words, proof of any one (or more) of these fault elements would suffice.

[18] The trial judge has analyzed the events that happened after the appellant collected the industrial pressure cooker in relation to his defense that he did not have intention to import any prohibited drug, from paragraphs 111-124 of the judgment. Thus, the judge has looked at only the fault element of intention. However, the same circumstances could be used to prove the appellant's knowledge or recklessness as well. If the circumstantial evidence proves any one of them *i.e.* intention, knowledge or recklessness, it is sufficient to establish the fault element.

[19] Among many other facts considered by the trial judge, the fact that the appellant threw away the industrial pressure cooker into a sugarcane field while on his way back with witness Paula Seru when he suspected that the police was following them in another vehicle, his false account as to how the consignment went missing from the car to the police officers coupled with the manner in which he sank into despondency when he was confronted with the pressure cooker recovered by the police from the place shown by Paula Seru, stand out as clear evidence of establishing the fault element.

02nd ground of appeal

[20] The appellant complains that the trial judge had not directed the assessors as to how they should evaluate the agreed facts. The trial judge's directions are as follows at paragraphs 45 and 46:

> *'45. In this trial the prosecution and the defence have agreed to certain facts which have been made available to you titled as amended admitted facts.*
>
> *46. From the admitted facts you will have no problems in accepting those facts as proven beyond reasonable doubt and you can rely on it. The admitted facts are part of the evidence and you should accept these admitted facts as accurate, truthful and proven beyond reasonable doubt.'*

[21] I do not think that there is any merits in this complaint.

[22] The appellant had embellished his argument under this ground of appeal by submitting that he had signed the agreed facts 'accidently' and further alleges incompetence of his trial lawyer as well.

[23] However, the fact remains that the appellant's evidence has been consistent with what is revealed in the agreed facts. Thus, his signing the agreed facts could not have been done accidently which proposition is clearly an afterthought and fanciful. Further, his evidence has been in line with his cautioned interview where he had admitted the importation of the industrial pressure cooker but denied any knowledge of the presence of prohibited drugs inside it. Agreed facts had left room for the appellant to take up that defense which shows that his trial counsel and the appellant have planned the defense strategy carefully around admitting to the physical element of importation but denying the fault element of importation. It is not an 'accident' as claimed by the appellant.

[24] On the other hand, the appellant has not followed the protocol precedent to raising a point of appeal based on criticism of trial counsel as set out in **Chand v State** [2019] FJCA 254; AAU0078.2013 (28 November 2019) without which such a complaint cannot simply be sustained. In any event, as pointed out in the earlier paragraph I do not see any flagrant incompetence on the part of the defense counsel who appears to have devised the appellant's strategy in the best possible manner given the parameters already fixed by the evidence available to the prosecution.

Order

1. Leave to appeal against conviction is refused.

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