

IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

CRIMINAL PETITION No. CAV 0018 of 2017
(On Appeal from Court of Appeal No. AAU 102 of 2013)

BETWEEN : **AMENA AREIBULU**

Petitioner

AND : **THE STATE**

Respondent

Coram : Hon. Mr. Justice Saleem Marsoof, Judge of the Supreme Court
Hon. Mr. Justice Suresh Chandra, Judge of the Supreme Court
Hon. Mr. Justice Buwaneka Aluwihare, Judge of the Supreme Court

Counsel : Ms. S. Nasedra for the Petitioner
Ms. S. Puamau for the Respondent

Date of Hearing: 16 April 2018

Date of Judgment: 26 April 2018

JUDGMENT

Marsoof, J

1. I have read the judgment of Aluwihare, J in draft and agree with his reasoning and conclusions.

Chandra, J

2. I agree with the reasons and conclusions in the judgment of Aluwihare, J.

Aluwihare, J

3. On 23.10.2017 the Petitioner filed a special leave to appeal application before this court challenging the decision of the Court of Appeal dated 14 September 2017, which affirmed the conviction and the sentence imposed on him for the offence of aiding and abetting the importation of a controlled chemical contrary to Section 6 (b) of the Illicit Drugs Control Act of 2004 read with Section 21 (c) of the Penal Code.
4. Following the trial, the Petitioner was found guilty by the learned trial Judge, and the Petitioner had been imposed a sentence of 8 years imprisonment with a non parole period of 6 years. The assessors, however, returned a unanimous opinion that the Petitioner was not guilty of the charge.
5. At the outset, I wish to refer to the statutory threshold for granting of special leave in criminal cases as set out in section 7 (2) of the Supreme Court Act 1998 which states thus:-
- “In relation to a criminal matter, the Supreme Court must not grant special leave to appeal unless-
- (a) a question of general legal importance is involved.
 - (b) A substantial question of principle affecting the administration of criminal justice is involved or;
 - (c) Substantial and grave injustice may otherwise occur.
6. In the case of **Taj Deo v The State**, Criminal Appeal CA 0017 of 2008, Justice William Marshall held that “The Supreme Court does not replicate the process of the Court of Appeal but is reserved for cases of special legal or public interest. So the requirement of

special leave exists with its relatively high threshold in order to promote and protect the really important, but limit to the jurisdiction of the Supreme Court."

7. The Supreme Court also observed in the case of Dip Chand v The State; CAV 0014/2012 that;

"given that the criteria set out in section 7 (2) of the Supreme Court Act No.14 of 1998 are extremely stringent, and special leave to appeal is not granted as a matter of course, the fact that the majority of the grounds relied upon by the petitioner for special leave have not been raised in the Court of Appeal, makes the task of the petitioner of crossing the threshold requirements for special leave even more difficult"

In the case referred to above the court further observed that:-

"the Supreme Court has been even more stringent in considering the application for special leave to appeal on the basis of grounds of appeal not taken up or argued in the court of appeal. In Josateki Solinakoroi v The State, Criminal Appeal CAV0005 of 2005 the Supreme Court of Fiji, in an exceptional case, took into consideration the principles developed by (the) Privy Council in similar situations and in particular relied on the following observations in Kawaku Mensah v The King (1946) AC 83: 'where a substantial and grave injustice might otherwise occur the privy Council allowed a new point to be taken which had not been raised below even though not raised in the petitioner's printed case.' (Paragraph 36 of the judgment).

8. Before this Court, the Petitioner has raised grounds of appeal against both the conviction and the sentence.
9. The grounds of appeal raised with regard to the conviction are:
- (i) That the charge was defective and the trial is a nullity because the learned judge did not find the Petitioner guilty of Section 5 of the illicit Drugs Act contrary to the charge under Section 6 (b) of the Illicit Drugs Control Act.

- (ii) That the Court of Appeal erred in law and in fact by dismissing the appeal under the proviso to section 23 (I) after allowing the appeal.

As against the sentence, the Petitioner has raised the following grounds of Appeal.

- (i) The sentence of 8 years for aiding and abetting to import controlled chemical (medicine not illegal drugs) weighing 2.680kg, is harsh and an excessive punishment.
- (ii) The sentence based on case of State v Balagan; HAC 049/11 is the wrong case law for the crime of importing legal drugs and it is a hard drug.

Background Facts

10. Carpenters Shipping, the agents of the international courier company Fed-Ex had received a package from China, sent by one Ms. Esther Wilson addressed to Jack Wilson (recipient).
11. According to witness Rokosugu, who worked as a clearing clerk at Carpenters Shipping, the Petitioner who had been known to the witness had phoned him on 06/10/2010 and had intimated that he wants to have a consignment cleared. The Petitioner had attended to his office and had produced a paper on which the number of Airway Bill had been written.
12. Upon checking, the witness had informed the Petitioner that the package had arrived and had told the Petitioner if he wants to clear it, the presence of the consignee, Jack Wilson is required. The Petitioner, having left, had phoned this witness again to say that the consignee was in front of the office. The witness had seen the Petitioner a few meters away from a taxi that was parked and when requested to show the consignee, the

Petitioner had pointed at the co-accused (Isikeli Tamani) who was seated in front of the taxi and had posed off as Jack Wilson.

13. When the witness questioned the Petitioner as to whether the consignee has any identification, the Petitioner had said the Petitioner is paralysed and as such he does not have any identification documents. The witness Rokosugu had added that when he had a conversation with the co-accused and questioned him as to whether he is Jack Wilson, the Petitioner had been standing close to the co-accused Tamani. Even the customs officer had approached the taxi to make certain that 'Jack Wilson' was present.
14. Eventually the consignment was brought and the package had been opened for verification of goods and there had been a tricycle and the package was closed. At that point, the Petitioner had offered \$100.00 and wanted the witness to share it with the customs officer, which the witness had not accepted.
15. The Petitioner had also asked this witness whether he could sign as "Jack Wilson" as the man in the car is paralysed.
16. At this point customs intelligence officer had walked in and they had been taken to the CID Headquarters.
17. The evidence of Sailasa Turagalevu, who had been attached to the CID, was that one of the customs officers informed him that a person is trying to clear a package and he was taken to a room at Carpenters Shipping Office. The customs officer had pointed to a brown box which this witness had taken charge of and the box had been taken to the CID office. When the box was opened, he had seen a dismantled tricycle. He had detected two 'zip lock' bags containing granules under the seat of the tricycle and the luggage compartment.
18. Customs officer Vimlesh Narayan who had been based at Nadi Airport at the time relevant to the incident had stated that he was entrusted with the task of verifying goods

before releasing them to consignees. Due to a discrepancy he spotted on a (airway) Bill, he had traced the package and had it opened in the presence of Narayan, a Fed-ex employee. He had found, in addition to a tricycle a blue box. When the blue box was opened, he had come across a bag containing granules and when the seat of the tricycle was unscrewed, had found another bag containing similar substance.

19. Witness Narayan had stated further, that he obtained samples of the substance detected and at a meeting of the officials, it was decided to send the package to Suva under "controlled delivery". According to the Analyst report, the samples analysed had contained pseudoephedrine and chlorpheniramine and it had not been disputed at the trial that the substance was a 'controlled chemical' within the meaning of the Act.
20. The prosecution had also led in evidence the caution interview statement of the Petitioner, wherein he had admitted that the co-accused Asikeli Tamani had been known to him for some time before the detection as he had been his neighbour. The Petitioner also had stated in his caution interview statement that the co-accused Asikeli Tamani's younger brother inquired from him about the best method to traffic drugs to New Zealand through Fiji.
21. The Petitioner in his caution interview statement had admitted that he assisted the co-accused Tamani and his younger brother Turi, to clear packages arriving from New Zealand on three previous occasions and the impugned transaction had been the fourth.
22. In the caution interview, the Petitioner had also admitted that he was paid for the assistance rendered to clear the packages and on two occasions he credited moneys of the co-accused to the petitioner's bank account. On the day the detection was made, the Petitioner had been given \$300 to pay the customs officer and the employees of the Carpenters Shipping Company.

23. It is to be noted that before the Court of Appeal, only a single ground was urged. And the said ground relates to a misdirection on the part of the learned trial judge relating to the requisite mental element of the crime the Petitioner was charged with. It was the contention of the Petitioner before the Court of Appeal that the Petitioner did not have any knowledge that the controlled chemical was inside the package.
24. The first ground of appeal raised before us was that the petitioner's conviction was a nullity as the charge was defective. At the hearing of this application no submissions were made to substantiate this ground of appeal, but the learned counsel stated that the Petitioner is relying on the written submissions tendered on his behalf.
25. The gist of the submissions is that:-
- (a) The Petitioner assisted the co-accused Tamani to clear the package and the co-accused happened to be a quadriplegic and needed help.
 - (b) The Petitioner gave assistance to have the package cleared because Tamani (the co accused) requested.
 - (c) The Petitioner cannot be faulted for the failure on the part of the employee of the Carpenter Shipping and Customs Officer to verify the correct identity of the co-accused Tamani.
 - (d) There were three persons in the taxi in which co-accused Tamani was seated, and Jack Wilson could have been any of them.
 - (e) And the circumstances referred to above demonstrates that there was neither foresight, nor any contemplation as the Petitioner had no knowledge that the drugs would be in the tricycle and that the part played by the Petitioner was only an innocent attempt to assist Tamani.

26. The item of evidence referred to above taken in isolation certainly would portray a picture such as contended by the Petitioner.
27. The evidentiary rules relating evaluation of evidence, however, require the Court to consider the evidence in its totality and not in isolation.
28. As referred to earlier in this judgment there is cogent and credible evidence which strongly incriminate the Petitioner and I am of the view that the learned trial judge is justified in drawing the inference that the Petitioner had the knowledge that the co-accused was not Jack Wilson and the package contained a 'prohibited' and/or a 'controlled' substance.
29. There is clear evidence that the Petitioner pointed to the co-accused as Jack Wilson, knowing very well that he was not and he had practiced this deception on a public official namely the customs officer. In addition, considering what the Petitioner has said in his evidence and what the Petitioner had stated in the caution interview, it appears he had the knowledge that the co-accused and his brother were involved in transactions relating to prohibited substances.
30. The Petitioner in any event has not raised any grounds in the written submissions to demonstrate his assertion that the charges are defective. Considering the above, I am of the opinion that there is no misdirection on the part of the learned trial Judge and accordingly leave to appeal on this ground (of Appeal) is refused.
31. As the second ground of appeal the Petitioner has complained that the Court of Appeal erred when it allowed the appeal and dismissed the same in terms of the proviso to Section 23 (1) of the Court of Appeal Act.

32. It was the contention of the learned counsel for the Petitioner that the Court of Appeal, having come to the conclusion that the ground of appeal raised before it should be decided in favour of the Petitioner, the court ought to have allowed the appeal without proceeding to apply the proviso to Section 23 (1) of the Court of Appeal Act.
33. I shall now consider the reasoning of the Court of Appeal.
34. There was ample cogent material in this case to come to a finding that the co-accused Tamani was trying to clear a package that contained a controlled chemical. It is also in evidence the co-accused also posed as 'Jack Wilson' the consignee.
35. It is also evidence that even before the package reached Suva, the law enforcement officials suspected that the package contained a controlled substance or a prohibited substance and that it had come to Fiji from China. All what the law enforcement did not know was the person or persons behind this operation of bringing this substance to the country. This was the reason for the law enforcement officials to have the package sent to Suva under 'controlled delivery' which is one of the methods used by the law enforcement to identify persons involved in trafficking prohibited or controlled substances.
36. It was the Petitioner who came forward to have the impugned package cleared and it was he who attended to the process of clearing.
37. Further, it was the Petitioner, knowing very well that the co-accused was not 'Jack Wilson' deceived the customs officials to believe that Tamani was "Jack Wilson". The Petitioner went to the extent of saying that Tamani has no documents to establish his identity as he was a quadriplegic, when such documents were requested. The Petitioner also used his professional knowledge in clearing cargo as he was employed by Pacific Agency as an operations supervisor. The Petitioner had collected the original (freight) documents from Tamani the co-accused, which bore the name of 'Jack Wilson' as the

consignee. The Petitioner had said under oath, that when questioned, he told the customs officer that "Jack Wilson' is sitting in the taxi.

38. Petitioner also admitted that he assisted Tamani, the co-accused for financial gain. Considering the facts referred to above, I do not think that it could be said, by any stretch of imagination, that the Petitioner did not aid and abet the co-accused Tamani to get the package which contained the controlled chemical released from the customs.
39. The issue however that was raised at the hearing of this application was that the Court of Appeal fell into error when it held that the Petitioner had entertained the requisite knowledge as to the contents of the package and it was further contended that the Court of Appeal fell further into error when it applied the proviso to Section 23 (1) of the Court of Appeal Act after holding that the ground appeal raised before it should be decided in favour of the Petitioner.
40. As referred to earlier, it was the contention of the learned counsel for the Petitioner that he only assisted the co-accused Tamani to clear the package and the Petitioner had no knowledge that it contained any controlled chemical as asserted by the prosecution.
41. As to the requisite 'knowledge' in case where a person is charged for possession of a controlled substance, Lord Slynn, referring to the judgement of Lord Lane CJ in the case of R v McNamara [1988] 87 Cr APP R 246 at page 252 held;

"This means in a case like the present that the prosecution must prove that the accused had a bag with something in it in his custody or control; and that something in the bag was a controlled drug. It is not necessary for the prosecution to prove that the accused knew that the thing was a controlled drug let alone a particular controlled drug. The defendant may then seek to establish one of the defences provided in section 5(4) or section 28 of the 1971 Act."

42. In the instant case, all what the Petitioner said was that he had no knowledge of the package contained the controlled chemical, but his conduct and other circumstances of the case proves otherwise.
43. The Court of Appeal in considering this issue held;

"However, I find that from paragraph 20 of the summing up and paragraph 9 of the judgement that the trial judge had only looked at the aspect of 'intentional aiding' in the mens rea' needed to convict the Appellant (Petitioner) of aiding and abetting the co-accused. No mention of the knowledge of the circumstances in the form of 'foresight or contemplation' of the commission of the principal offence had been considered. This, I think, is a non-direction and an error of law.

Yet, the verdict of the learned judge could not be ill-founded. I think, having regard to the evidence led, the Appellant could have been convicted of the charge levelled against him and therefore the verdict of guilt against him could be supported. In Ram v State Criminal Appeal No. CAV 0001 of 2011: 09 May 2012 [2012 FJSC] where the Supreme Court held, inter alia, that an appellate court will not set aside "a verdict of a lower court unless the verdict is unsafe and dangerous having regard to the totality of evidence in the case". To my mind the verdict of guilt against the appellant (The Petitioner) has been proved beyond a reasonable doubt and only reasonable and proper verdict would be one of guilt." [Paragraphs 51 and 52 of the judgment]

44. Having regard to the evidence led at the trial, I cannot agree more with the conclusions arrived at by their Lordships of the Court of Appeal. In fairness, however, to the learned trial judge, it must be stated that he having discussed the complicity on the part of the Petitioner and the circumstances under which the package was cleared, had held that *"The evidence presented by the prosecution very well establishes that the second accused (the Petitioner) intentionally assisted Iseki Tamani in committing importation of the controlled chemical"*. (Emphasis added)

45. What the learned trial judge appears to have concluded is that the Petitioner not only had intentionally assisted Tamani in the mere importation process but had intentionally assisted the importation of a 'controlled chemical'.
46. As stated earlier in this judgement, the learned trial judge had arrived at this finding having considered the totality of the evidence led at the trial. As such I do not find any miscarriage of justice caused to the Petitioner.
47. Accordingly, special leave to appeal on the 2nd ground of appeal against the conviction is refused.
48. The Petitioner is also seeking special leave to appeal against the sentence.
49. The Petitioner had been imposed a sentence of a term of imprisonment of 8 years with a non-parole period of 6 years.
50. It was the contention on behalf of the Petitioner that the reliance by the learned trial judge on the decision of the case of **State v Balagan**; HAC 049/2011 was wrong in that, the said case involves "hard drugs".
51. The sentence prescribed for violation of Section 6 (b) of the Illicit Drugs Control Act of 2004 is, a fine not exceeding \$100,000 or life imprisonment or both. The Petitioner had not canvassed the sentence before the Court of Appeal and is raising this issue for the first time before the Supreme Court as a new ground of appeal.
52. As referred to earlier in the case of **Dip Chand v The State** ; CAV0014/2012 it was held;
*"The Supreme Court has been even more stringent in considering the application for special leave to appeal on the basis of grounds of appeal not taken up or argued in the court of appeal. In **Josateki Solinakoroi v The State**; Criminal Appeal CAV0005 of 2005 the Supreme Court of Fiji, in an*


exceptional case, took into consideration the principles developed by (the) Privy Council in similar situations and in particular relied on the following observations in Kawaku Mensah v The King: (1946) AC 83: 'where a substantial and grave injustice might otherwise occur the privy Council allowed a new point to be taken which had not been raised below even though not raised in the petitioner's printed case.'


53. Applying the rationale in the case referred to above, this court is not inclined to consider the ground of appeal raised with regard to the sentence and accordingly special leave to appeal raised with regard to the sentence is refused.


Orders of the Court

1. Application for special leave to appeal is refused.
2. Application dismissed.




.....
Hon. Mr. Justice Saleem Marsoof
Judge of the Supreme Court


.....
Hon. Mr. Justice Suresh Chandra
Judge of the Supreme Court


.....
Hon. Mr. Justice Buwaneka Aluwihare
Judge of the Supreme Court