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

CRIMINAL APPEAL NO. AAU 122 of 2015
High Court Criminal Case No. HAC 001 of 2015

BETWEEN	:	**THE STATE**
		Appellant
AND	:	**MOHAMMED SHAHEED KHAN**
		Respondent
Counsel	:	**Ms J. Fatiaki for the Appellant**
		Respondent absent and unrepresented

CRIMINAL APPEAL NO. AAU 123 of 2015
High Court Criminal Case No. HAC 001 of 2015

BETWEEN	:	**ETHAN KAI**
		Appellant
AND	:	**THE STATE**
		Respondent
Counsel	:	**Mr M. Naivalu for the Appellant**
		Ms J. Fatiaki for the Respondent
Coram	:	**Dayaratne, JA**
		Mataitoga, JA
		Qetaki, JA
Dates of Hearing	:	**3 July, 10 July and 12 July 2023**
Date of Judgment	:	**28 July 2023**

JUDGMENT

Dayaratne, JA

Case against the Appellants in the High Court

[1] The Respondent in AAU 122 of 2015 (herein after referred to as the '1st Accused') and the Appellant in AAU 123 of 2015 (herein after referred to as the '2nd Accused') were charged in the High Court on two counts.

[2] The 1st Accused was charged with importing 29.9 Kilograms of heroin without lawful authority contrary to section 4(1) of the Illicit Drugs Act 2004 and the '2nd Accused was charged with engaging in dealing with the 1st Accused for the importation of 29.9 Kilograms of heroin without lawful authority contrary to section 5(b) of the Illicit Drugs Act 2004.

[3] By his judgment dated 10 September 2015 the learned High Court Judge acquitted the 1st Accused' of the said charge while the 2nd Accused was convicted of the charge against him and was sentenced to 15 years imprisonment with a non parole period of 14 years.

Application for leave to appeal

[4] The State filed a timely application for leave to appeal against the acquittal of the 1st Accused while the 2nd Accused also filed a timely application for leave to appeal against the conviction and sentence.

[5] The State has been granted leave to appeal on three grounds of appeal while the 2nd Accused has been granted leave to appeal on a sole ground of appeal.

[6] Both appeals are consolidated and the parties have agreed that they will be bound by one judgment of this court.

Respondent in AAU 122 of 2015 absent and unrepresented

[7] When Appeal bearing No. AAU 122 of 2015 was taken up before this court on 3 July 2023, the Respondent (hereinafter referred to as the '1st Accused') was not present and Messrs Iqbal Khan Associates who had represented him at the Trial in the High Court, at the hearing before the single judge and the hearing before the full court in May 2021 too were not present. Court directed the Registry to issue notices on the 1st Accused and Messrs Iqbal Khan Associates and informed State Counsel and the learned counsel for the Appellant in Appeal bearing No. 123 of 2015 that the hearing will be taken up on 10 July 2023.

[8] On 10 July 2023 also, the 1st Accused was absent and Mr. Fa appeared on behalf of Messrs Iqbal Khan Associates and informed court that they do not have any instructions from the 1st Accused. The Registry informed court that it was not possible to serve notice on the 1st Accused since his whereabout are not known. Court having expressed its displeasure at the conduct of Messrs Iqbal Khan Associates in not taking any meaningful steps to either represent the 1st Accused or withdraw from representing the 1st Respondent, informed Mr. Fa to convey to Messrs Iqbal Khan Associates to take steps to file an application to withdraw from representing the 1st Accused if it did not have instructions from the 1st Accused. The hearing was re-fixed for 12 July 2023.

[9] When these matters were taken up on 12 July 2023, it was brought to our attention that Messrs Iqbal Khan Associates had filed Summons for leave to withdraw as solicitors for the 1st Accused supported by an affidavit on 11 July 2023. Having perused the said documents and having heard Mr.Fa who represented Messrs. Iqbal Khan Associates in support of the application to withdraw as well as the learned State Counsel for the State, this court decided to allow the application for withdrawal.

Application of the State to proceed with the hearing in the absence of the 1st Accused

[10] Court thereafter heard learned State Counsel who moved that the appeal of the State be taken up for hearing in the absence of the 1st Accused.

[11] Court was satisfied that;

(a) the 1st Accused was aware that an appeal against acquittal was pending in this court and on his instructions Messrs Iqbal Khan & Associates represented him at the hearing of the appeal on 15 September 2022,

(b) according to the affidavit dated 10 July 2023 which has been submitted by Mr. Iqbal Khan in support of his motion to withdraw as solicitor for the 1st Accused, the 1st Accused had on or about 15 September 2022 taken away all his documents from the office of Mr. Khan and that he has had no instructions from the 1st Accused thereafter,

(c) modern means of communication would have enabled him to provide instructions to his legal advisers in Fiji should he have chosen to do so,

(d) the 1st Accused's behavior suggests that he has voluntarily elected not to exercise his right to be heard in this appeal either in person or through counsel,

(e) the Court of Appeal Act and Rules do not require that a respondent attends in person,

(f) given the nature of appellate proceedings there is no disadvantage to the 1st Accused since he is not entitled to give or call evidence,

(g) the issue in this appeal is principally whether the learned trial judge fell into an error of law,

(h) this appeal concerns a serious offence of importation of a large quantity of heroin into Fiji and the other accused Ethan Kai has been sentenced to 15 years imprisonment,

(i) appeals should be heard within a reasonable time,

(j) this appeal is to be heard along with AAU 123/15 and the rights of the appellant in that appeal will be affected if there is a prolonged delay in taking up these matters for hearing,

(k) this court will consider all points that can properly be taken in favour of the 1st Accused and will take into consideration the matters stated in the written submissions that had been previously filed on his behalf.

[12] Accordingly, the court was of the unanimous view that this matter should be taken up for hearing in the absence of the 1st Accused and court proceeded to hear submissions of learned counsel.

Consideration of the appeal filed by the State – AAU 122 of 2015

[13] The appeal by the State is against the acquittal of the 1st Accused.

[14] At the hearing before this court, learned counsel for the State informed court that the State was relying only on the first two grounds of appeal. They are;

Ground 1. *'That the learned Trial judge erred in law and fact in acquitting the respondent of importing 29.9 kilograms of heroin without lawful authority contrary to section 4 (1) of the Illicit Drugs Control Act 2004 when it was not reasonably open to him to do so having regard to in particular to the fact that the Learned Trial judge convicted the respondent's co-accused Ethan Kai, of engaging in dealings with the respondent for the import of the same 29.9 kilograms of heroin'.*

Ground 2. *'That the learned Trial judge erred at paragraph 33 of his Judgment in misconstruing the admitted facts as an admission by the prosecution that the content of the respondent's cautioned interview was true whereas the admission went only to the admissibility of the cautioned interview. The weight to be attached to the content of the cautioned interview was a matter for the Learned Trial Judge and by treating the exculpatory matters in the cautioned interviews as uncontested the Learned Trial Judge attached undue weight to the exculpatory matters thereby giving rise to a miscarriage of justice'.*

[15] As submitted by the State, the first ground of appeal of the State mirrors the sole ground of appeal of the 2nd Accused and hence, I will deal with the submissions made by learned State Counsel in respect of that ground when dealing with the submissions made by learned counsel for the 2nd Accused (who is the Appellant in AAU 123 of 2015) in order to avoid repetition.

[16] I will first deal with the second ground of appeal of the State.

[17] The main contention of the State is that the trial miscarried as a result of a fundamental error made by the learned trial judge by misdirecting the assessors. She contended that the trial judge in his summing up had directed the assessors to consider the contents of the 1st Accused's caution interview as facts proved beyond reasonable doubt. In the summing up he has said *'You are allowed to consider the contents of the caution interview as the facts proved beyond reasonable doubt in respect of the first count* (at paragraph 221).

[18] The learned State Counsel submitted that this misdirection resulted in depriving the prosecution of a fair trial and hence the trial was miscarried. She submitted that it was thus a pure question of law that this court was required to look into.

The purpose of a summing up

[19] Appellate courts have time and again set down what a trial judge should cover in a summing up as well as the consequences of a misdirection or an inadequate direction.

[20] The Supreme Court in **State v Li Jun [2008] FJSC 18, CAV0017.2007S (13 October 2008);** discussed the purpose of a summing up and what it ought to contain. Court cited the following passage from the case of **RPS v The Queen** (2000) 199 CLR 620, 637;

> *'It is as well to say something more general about the difficult task trial judges have in giving juries proper instructions. The fundamental task of a trial judge is of course to ensure a fair trial of the accused. That will require the judge to instruct the jury about so much of the law as they need to know in order to dispose of the issues in the case. No doubt that will require instructions about the elements of the offence the burden and standard of proof and the respective functions of judge and jury. Subject to any applicable statutory provisions it will require the judge to identify the issues in the case and to relate the law to those issues. It will require the judge to put fairly before the jury the case which the accused makes'.*

[21] The Supreme Court went on to state that:

> *'The function of the summing up is to tell the assessors what are the issues of fact on which they have to make up their minds in order to determine whether the accused is guilty of an offence:_ R v Mowatt [1968] 1 QB 421, 426, per Diplock LJ; cited by Mc Hugh J. in Fingleton v R [2005] 216 ALR 474 [79]. While the course of the trial may have contributed to the form of the summing up in this case, a trial judge must be astute to secure for the accused a fair trial according to law. This involves..... an adequate direction both as to the law and the possible use of the relevant facts upon which any matter upon which the jury could in the circumstances of the case upon the material before them find or base a verdict in whole or in part'.*

[22] The 1st Accused had made a caution interview and the State was entitled to produce it in evidence at the trial since court had held that it had been made voluntarily consequent to a *voir dire* inquiry.

[23] However, a number of facts had been admitted between the parties pursuant to Section 135 of the Criminal Procedure Act and that included the caution interview of the 1st Accused as well. Thus the caution interview too had been considered as an admitted fact.

[24] The State submits that by misapprehending that the prosecution accepted the truth of the 1st Accused's protestations of ignorance/innocence, the trial judge denuded the 'trial' of the very essence of a fair trial under the adversarial system of criminal justice.

[25] The State also takes up the position that since the 1st Accused did not elect to give evidence at the trial and has entirely relied on the exculpatory parts in his caution interview as his defence, it was incumbent on the trial judge to deal with the contents of the caution interview with utmost caution.

[26] In summary, the State submits that there was overwhelming evidence against the 1st Accused as can be gleaned from the summing up of the trial judge himself, but having formed an erroneous view that the contents of the caution interview have been proved beyond reasonable doubt on account of it being an admitted fact, the

learned trial judge has concluded that a reasonable doubt has been created in the prosecution's case against the 1st Accused.

[27] The State points out that a perusal of his summing up reveals that the trial judge had clearly arrived at certain findings of guilt against the 1st Accused.

[28] It was also submitted that he had also correctly observed that the evidence in order to establish knowledge on the part of the 1st Accused with regard to the contents of the cargo containing heroin, was circumstantial in nature. The State admitted that the prosecution in fact had relied on circumstantial evidence to impute knowledge on the 1st Accused.

[29] A perusal of the summing up of the trial judge reveals that he has arrived at the conclusion that the prosecution had proved beyond reasonable doubt that the 1st Accused was the consignee of the container in question and the cargo found therein (para 219 of the summing up and para 31 of the judgment).

[30] However, in arriving at a conclusion as to whether the 1st Accused had knowledge of the contents of the cargo, he has relied on the exculpatory version as contained in the caution interview and arrived at a conclusion that there was a reasonable doubt as to whether he knew of the actual nature of the contents.

[31] It is important to emphasize here that by admitting the caution interview as an admitted fact, the prosecution was not conceding the contents thereof as the truth or as having been proven beyond reasonable doubt.

[32] The contents of the caution interview had to be taken into consideration together with the rest of the evidence placed before court by the prosecution. It was thereafter that a decision could have been arrived at as to whether the evidence taken as a whole was sufficient to prove the guilt of the accused beyond reasonable doubt. This was the task of the assessors and the trial judge had to make a proper direction to the assessors in this regard and direct himself as well in arriving at his ultimate conclusion.

[33] A perusal of the summing up and the judgment of the learned High Court judge reveals that this has not been done. As pointed out by the State, there certainly has been a misdirection on the part of the learned trial judge with regard to the effect of the caution interview of 1st Accused and that clearly appears to have had a significant bearing on the opinion of the assessors and the ultimate decision of the High Court Judge.

[34] Learned State Counsel submitted that the trial judge's inexplicable error in his approach to the 1st Accused's caution interview cannot be brushed aside as inconsequential or a mere technicality.

[35] She further submitted that this error fed to the learned judge's reasons for disagreeing with the guilty opinions of two assessors and agreeing with the other two assessors that the 1st Accused was not guilty.

[36] The State also takes up the position that the error had resulted in a miscarriage of justice because, had the learned judge properly assessed the exculpatory statements in the context of the totality of the evidence, he could not have reasonably concluded that the 1st Accused's excuses may have been truthful.

[37] How a jury should be directed to consider a statement which contains exculpatory as well as inculpatory matters was dealt with in the case of **R v Sharp [1988] 1 All ER 65** by the House of Lords. They considered a series of cases which dealt with this issue and ultimately decided that the view expressed in ***R v Duncan* (1981) 73 Cr App R 359, CA** was the most appropriate and should therefore be followed.

[38] Lord Lane CJ said in the case of **Duncan** stated that;

> *'Where a mixed statement is under consideration by the jury in a case where the defendant has not given evidence, it seems to us that the simplest, and therefore, the method most likely to produce a just result, is for the jury to be told that the whole statement, both the incriminating parts and the excuses or explanations, must be considered by them in deciding where the truth lies. It is, to say the least, not helpful to try to*

explain to the jury that the exculpatory parts of the statement are something less than evidence of the facts they state. Equally, where appropriate, as it usually will be, the judge may, and should, point out that the incriminating parts are likely to be true (otherwise why say them?), whereas the excuses do not have the same weight. Nor is there any reason why, again where appropriate, the judge should not comment in relation to the exculpatory remarks upon the election of the accused not to give evidence'.

[39] In the light of the above, there is no doubt that the direction of the learned High Court Judge was erroneous and amounted to a misdirection on a material aspect.

[40] In spite of the absence of the 1st Accused during the proceedings before this court, it is incumbent on us to consider all matters that annure to his benefit. I will also pay heed to the matters adverted to in the written submissions that had been filed on his behalf by his then solicitors on record Iqbal Khan & Associates dated 1 September 2022 and the written submissions filed at the leave hearing.

[41] It has been submitted in the said written submissions that the prosecution had to prove beyond reasonable doubt that the 1st Accused had knowledge that the container in question contained heroin. It has also been submitted that the 1st Accused had no knowledge of the contents that were found in the said container and that he had, at the first available opportunity stated so to the customs officer.

[42] It is further contended that the prosecution had admitted the caution interview as an agreed fact and hence the version of the 1st Accused was an honest account and that the High Court was correct in relying on the contents of the caution interview. I am however unable to agree with the said submission.

[43] Several authorities too had been cited with regard to the determination of possession in illicit drugs cases and it has been emphasized that the 1st Accused did not have possession or knowledge of the heroin in the container.

[44] It is clear that the error as pointed out by the State and discussed in detail above was so fundamental that it had contributed in no small measure to the ultimate

outcome of the case against the 1st Accused and tainted the entire proceedings to the detriment of the prosecution.

[45] As can be gleaned from the summing up and the judgment of the learned High Court Judge, the alleged reasonable doubt which resulted in the ultimate acquittal of the 1st Accused stemmed from that fundamental misdirection of the learned High Court Judge.

[46] The State has rightly sought a new trial consequent to the quashing of the acquittal on the basis that the trial has been miscarried. I am in agreement with that submission and hold that the acquittal of the 1st Accused should be quashed and a new trial be held.

Consideration of the Appeal of the 2nd Accused (Appellant in AAU 123 of 2015)

[47] The sole Ground of Appeal of the 2nd Accused (Appellant in AAU 123 of 2015) was as follows;

> *'That the Learned Trial Judge erred in law in finding the Appellant guilty after a Not Guilty verdict was upheld for his co-accused, in particular as an element of the offence was dependent on Mohammed Shaheed's guilt'.*

[48] It must be mentioned here that the first ground of appeal of the State in their appeal was also on the same lines, i.e. that the verdicts were inconsistent.

[49] As borne out from the above, the position taken up by the 2nd Accused in his appeal before this court is that the two verdicts are logically inconsistent and that as a result the verdict is unreasonable.

[50] In order to press his point that the two verdicts are logically inconsistent and that as a result the verdict is unreasonable, learned counsel for the 2nd Accused submitted that there was a fundamental omission in the summing up of the trial judge in that he failed to direct the assessors on the legal consequence of finding the 1st Accused not guilty and its impact on the 2nd Accused.

[51] He pointed out that the non direction to the assessors has resulted in a miscarriage of justice. I am in agreement with learned counsel for the 2nd Accused that a determination as to whether there was a non direction by the learned High Court Judge as referred to above, is critical to the determination of inconsistent verdicts. Therefore, although there is no separate ground of appeal to that effect, it becomes necessary for this court to look at that aspect as part of the sole ground of appeal of the 2nd Accused.

[52] The State does not use the term 'inconsistent verdict' in the ground of appeal it has raised although it is stated that *'it was not reasonably open to have acquitted Rasheed Khan having regard to the fact that court had convicted Kai'.*

[53] The State acknowledges in its written submissions that *'the verdicts appear to be odd given that Kai was convicted on a count of engaging with the respondent to import* ***the very same heroin that the respondent was acquitted of importing'*** (emphasis added).

[54] Whilst taking up this somewhat contradictory position, it is their submission that *'the verdicts are not inconsistent or, at least, any logical inconsistency is not such as to render Kai's conviction unsafe'.*

[55] I have already referred to and dealt with the importance of a summing up and hence will not venture to repeat it here except to say that I will be dealing with that aspect here as well since that becomes a pivotal issue in this appeal.

Directions of the trial judge in his summing up

[56] The learned trial judge has referred to the elements of the two offences in his summing up (at Volume 1 of the Copy record pages 90 - 168) from paragraphs 16 - 27 and states that:-

> *"The term import also connotes that the person who was involved in such activity had the knowledge or the belief that he brought or caused to be brought any illicit drugs"* (paragraph 19).

'Accordingly, the prosecution is required to prove beyond reasonable doubt that the first accused person has imported 29.9 kilograms of illicit drugs namely Heroin and the ***first accused had the knowledge or belief that what he had imported is an illicit drug'*** (emphasis added, at paragraph 22).

'Apart from the second element which is "engages in dealing with any other person" the remaining elements are founded on the same definitions and the principles that I have explained above with regard to the first count. ***In order to prove the element of "engages in dealing with any other person", the prosecution is required to present evidence that the accused has involved with another person in any open or covered interaction to import an illicit drug into the country'***
(emphasis added, at paragraph 26)

'Accordingly, it is the onus of the prosecution to prove beyond reasonable doubt ***that Ethan Kai has engaged in dealing with Mohammed Shaheed Khan to import 29.9 kilograms of illicit drugs namely 'Heroin'*** (emphasis added at paragraph 27).

[57] The learned High Court judge under the heading *'Analysis of Evidence'* has opined that *'In other words, the prosecution case is founded on circumstantial evidence'* and has given a brief overview as to what circumstantial evidence is (at paragraph 211). He has once again engaged in a discussion pertaining to circumstantial evidence at paragraphs 231 – 233.

[58] He has thereafter gone on to observe that –

'The circumstantial evidence that the prosecution is seeking to rely in this instant case is that;

(I) Importation of the container No. TGHU0623796 and four wooden boxes into Fiji by the first accused person,
(II) The contents found inside the four wooden boxes in the said container.
(III) The knowledge of the first and the second accused person of the importation of this illicit drug' (at paragraph 212).

[59] Thereafter he concludes by telling the assessors to consider all the evidence presented during the course of the hearing and if they believe and are satisfied that the prosecution has failed to prove beyond reasonable doubt that the 1st accused has committed the offence, they must find him 'not guilty' and also that if they are satisfied that the prosecution has proved beyond reasonable doubt that the 1st

accused has committed the offence, they must find him 'guilty' (at paragraphs 238 -239).

[60] An identical direction has been given in respect of the 2nd Accused (at paragraphs 240 -241).

[61] However, most importantly, there is no direction with regard to how they should approach and arrive at a decision in the event they find the 1st Accused 'not guilty'.

Matters as discussed by the trial judge in his judgment

[62] Bearing in mind the difference between jury trials in other jurisdictions and trials with assessors in Fiji, I will also advert to the judgment with reasons delivered by the learned High Court Judge.

[63] At the very outset, the learned High Court Judge has referred to the opinions of the four assessors. He notes that as far as the 1st Accused was concerned it was a split opinion in that two assessors returned an opinion that he was guilty while the other two were of the opinion that he was 'not guilty'. With regard to the 2nd Accused it was a unanimous opinion of 'guilty'. Having observed that the opinion of the assessors was not perverse and that it was open to them to reach such conclusion, he has gone on to pronounce his judgment (at paragraph 3).

[64] He then goes on to examine the charges, their elements, the required proof and has engaged in an analysis of the evidence. He has thereafter concluded that *'the prosecution has failed to prove beyond reasonable doubt that the first accused person had a knowledge or belief that the imported consignment under his name contained any illicit drugs in it'.*

[65] He has then referred to the evidence in respect of the 2nd Accused and has arrived at the conclusion that *'In view of the evidence presented by the prosecution in respect of the second accused person, it appears that if the evidence presented by the prosecution is considered as a whole, it leads to indisputable and inescapable*

conclusion that the second accused person had engaged in dealings with Mohammed Shaheed Khan to import this consignment and had knowledge and belief that what was imported in this consignment contained illicit drugs. It does not lead to any other probable conclusions and inferences showing the innocence of the second accused person' (at paragraph 53).

[66] On that basis, he has expressed the opinion that the prosecution has proved beyond reasonable doubt that the 2nd Accused has committed the offence with which he was charged.

[67] He further states that he sees no cogent reason to disagree with the 'verdict of not guilty' of the two assessors in respect of the first count and the 'unanimous verdict of guilty' in respect of the second count.

[68] Accordingly he has acquitted the 1st Accused and convicted the 2nd Accused.

[69] It must be pointed out that like in the summing up, there is no discussion of the impact a 'not guilty' verdict of the 1st Accused would have on the guilt or otherwise of the 2nd Accused.

Was there a non direction to the assessors by the High Court Judge?

[70] Since the nature of the offences become critical for the determination as to whether there was a non-direction by the learned High Court Judge, I will reproduce here, the Information that had been presented against the two Accused. It was as follows:

'COUNT 1

Statement of Offence

UNLAWFUL IMPORTATION OF ILLICIT DRUG; Contrary to section 4(1) of the ILLICIT DRUGS CONTROL ACT, 2004.

Particulars of offence

MOHAMMED SHAHEED KHAN between the 1st day of December 2014 and 21st day of December 2014 at Lautoka in the Western Division, imported 29.9 kilograms of illicit drugs namely HERIOIN without lawful authority.

COUNT 2

Statement of Offence

UNLAWFUL IMPORTATION OF ILLICIT DRUG; Contrary to section 5(b) of the ILLICIT DRUGS CONTROL ACT, 2004.

Particulars of offence

ETHAN KHAI between the 1st day of December 2014 and 21st day of December 2014 at Lautoka in the Western Division, without lawful authority engaged in dealing with MOHAMMED SHAHEED KHAN for the import of 29.9 kilograms of illicit drugs namely HERIOIN.'

[71] It has been submitted on behalf of the 2nd Accused that *'If the State's case can be assumed to be that Mr. Khan, the consignee and the Appellant were in this together, then the absence of the necessary fault element of knowledge would invariably mean the absence of the same in the other. The case for the State was a joint enterprise, without the formal reference to it in the information'.*

[72] It has further been contended that *'They are said to engage in dealing (together) for the import of illicit drugs. The State has just preferred not to charge them together in the same count. But it doesn't remove the basis and the scheme of their prosecution case'.*

[73] It has also been submitted that *'We say if the limb on which such allegation failed against Mr. Khan, then the remaining allegations against Mr. Khai, cannot stand. Because the charge presumes common design by the parties in their engagement'.*

[74] Unfortunately the State has not countered the above position that the 2nd Accused has taken up in the written submissions that had been filed on his behalf. Neither

has the State explained its position with regard to the charges that had been preferred against the two Accused in their written submissions.

[75] The only explanation offered during the hearing before us by the learned counsel for the State was that it was convenient for the State to have charged both Accused under one Information lest it would have resulted in the same evidence being presented twice in different proceedings.

[76] Learned counsel for the State submitted that she was unable to explain the rationale for the choice of the charges or the reasons for the consolidation of the charges since she was not involved in such decision making. Her submission was since a decision has been taken by the State to charge the two Accused in that manner, it cannot now resile from that decision and say that it would have been more appropriate if charges had been preferred in any other manner.

[77] Prior to the filing of the Information upon which the trial proceeded, the State had filed two separate Informations against the two accused in different courts. The consolidation of the charges into one Information happened later.

[78] At the time the consolidation was done, both accused raised objections and made applications for separate trials. Having heard counsel for the two accused and the State, the learned trial judge made a Ruling on 23 June 2015 whereby the said applications were refused and the prosecution was allowed to proceed against both accused in one Information (at page 294 of the Copy Record, Volume 1).

[79] The learned trial judge in the said Ruling, having referred to the offences contained in the Information and having identified the elements of the two offences that the prosecution was required to prove, observed that;

> *'Accordingly, it appears that the two counts against these two accused persons are founded on the same facts or transaction'* (paragraph 8 of the Ruling).

[80] The trial judge has then referred to Section 60 of the Criminal Procedure Act which spells out the basis for joinder of charges. I will reproduce here Section 60. It reads as follows;

> *'The following persons may be joined in one charge or information and may be tried together –*
>
> *(a) Persons accused of the same offence committed in the course of the same transaction;*
> *(b) Persons accused of an offence and persons accused of –*
> *(i) aiding or abetting the commission of the offence; or*
> *(ii) attempting to commit an offence;*
> *(c) Persons accused of different offences provided that all offences are founded on the same facts, or form or are part of a series of offences of the same or similar character; and*
> *(d) Persons accused of different offences committed in the course of the same transaction.'*

[81] With regard to the joinder of charges, he observed in his Ruling that;

> *'The learned counsel for the prosecution stated in her submissions that they* ***will adduce evidence to prove the interaction of the second accused person with the first accused*** *and also with the person who allegedly sent this consignment to Fiji. She further submitted that the prosecution will present evidence in the form of records of phone conversations, CCTV footages and other documents in order to prove the guilt if these two accused persons'* (emphasis added, at paragraph 17 of the Ruling).

[82] In the absence of any explanation from the State with regard to the basis on which the charges had been preferred I find the above to be an indication of its thinking behind the forwarding of charges in that manner.

[83] The learned High Court Judge has observed as follows;

> *'Accordingly, the admissible evidence in respect of the first count is that the first accused has unlawfully imported the illicit drugs as mentioned in the information. The admissible evidence for the second count is that the second accused has unlawfully imported the illicit drugs and* ***in doing so, he has engaged in dealing with the first accused'*** (emphasis added, at paragraph 18 of the Ruling).

'Having considered the reasons discussed above and the judicial proceedings mentioned above, it is my opinion that no prejudice will cause to the two accused persons in a joint trial that cannot be cured by clear directions to the assessors to consider the evidence against each accused separately. ***Specially in the event that the involvement of the dealings of the first accused constitutes one of the main composition of the second count. It is my opinion that a joint trial will necessitate more as it allows to determine the entire allegation at once'*** (emphasis added, at paragraph 19 of the Ruling)

'As discussed above, ***the dealing with the first accused person is an important component in the second count and it is important to hear the second count together with the first accused.*** *I find the interest of justice to hear this trial jointly is overwhelmingly greater than the right to remain silent'* (emphasis added, at paragraph 22 of the Ruling).

[84] The above observations clearly demonstrate the view the learned trial judge held of the charges and the rationale for trying the two accused together under one Information.

[85] It is in this backdrop that this court will have to consider as to whether the learned High Court Judge had been remiss in discharging his duty to properly direct the assessors in order for them to have arrived at a legally valid opinion regarding the guilt of the two Accused.

[86] In the case of **DPP v Woolminton [1935] All ER 1**, it was stated that the golden rule in any criminal case is that the prosecution needed to prove beyond reasonable doubt, each and every element of the offence.

[87] The offences were of such nature that they were connected to each other. The second count being one of the 2nd Accused 'engaging in dealing' with the 1st Accused in the importation of the quantity of Heroin meant that the outcome of the first count had a bearing on the second count.

[88] Learned counsel for the 2nd Accused, in his written submissions has stated that *'MSK was acquitted because as far as he was concerned he was importing used tyres and motorbikes. Thus any dealings MSK had with the appellant was in*

relation to importing those items. How can the appellant then be guilty of importing illicit drugs if all his dealing with MSK related to the used tyres and quad bikes, evidenced by MSK's acquittal? It is submitted that because of the way the charges were framed including the elements of the offence, MSK and the Appellant stand or fall together'.

[89] He also states as follows; *'On appeal it is submitted that it was not enough to show the appellant had knowledge. As an element of the offence being charged, the State need to also establish that MSK had knowledge when he was meeting and calling the appellant, which they could not do so resulting in his acquittal. However, the logic in that is that knowledge of the named person MSK was also needed to be established to cover the element of the offence'.*

[90] As referred to earlier, a perusal of the summing up and the judgment reveal that the 1st Accused was found 'not guilty' on the basis that he had no knowledge that the container he imported contained 29.9 kilograms of Heroin. The 2nd Accused was charged on the basis that he 'engaged in dealing' with the first accused in importing the same quantity of Heroin. So if the 1st Accused in effect did not import the said quantity of heroin, could the 2nd Accused have engaged in dealing with him in such importation?

[91] There was no charge of conspiracy against the two Accused and the 2nd Accused has neither been charged on the basis that he had aided and abetted the 1st Accused in the importation of the said quantity of Heroin. Criminal law imposes distinct liability on accused who are charged for conspiracy and for aiding and abetting. In the charge against the 2nd Accused, it is specifically referred to his having 'engaged in dealing' with the 1st Accused. In my view, the liability of the 2nd Accused could not have stood separated from that of the 1st Accused.

[92] As explained earlier in this judgment, the learned trial judge was aware of the nature of the offences and as to why they were included in one Information since he had looked into that aspect and made a pronouncement at the very commencement.

[93] Therefore, making reference to the two offences separately and directing the assessors with regard to ingredients, evidence, culpability and burden of proof separately without any reference to the nexus between the two charges was not a proper direction. It amounts to a non-direction.

[94] The impact the verdict of 'not guilty' of the 1st Accused had on the 2nd Accused had to be explained and a proper direction had to be given to the assessors. As referred to earlier, he had already decided that *'the dealing with the first accused person is an important component in the second count and it is important to hear the second count together with the first accused* (at paragraph 22 of the Ruling).

Inconsistent verdicts

[95] As already adverted to, the position taken up on behalf of the 2nd Accused is that the verdicts are inconsistent in that it was not logical to have found the 2nd Accused 'guilty' after having decided that the 1st Accused was 'not guilty'. The issue then arises as to whether the verdicts are inconsistent and the trial may have miscarried as a result of the failure to give any direction to the assessors on this material point.

[96] The learned counsel for the 2nd Respondent has relied on the cases of **Balemaira v State** [2013] FJSC 17, CAV0008 of 2013 (6 November, 2013) and **Vulaca v State** [2013] FJSC 16; CAV0005.2011 (21 November 2013) in support of its position that the verdicts were inconsistent. In both cases, the Supreme Court relied on the well known case of **Mackenzie v R** (1996) 190 CLR 348 decided by the High Court of Australia.

[97] In **Vulaca**, the Supreme Court opined as follows;

> *'As was observed by the High Court of Australia in Mackenzie v R (1996) 190 CLR 348, at 366-7 [Gaudron, Gummow and Kirby JJ], the test that is applied in dealing with questions of inconsistent verdicts, **"is one of logical reasonableness"**. In the course of its judgment , the High Court of Australia cited a passage in an unreported judgment of Devlin J in R v Stone (13 December 1954), to the effect that an accused who asserts that two verdicts are inconsistent with each other, "must satisfy the court that the two verdicts cannot stand together* '(emphasis added).

[98] In **Balemaira**, the Supreme Court stated that;

> *'Although these cases involved multiple defendants with different verdicts on the same charge, the nature of the inquiry is the same in cases where one defendant is charged with multiple offences of similar nature. That inquiry was aptly described in the Canadian case of* ***R v Mc Shannock (1980) 44 CCC (2d) 53 (Ont C.A) at p.56*** *as follows: "Where on any realistic view of the evidence, the verdicts cannot be reconciled on any rational or logical basis the illogicality of the verdict tends to indicate that the jury must have been confused as to the evidence or must have reached some sort of unjustifiable compromise. We would, on the ground that the verdict is unreasonable alone, allow the appeal, set aside the verdict, and direct an acquittal to be entered'.*

[99] The case of **Mackenzie** which as stated above, has been relied upon by the Supreme Court of Fiji, becomes directly relevant to this case. It dealt with inconsistent verdicts as well as inadequate directions to the jury which are matters that have been raised in this case as well.

[100] With regard to inconsistent verdicts, the High Court of Australia in that case observed that;

> *'On the other hand while ordinarily a jury is as inscrutable as the Sphynx, sometimes, by series of verdicts or, where permitted, answers to questions posed by the judge, there is placed on the public record an insight into the jury's thinking. This does not arise unlawfully or irregularly. If the result of this insight is to cast doubt upon the verdict under consideration, because logically it cannot stand together with another verdict, the court is then confronted by a problem of justice. The high respect paid to jury verdicts is reinforced by a general appreciation of their usual correctness. However, where, in a particular case, doubt is cast upon a verdict, an appellate court invited to do so, must determine whether it should intervene. In a criminal appeal, it must decide whether the conviction based upon the verdict which is impugned is unsafe or unsatisfactory.'*

[101] They went on to express the view that;

> *'A distinction must be drawn between cases of legal or technical inconsistency and cases of suggested factual inconsistency. The former will generally be easier to resolve. On the face of the court's record there will be two verdicts which in law, cannot stand together. Examples include the case where the accused was convicted both of an attempt to commit an offence and the completed offence or of being, in respect of the same property and occasion, both the thief and the receive. There are other like cases. Where technical or legal inconsistency is established, it must be inferred that the jury misunderstood the judge's directions on the law;*

compromised disputes among themselves; or otherwise fell into an unidentifiable error. The impugned verdict or verdicts must be set aside and appropriate consequential orders made' (at page 82).

[102] Court however observed that *'But once again, the relief which is appropriate depends upon the facts of the particular case'* (at page 85).

[103] In view of my analysis above, I am of the view that the inconsistency in this appeal is a legal inconsistency since it emanates from the nature of the offences. Therefore, there is no necessity to go into and examine the evidence that was led at the trial.

[104] Applying the test of 'logical reasonableness' as propounded in **Mackenzie,** I am of the view that there is an inconsistency in the verdicts. This in effect is what both the State in their appeal as well as the 2nd Accused in his appeal raised as grounds of appeal. I answer those grounds in the affirmative.

Failure to give proper directions to the assessors

[105] With regard to the failure to give adequate directions to the jury, in **Mackenzie,** court expressed the view that;

'The jury therefore considered their verdict without that assistance. In our view it was a matter upon which assistance ought to have been given. The failure to give it (particularly when the problem was expressly raised with the judge) is one which, in the circumstances of this case, occasioned a miscarriage of justice' (at page 90-91).

[106] Court further opined that;

'Where an appeal succeeds upon the basis that the trial miscarried because of an inaccurate or inadequate direction to a jury, it is ordinarily appropriate to order that there be a re-trial which, it will be assumed, will be conducted in accordance with the law as clarified'(at page 91).

[107] The above, I consider to be useful guidance to this court.

Conclusion

[108] In this case, the failure of the trial judge to give proper directions to the assessors on the impact of the 1st Accused being found 'not guilty', considering the nature of the offences, in my view rendered the verdict unreasonable and unsafe. It has occasioned a miscarriage of justice.

[109] The conviction therefore should not stand since it violates the concept of a fair trial.

[110] It must be emphasized here that as stated earlier, the State also raised the issue of inconsistent verdicts and sought to apply that in order to have the acquittal of the 1st Accused overturned. However, responding to the appeal of the 2nd Accused, the State submitted that there was no logical inconsistency so as to render the conviction of the 2nd Accused unsafe. I find this hard to reconcile.

[111] The next question to be decided is as to what the decision of this court should be in regard to the appeal of the 2nd Accused. Should it be an acquittal or should a new trial be ordered considering the totality of the circumstances. In determining this, I cannot ignore the grounds on which I have arrived at a decision pertaining to the State's appeal.

[112] I have already decided in the appeal filed by the State that the acquittal of the 1st Accused ought to be quashed on the basis that the trial against him was miscarried due to a misdirection of the trial judge.

[113] Therefore, there cannot be an acquittal of the 2nd Accused. For reasons explained by me, I have concluded that the conviction of the 2nd Accused was unreasonable and unsafe. The conviction of the 2nd Accused therefore has to be quashed.

[114] What next after the quashing of the acquittal of the 1st Accused and the conviction of the 2nd Accused? The only logical option available to this court is to order a

new trial against both Accused. In arriving at this decision, I have drawn inspiration from the authorities referred to by me in this judgment.

[115] Accordingly the Judgment of the High Court dated 10 September 2015 is set aside. The acquittal of the 1st Accused and the conviction of the 2nd Accused are quashed. A new trial is ordered against both Accused.

[116] The new trial is to take place before a different judge of the High Court within a reasonable time.

Mataitoga, JA

[103] I agree with the reasons and the conclusions in the judgment.

Qetaki, JA

[104] I have considered the judgment in draft and I agree with it, its reasoning and orders.

The Orders of the Court:

1. *Both Appeals are allowed.*
2. *The Judgment of the High Court dated 10 September 2015 is set aside.*
3. *Acquittal of the Respondent (Mohammed Shaheed Khan) in AAU 122 of 2015 is set aside.*
4. *Conviction and sentence of the Appellant (Ethan Kai) in AAU 123 of 2015 are set aside.*
5. *A new trial to be held in respect of both the Respondent (Mohammed Shaheed Khan) in AAU 122 of 2015 and the Appellant (Ethan Kai) in AAU 123 of 2015.*

6. *The Prison Authorities are directed to produce the Appellant (Ethan Kai) in AAU 123 of 2015 before the High Court on or before 11 August 2023 and until then he shall be kept in remand custody.*

Hon. Justice Viraj Dayaratne
JUSTICE OF APPEAL

COURT OF APPEAL
FIJI

Hon. Justice Isikeli Mataitoga
JUSTICE OF APPEAL

Hon. Justice Alipate Qetaki
JUSTICE OF APPEAL