

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

CRIMINAL APPEAL NO. AAU 0102 of 2013
[High Court Criminal Case No. HAC 059 of 2011S]

BETWEEN : AMENA ARAIBULU

Appellant

AND : THE STATE

Respondent

Coram : Calanchini, P
Prematilaka, JA
Rajasinghe, JA

Counsel : Mr. Fesaitu. M for the Appellant
Ms. Korovou. MD for the Respondent

Date of Hearing : 24 August 2017

Date of Judgment : 14th September 2017

JUDGMENT

Calanchini, P

[1] I agree that the appeal should be dismissed and the conviction affirmed.

Prematilaka, JA

[2] This appeal arises from the conviction of the Appellant on a single count under section 21 (1) (c) of the Penal Code and section 6 (b) of the Illicit Drugs Control Act, 2004 alleged to have been committed at Suva in the Central Division on 06 January 2010. The Amalgamated Information dated 01 August 2011 further describes the particulars of the offence as the Appellant having aided and abetted Isikeli Tamani to

import into Fiji controlled chemical namely pseudoephedrine hydrochloride weighing approximately 2.680 kilograms without lawful authority.

- [3] The said Isikeli Tamani had been charged under the first count of the Amalgamated Information with importation of the said controlled chemical without lawful authority in the same transaction contrary to section 6 (b) of the Illicit Drugs Control Act, 2004.
- [4] After trial, the three assessors on 30 September 2013 expressed a unanimous opinion that the Appellant was not guilty of the said count. The Learned High Court Judge on 02 October 2013 disagreed with their opinion in the Judgment and convicted the Appellant. On 04 October 2013 the Learned Judge imposed a sentence of 08 years of imprisonment with a non-parole period of 06 years.

Preliminary observations

- [5] The Appellant in person had sought to appeal against the said conviction by way of a letter which had reached the Court of Appeal registry on 21 October 2013. In the said letter the Appellant had challenged only the sentence. Thereafter, the Appellant had sent another letter which had reached the registry on 28 October 2013 where he had challenged both the conviction and the sentence. Having obtained the services of the Legal Aid Commission the, Appellant had filed an amended application for leave to appeal dated 17 July 2014 only against the conviction on three grounds of appeal. The State and the Legal Aid Commission had tendered written submissions on the leave to appeal application only on the three grounds of appeal against the conviction.
- [6] The single Judge of the Court of Appeal in the Ruling of 15 September 2014 had held all three grounds of appeal to be not arguable, refused leave and dismissed the appeal on the basis that it was frivolous in the sense that he was confident that it could not possibly succeed, relying on section 35(2) of the Court of Appeal Act and **Naisua v State** Criminal Appeal No.CAV0010 of 2013: 20 November 2013 [2013] FJSC 14.

- [7] The Appellant challenged the single Judge Ruling by way of a Leave to Appeal Application to the Supreme Court. The Supreme Court in Araibulu v State Criminal Petition No. CAV 03 of 2015: 23 October 2015 [2015] FJSC 31 had *inter alia* allowed the Appellant's appeal and referred the matter to the Full Court for a renewed application for leave to appeal to the Court of Appeal pursuant to section 35(3) of the Court of Appeal Act.
- [8] The Chief Justice had *inter alia* remarked in the said Judgment that the extent of proof required to establish guilty knowledge for an offence brought under section 6(b) of the Illicit Drugs Control Act, 2004 is an important issue, which may have to be set by the Court of Appeal. Keith J. had raised the question, assuming that the prosecution was required to prove that the Appellant knew that what he was helping to import were illicit chemicals to be used in the manufacture of illicit drugs, whether such an inference of knowledge of the Appellant could be drawn from all the relevant facts of the case.
- [9] The counsel for the Appellant informed this Court at the hearing on 24 August 2017 that he would pursue only the second ground of appeal against the conviction and rely on the written submissions filed on 24 July 2014 at the leave to appeal stage while the Respondent had tendered fresh written submissions on 15 August in respect of the hearing of the appeal on the conviction.

Ground of Appeal

- [10] Therefore, the sole ground of appeal that would be considered by this Court is as follows.

Ground 2

'The Learned Trial Judge erred in law and in fact when he overturned the unanimous finding of not guilty by the 03 assessors without considering the fact that the Appellant does not know that the controlled chemicals was inside the bicycle and neither does he had any intention to assist in the importation of the drugs.'

Summery of evidence

The extract of prosecution evidence.

- [11] The prosecution case against the appellant was that he accompanied his co-accused to the Carpenters Shipping to pick up a parcel that had been sent from China by one Esther Wilson. The parcel had been addressed to one Jack Wilson of 77 Malau Place, Vatuwaqa. When the appellant and his co-accused arrived at the Carpenters Shipping Bond Yard in a vehicle, the appellant got off and presented the original documents given to him to collect the parcel by the co-accused who remained in the vehicle. The appellant was attended by Jonetani Rokosugu who was a receiving/delivery clerk at the Carpenters Shipping. The appellant told Rokosugu that the consignee, Jack Wilson had physical disability and was in the vehicle. Rokosugu then accompanied the appellant to the vehicle. When Rokosugu requested the co-accused for proof of his identification, the appellant replied that the co-accused did not have any identification. Both men then returned to the premises for an inspection of the consignment by a Customs officer. Before inspecting the consignment, Josua Volau who was a Customs officer approached the co-accused for verification of his identity. The co-accused told Volau that he was Jack Wilson. Thereafter the consignment was opened in the presence of Volau. The consignment contained a tricycle. The co-accused then offered a \$100.00 note to Rokosugu to be shared with Volau. Rokosugu declined to accept the money. The appellant then signed the Waybill on behalf of the consignee. At this point, the law enforcement officer intercepted and arrested the appellant and his co-accused. The consignment was seized and upon further inspection it was discovered that 2.68kg of pseudoephedrine hydrochloride was concealed underneath the seat of the tricycle.
- [12] The prosecution also produced the Appellant's caution interview unchallenged by him where the Appellant had admitted *inter alia* the following
- (i) He had known the 01st Accused Isikeli Tamani also known as Sikeli Cawanikawai, being his neighbour for 05 years prior to the incident in issue.

- (ii) He had known the elder brother of the 01st Accused by the name of Tu Vere living in New Zealand since 2007 who had got his phone number through the younger brother called Tuniu who too was known to him.
- (iii) Tu Vere had asked the Appellant the procedures to follow if he wanted to traffic drugs from Asia into Fiji and then to New Zealand. The Appellant had advised him to pack them properly and send in a container and not by air freight as it is too risky.
- (iv) Tu Vere had struck a deal with the Appellant where he would assist in clearing the drugs in Fiji and Tu Vere would arrange for him to visit New Zealand. Tu Vere had said that he would call the Appellant when drugs are sent.
- (v) Tu Vere had given a call to the Appellant at 7.33 a.m. on 07.01.2010 but he had been already under arrest by that time but according to him that call from Tu Vere may be related to his deal with him.
- (vi) He had assisted the 01st Accused and his younger brother Tuniu to clear parcels coming from New Zealand 03 times before and been paid for his help. On all three occasions he had signed the delivery docket. He had also assisted the 01st Accused in clearing money sent from New Zealand through Western Union and had been given the 01st Accused's account number as well. The Appellant had deposited some money belonging to the 01st Accused into his own account on two occasions.
- (vii) On the fourth occasion where he was arrested along with Isikeli Tamani had given him FJD 300.00 to pay the custom officer and the Carpenters Shipping employee FJD 50.00 each and to take the balance if no duty was paid.

[13] According to custom officer Vimlesh Narayan while he was checking the goods at Carpenters Air Freight Bond on 30 December 2009 at Nandi Air Port, he had come across an Airway Bill which had aroused his suspicion due to several risk indicators including the discrepancies in weight, third party involvement, shipping payment

made in cash, lack of local contact for consignee, and the originating country being a higher risk country. He had asked Fed Ex Employee Praneel Anish Narayan to open the blue colour box with a picture of a tricycle relating to the said Bill and found that in addition to the tricycle there had been some granules inside the box and he had also felt the box heavier than it should normally be. He had got Praneel to unscrew the seat cover and found two plastic bags inside the seat compartment. The same granules in yellow and pink had been seen inside the bags. Having tested a sample and found it to contain antidrug, it had been decided to carry out a controlled delivery of the consignment to Suva which was its ultimate destination.

The extract of Appellant's evidence at the trial.

- [14] At trial, the Appellant in his sworn evidence had said that he was only assisting the co-accused to clear the consignment. He had said that he did not know that the consignment contained controlled chemicals. He knew the co-accused well. He knew that the co-accused was not Jack Wilson, yet, he presented him as Jack Wilson to the officers when he went to collect the consignment. He had admitted that he knew that the person in the taxi was Isikeli Tamani and he was not Jack Wilson. On the fourth occasion unlike on three previous occasions he had not put his signature to clear the parcel but had asked Jonetani, the Carpenters Shipping employee to sign. The prosecution suggested that it was because the Appellant knew what the parcel contained beforehand. He had admitted under cross-examination that he had advised the co-accused's brother to import drugs into Fiji by the safer mode of shipping rather than through air freight.

- [15] I shall now deal with the ground of appeal.

'The Learned Trial Judge erred in law and in fact when he overturned the unanimous finding of not guilty by the 03 assessors without considering the fact that the Appellant does not know that the controlled chemicals was inside the bicycle and neither does he had any intention to assist in the importation of the drugs.' (emphasis added)

[16] Section 21(1) of the Penal Code states *inter alia*

'When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say –

- (a)*
- (b)*
- (c) Every person who aids or abets another person in committing the offence;*

[17] Section 6 (b) of the Illicit Drugs Control Act 2004 states as follows

' Any person who without lawful authority imports, exports, manufactures, possesses, or supplies any controlled chemical or controlled equipment -

- (a)*
- (b) being reckless as to whether that chemical or equipment is to be used in or for the commission of an offence under section 5;*

commits an offence and is liable to a fine not exceeding \$1,000,000 or imprisonment for life or both.'

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

'Any person who without lawful authority

- (a) acquires, supplies, possesses, produces, manufactures, cultivates, uses or administers an illicit drug; or*
- (b) engages in any dealing with any other person for the transfer, transport, supply, use, manufacture, offer, sale, import or export of an illicit drug;*

commits an offence and is liable on conviction to a fine not exceeding \$1,000,000 or imprisonment for life or both.'

[19] Although the Crime Decree, 2009 (now Crimes Act, 2009) under Part 5 on General Elements of An Offence sets set out in details the physical and fault elements of offences, when the offence alleged against the Appellant was committed it was the Penal Code that was still in force. Therefore, recourse has to be had to common law to resolve the issues at hand in this appeal.

- [20] Responsibility for a criminal offence may be incurred either as a principal offender or as an accessory. A principal offender is the actual perpetrator of the offence *i.e.* the person whose individual conduct satisfies the definition of a particular offence. An accessory is one who aids, abets, counsels or procures the commission of the offence. Chapter V of the Penal Code describes the parties to offences. Section 21(1)(a) of the Penal Code describes the principal offender while section 21(1)(b) – (d) seem to be on different types of accessories. Section 22 deals with joint offenders while section 23 is concerned with those who counsel others to commit offences. An accessory could be charged with actually committing the offence and is liable to suffer the same consequences as the principal offender.

Actus reus of an accessory.

- [21] The *actus reus* of an accessory *inter alia* involves (a) aiding, abetting, counselling and procuring (b) an offence (the principal offence).
- [22] According to Oxford English Dictionary the natural meaning of ‘to aid’ is to ‘give help, support or assistance to’; and of ‘to abet’, ‘to incite, instigate or encourage’. As this appeal concerns aiding and abetting, I would mainly focus on those two acts.
- [23] Therefore, any type of assistance given prior to or at the time of the commission of the offence will suffice to constitute aiding. It may be pertinent to mention that ‘import’ under Illicit Drugs Control Act 2004 is to bring or cause to be brought into Fiji and is a continuing process including any stage thereof until any item reaches the intended recipient (*vide* section 2) (*emphasis added*).
- [24] The ordinary meaning of the word does not import a requirement that the assistance was a *sine qua non* or ‘but for’ cause of the offence; for example if A2 (aider and/or abettor) helps A1 (principal offender) to carry out an offence, the fact that A1 would have committed the offence even without assistance does not preclude A2’s liability as a secondary party. Nor is it necessary that assistance was sought or that the principal offender was aware of the assistance. For example, if A2, knowing that A1 is planning to shoot V, ensures, without A1’s knowledge, that his gun is in good working order, he assists him in carrying out the murder. However, there must be a

connection between the assistance and the commission of the offence. It must have actually helped the principal offender in carrying out the offence and whether it did so is a question of fact.

- [25] Abetting involves encouraging the commission of an offence. The Accused should have intended to encourage and *willfully* encouraged the crime committed. The encouragement must have come to the attention of the principal offender but, as with aiding, there is no requirement that the encouragement was a *sine qua non* of the offence. In R. v Giannetto [1997] 1 Cr App R 1 the Court of Appeal held that the fact that the principal had already decided to commit the offence would not relieve an alleged accomplice of liability. Any encouragement suffices. Abetting and counselling are similar terms. Both involve encouraging the commission of an offence. In R v Calhaem [1985] 2 All ER 266, Parker LJ, delivering the judgment of the Court of Appeal, said '*There is no implication in the word itself that there should be any causal connection between the counselling and the offence.*'
- [26] Aiders and abettors are those who are present at the commission of the offence, and aid and abet its commission.....Presence, in this sense, may be either actual or constructive. It is not necessary that the party should be actually present, an eye-witness or ear-witness of the transaction; he is, in construction of law, present, aiding and abetting, if, with the intention of giving assistance, he is near enough to afford it, should occasion arise (*vide* Archbold Criminal Pleading, Evidence & Practice 39th Edition page 1704).
- [27] Mere continued voluntary presence at the scene of a crime, even though it was not accidental, does not of itself necessarily amount to encouragement; but the fact that a person was voluntarily and purposely present witnessing the commission of a crime, and offered no opposition, though he might reasonably be expected to prevent and had the power to do so, or at least express his dissent, might in some circumstances afford cogent evidence upon which a jury would be justified in finding that he willfully encouraged and so aided and abetted, but it would be purely a question of fact for the jury whether he did so or not (*vide* Archbold Criminal Pleading, Evidence & Practice 39th Edition page 1707).

- [28] For example in **R v Clarkson (David)** (1971) 55 Cr. App. Rep. 445; [1971] 3 All ER 344 the accused watched X rape a woman and did nothing to stop him. However they did nothing to encourage the rape nor was there evidence to show that they intended to encourage the rape. They were convicted but the Court of Appeal quashed convictions on the basis that intent and act of encouragement had to be proved (not mere presence). Of course there could be instances where mere presence was the purpose of the event [e.g. illegal prize fighting where all persons present aiding abetting therein are guilty of assault: **R v Coney** 8 Q.B.D 534 at p.557] and could be construed as encouragement.
- [29] Another example is **R v. JF Alford Transport** [1997] 2 Cr. App. R. 326 where the accused worked for a company and turned a blind eye to their truck drivers working longer hours than was allowed by EC regulations. In these circumstances the Court of Appeal quashed their convictions as accessories to the offence by saying that passive acceptance did not constitute aiding, abetting etc. There has to be active encouragement or assistance.
- [30] In **R v Bainbridge** [1960] 1 QB 129; [1959] 3 All ER 200 the accused bought equipment for X, which X used in a crime. The trial judge said that it was sufficient for prosecution to show that accused knew of X's intention to commit a crime of the type which was committed, and that he did something, with that knowledge, to help the commission of the crime. The accused was convicted and the Court of Appeal held it to be the correct direction.
- [31] There could be instances such as in **R v. Bourne** (1952) 36 Cr. App. R 125 where an aider or abettor could be convicted even if the principal offender is acquitted. There are also circumstances where a secondary party is guilty of a more serious offence than the perpetrator. In the House of Lords in **R v. Howe** [1987] AC 417 Lord Mackay stated that

'It would seem absurd that [D2] should thereby escape conviction for murder... [W]here a person has been killed and that result is the result intended by [D2], the mere fact that [D1] may be convicted only of the reduced charge of manslaughter for some reason special to himself does not, in my opinion in any way, result in a compulsory reduction for [D2].'

Mens rea of an accessory

- [32] The mental element for an accessory is generally considerably narrower and more demanding than that required for the principal offender in that intention or knowledge rather than recklessness or negligence or other less culpable states of mind is required [*vide* **Blackstone's Criminal Practice 1993** (Third Edition) at page 64]. In **Giorgianni v The Queen** (1985) 156 CLR 473, the Australian High Court, having discussed at length the English authorities, held that recklessness was not sufficient for an accessory to an offence of causing death by culpable (reckless) driving.
- [33] Although there are various ways in which a person may be liable as a secondary party it was said in **Regina v Rook** [1993] EWCA Crim 3, [1997] Cr App R 327, [1993] 2 All ER 955, [1993] Crim LR 698 and accepted in **Regina v Bryce** [2004] EWCA Crim 1231, [2004] 2 Cr App R 35 that the *mens rea* requirements are the same in all cases of secondary liability. No distinction is drawn between cases where the assistance or encouragement is given at the time of the offence and those where the assistance or encouragement is given before it is committed. It follows that the same principles apply whether or not the secondary party is present or absent at the time the offence is committed and whether or not he is participating in a joint criminal enterprise with the principal and other secondary parties.
- [34] The mental elements for an accessory (A2) are '*intention to aid*' and '*foresight/contemplation*'.
- [35] In **National Coal Board v Gamble** (1959) 42 Cr App R 240 where a truck driver was allowed to carry excess load of coal by NCB and NCB was tried as an accessory to the offence and convicted Devlin J said

'... aiding and abetting is a crime that requires proof of mens rea, that is to say, of intention to aid as well as of knowledge of the circumstances.'

'The mens rea requisite to constitute aiding and abetting is a matter of intent only and does not depend on desire or motive.'

'A person who supplies [i.e., gives, lends, sells or otherwise transfers the right to property] an instrument for a crime or anything essential to its commission

aids in the commission of it: and if he does so knowingly and with intent to aid, he abets as well and is therefore guilty of aiding and abetting."

Intention to aid

[36] The act of assistance, encouragement or procuring should have been done intentionally and A2 should have known it to be an act capable of assisting, encouraging or procuring the offence. This is not the same as an intention that the principal crime be committed. Thus, it is the intention to do the acts of assistance or encouragement which must be proved.

- (i) A2 must intend to do the act of assistance or encouragement and he must intend that the act will assist or encourage A1. Thus, if A2 accidentally assists A1 to commit an offence he will not attract secondary liability. Mere presence at the scene of a crime – even deliberate presence – is not enough to give rise to secondary liability. Neither was non-interference to prevent a crime.
- (ii) In Clarkson Megaw LJ, delivering the judgment of the Court of Appeal, quoted with approval the following passage from Coney [1882]

'Encouragement does not of necessity amount to aiding and abetting, it may be intentional or unintentional, a man may unwittingly encourage another in fact by his presence, by misinterpreted words, or gestures, or by his silence, or non-interference, or he may encourage intentionally by expressions, gestures, or actions intended to signify approval. In the latter case he aids and abets, in the former he does not.'

- (iii) In Bryce the Court of Appeal held that A2 must intend to assist or encourage and an intention to hinder will negative this element of the *mens rea*. Mere recklessness, still less negligence, whether assistance be given, is probably not enough [see Giorgianni].

Knowledge of circumstances

[37] At the time of the act of assistance or encouragement or procuring, A2 must have foreseen the commission of the offence by A1. Historical development of this 'knowledge' aspect could be traced as follows.

- (i) Goddard CJ in **Johnson v Youden** [1950] 1 KB 544 at p. 546 formulated a test in the following words which underwent several changes later on.

'Before a person can be convicted of aiding and abetting the commission of an offence, he must at least know the essential matters which constitute that offence. He need not actually know that an offence has been committed, because he may not know that the facts constitute an offence and ignorance of the law is not a defence'.
(emphasis added)

- (ii) This applies even where the principal offence is one of strict liability [see **Callow v Tillstone** (1900) 83 LT 411; **Smith v Mellors** (1987) 84 Cr App R 279].
- (iii) This statement that the accessory '*must at least know the essential matters which constitute the offence*' is not, and does not purport to be, a complete definition of the mental element because *inter alia*, it only relates to *actus reus* of the principal offence. It says nothing about the intention to '*aid, abet, counsel and procure.*' [see **Blackstone's Criminal Practice 1993** (Third Edition) at page 64.]
- (iv) Where the accused does not actually desire to assist or encourage the commission of an offence, but knows that his actions are extremely likely or virtually certain to have the result, the question is one for the jury to infer whether or not he has the requisite intent (*vide* **Moloney** [1985] AC 905 and **Hancock** [1986] AC 455).
- (v) It is not necessary to prove that the secondary party intended the principal crime to be committed. In **National Coal Board** Devlin J said

'If one man deliberately sells to another a gun to be used for murdering a third, he may be indifferent whether the third man lives or dies and is interested only in the cash profit to be made out of the sale, but he can still be an aider and abettor'

- (vi) In Lynch v DPP for Northern Ireland [1975] AC 653 A2 drove A1 to a garage where he knew that A1 intended to murder a policeman. Lord Morris of Borth-y-Gest said that the intentional driving of the car was enough to render A2 liable as a secondary party 'even though he regretted the plan or indeed was horrified by it' (see also *Rook*).
- (vii) Nor is it necessary that A2 knows that the crime will be committed; it is sufficient that he foresaw it as a 'real or substantial risk' or 'real possibility'. As was pointed out in *Bryce* it would be inappropriate to require proof of knowledge of an offence which is yet to be committed. And thus, where, for example, A2 supplies a weapon or other equipment to A1 he will be guilty of aiding the commission of an offence in the course of which the weapon or equipment is used provided that at the time of supply he foresaw that there was a real possibility it would be used for such a purpose.
- (viii) It is also not necessary that A2 had knowledge of the precise crime intended by A1. For example, where the offence is to be committed in the future or by a person of whose precise intentions the accused cannot be certain in advance, strict requirement of knowledge is inappropriate or unworkable. In *Bainbridge* A2 was convicted of being an accessory to an offence of breaking and entering. He had supplied A1 with oxygen cutting equipment which had been used to break into a branch of the Midland Bank in Stoke Newington, London. On appeal it was contended that he should not have been convicted unless it was shown that when he bought the equipment he knew it was to be used for breaking into that bank. Lord Parker CJ, delivering the judgment of the Court of Criminal Appeal, said that it was unnecessary that '*knowledge of the particular crime which was in fact committed should be shown to his knowledge to have been intended*'. While recognizing that it was not enough to show that a man knows that some illegal venture is intended, he approved of the direction given by Judge Aarvold who had told the jury that it must be proved that A2 knew the type of crime which A1 intended and was in fact committed.

Foresight/contemplation

- (ix) Knowledge of circumstances test finally moved from ‘knowledge’ to ‘contemplation’. Dictum of Lord Goddard C.J. in Johnson was applied and Bainbridge was approved but reformulated in DPP for Northern Ireland v Maxwell [1978] 3 All ER 1140 at 1162; [1978] 1 WLR 1363 at 1374–1375) which is an authority to the proposition that a person can be convicted of aiding and abetting the commission of a criminal offence without prior knowledge of the actual crime intended if he contemplated the commission of one or more of a number of crimes by the principal and he intentionally lends his assistance in order that such a crime will be committed. It is irrelevant if at the time of lending his assistance, the accused person did not know which of the crimes the principal intended to commit.
- (x) Lowry LCJ on behalf of the Court of Criminal Appeal, Northern Ireland in Maxwell that considered the first appeal said

‘The situation has something in common with that of two persons who agree to rob a bank on the understanding, either express or implied from conduct (such as the carrying of a loaded gun by one person with the knowledge of the other), that violence may be resorted to. The accomplice knows, not that the principal will shoot the cashier, but that he may do so; and, if the principal does shoot him, the accomplice will be guilty of murder. A different case is where the accomplice has only offence A in contemplation and the principal commits offence B. Here the accomplice, although morally culpable (and perhaps guilty of conspiring to commit offence A), is not guilty of aiding and abetting offence B. The principle with which we are dealing does not seem to us to provide a warrant, on the basis of combating lawlessness generally, for convicting an alleged accomplice of any offence which, helped by his preliminary acts, a principal may commit. The relevant crime must be within the contemplation of the accomplice and only exceptionally would evidence be found to support the allegation that the accomplice had given the principal a completely blank cheque.’ (emphasis added)

- (xi) In the House of Lords, Lord Scarman in Maxwell expressed his approval of this approach of Lowry LCJ and agreed with Viscount Dilhorne that liability of a secondary party should not depend on whether the offence committed was of the same type as that intended, but whether it was foreseen or contemplated. Lord Scarman stated

'The principle thus formulated has great merit. It directs attention to the state of mind of the accused: not what he ought to have in contemplation, but what he did have. It avoids definition and classification, while ensuring that a man will not be convicted of aiding and abetting any offence his principal may commit, but only one which is within his contemplation. He may have in contemplation only one offence, or several; and the several which he contemplates he may see as alternatives. An accessory who leaves it to his principal to choose is liable, provided always the choice is made from the range of offences from which the accessory contemplates the choice will be made.' (emphasis)

- (xii) Therefore, the principle is that a secondary party will be liable for an offence which he foresaw or contemplated might be carried out by the perpetrator. As **Smith and Hogan (Criminal law)** note in their commentary on **Maxwell**

'If [D2] gives assistance to [D1], knowing that [D1] intends to commit a crime, but being uncertain whether [D1] has crime X, or crime Y, or crime Z, in mind, D2 will be liable as a secondary party to whichever those crimes [D1] in fact commits. He will not be liable for crime W, even if it is of the same type as X, Y or Z unless it was also one he contemplated'

- [38] To recapture the discussion, the *mens rea* of secondary liability requires proof that A2 intentionally did an act which assisted, encouraged or procured the commission of the offence and he knew that it was capable of assisting, encouraging or procuring the offence. In addition it must be proved that at the time of the act of assistance or encouragement or procuring A2 contemplated or foresaw the commission of the offence by A1. It is not however necessary to prove that A2 intended the principal offence to be committed, foresight will suffice.
- [39] I shall now turn to analyze the facts of this case in the light of above legal principles to determine whether the conviction of the Appellant could be upheld or not.
- [40] Following the assessors' unanimous opinion, the trial Judge has convicted the co-accused of count No.01 of the indictment where he had been found guilty of importing the controlled chemical into Fiji without lawful authority contrary to section 6 (1) (b) of the Illicit Drugs Control Act, 2004. Thus, it could be safely assumed that all the ingredients relating to *actus reus* and *mens rea* of the offence alleged against the co-accused are proved and his conviction stands undisturbed.

Therefore, I do not intend nor am I required to reconsider the conviction of the co-accused at all in this appeal.

- [41] It is clear that the *actus reus* of the offence alleged against the co-accused is importation without lawful authority. The *mens rea* is recklessness as to whether that chemical is to be used in or for the commission of an offence under section 05 of the Illicit Drugs Control Act, 2004. This is as far as the principal offender is concerned. The *mens rea* for secondary liability is quite distinct from the *mens rea* required for liability as a principal offender. The prosecution need not prove the same *mens rea* attributed to the co-accused as the principal offender with regard to the Appellant. His *mens rea* is that of an aider or abettor.
- [42] It is alleged that the Appellant aided and abetted the co-accused to commit the offence of importing the controlled chemical into Fiji without lawful authority contrary to section 6 (1) (b) of the Illicit Drugs Control Act, 2004. Therefore, it has to be determined whether the evidence has established the *actus reus* and the *mens rea* of the offence alleged against the Appellant as an accessory to the principal offence.
- [43] On the basis of the Appellant's confession and the evidence under oath which I have already quoted above and needs no repetition and in the light of the relevant principles of law applicable, I am of the view that there is overwhelming evidence that the Appellant had fulfilled all the requirements of *actus reus* of aiding the co-accused in the commission of the offence under count 01 of the Amalgamated Information.
- [44] The only question that has to be considered is whether the *mens rea* of aiding and abetting has been satisfied. As I said before, the prosecution need not establish the *mens rea* of the offence the co-accused was charged with in order to prove *mens rea* of aiding and abetting against the Appellant. It needs to only prove *mens rea* of aiding and abetting. In other words the prosecution does not have to show that the Appellant was '*being reckless as to whether that chemical or equipment is to be used in or for the commission of an offence under section 5*' which is the *mens rea* of the principal offence under section 6(b) of Illicit Drugs Control Act, 2004. It is only relevant to the co-accused being the principal offender.

[45] It could be ascertained from the totality of evidence including the confessional statement and the evidence of the Appellant *inter alia* that

- (i) He was aware that the co-accused's elder brother Tu Vere was planning to send drugs into Fiji from New Zealand.
- (ii) He had advised him to how to do that safely.
- (iii) He was expecting a call from Tu Vere of the dispatch of drugs but when the call came the Appellant was already in custody.
- (iv) He had cleared 03 consignments for the co-accused and his younger brother Tuniu from New Zealand before and been remunerated.
- (v) On all previous occasions the Appellant himself had signed the delivery docket but on the last occasion had had requested Jonetani to sign.
- (vi) He had deliberately lied and misled the Jonetani of Carpenters Shipping and Josua of Customs on the real identity of the co-accused, both of whom he had known before.
- (vii) He had attempted to bribe both Jonetani and Josua when things started going wrong.
- (vii) He had been involved in monetary transactions with the co-accused before where he had twice cleared money sent from abroad and deposited such money into his own account. He had been paid for on those occasions.

[46] In the circumstances I do not believe the Appellant's assertion that it was not his intention to help the co-accused to break the law but only to help him as he was paralyzed. Giving evidence under the guidance of his lawyer the Appellant had failed to assert emphatically that he did not know that the parcel contained a controlled chemical.

- [47] In my view the Appellant being an experienced operations supervisor at Pacific Agency doing similar business to Carpenters Shipping, ought to have known that importing illegal things into Fiji was an offence and thus, he had knowingly and deliberately intervened through his actions and verbal representations to make sure that the parcel containing controlled chemical would be cleared without any trouble. I have no doubt that the Appellant had intended to aid the co-accused and his acts of assistance had been done intentionally (not unwittingly or accidentally) and he had known them to be capable of assisting the commission of an offence for which the co-accused stands convicted. He need not have intended that the exact offence alleged and proved against the co-accused be committed. Thus, I hold that the requirement of 'intend to aid' aspect of the *mens rea* of aiding is established.
- [48] Given that he had voluntarily advised the co-accused's elder brother Tu Vere to import drugs into Fiji and that he had been involved with the co-accused and his younger brother Tuniu in clearing several consignments before, it was well within the Appellant's contemplation that the co-accused under the pseudonym John Wilson may be attempting to import something illegal if not drugs on this occasion. In the circumstances of this case it is not difficult to conclude that the Appellant should have foreseen the commission of a crime of this nature as a 'real or substantial risk' or 'real possibility'. Thus, I hold that the 'foresight' aspect in the *mens rea* of aiding is also established.
- [49] The test formulated in DPP for Northern Ireland v Maxwell (supra) commends itself to me most. I would apply that and hold that the Appellant could be convicted of aiding and abetting the importation of the controlled chemical contrary to section 6(b) of Illicit Drugs Control Act 2004 even if he did not have any prior knowledge of it because on the evidence available the commission of any offence of that nature by the co-accused could be taken to have been within the Appellant's contemplation and also because he intentionally lent his assistance in order that such a crime will be committed.

- [50] In the circumstances, it is irrelevant even if the Appellant did not know that the controlled chemicals were inside the bicycle and he did not entertain any intention to assist in the importation of the drugs as argued by the Appellant. However, to me even that proposition of the Appellant lacks credibility in as much as it is inexplicable and remains a mystery as to why *inter alia* the co-accused was using a false identity to import an innocuous item such as a bicycle or a tricycle and why the Appellant deliberately and knowingly perpetuated the same false identity of the co-accused in trying to clear the same. He obviously knew and if not at least it was within his contemplation or should have foreseen that the co-accused was committing an act of bringing an illegal substance to Fiji and intentionally assisted him in that process to achieve that end. The co-accused stand convicted. So should the Appellant be.
- [51] However, I find that from paragraph 20 of the summing up and paragraph 9 of the Judgment the trial Judge had only looked at the aspect of '*intentional aiding*' in the *mens rea* needed to convict the Appellant of aiding and abetting the co-accused. No mention of knowledge of 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.
- [52] Yet, the verdict of the Learned Judge could not be considered as 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. CAV0001 of 2011: 09 May 2012 [2012 FJSC 12] 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 is not unreasonable and is supported by evidence. I have no doubt that on the available evidence the case against the Appellant has been proved beyond reasonable doubt and the only reasonable and proper verdict would be one of guilt.

[53] Therefore, I think the point raised under the sole ground of appeal against the conviction should be decided in favour of the Appellant as a miscarriage of justice. However, I conclude that on the totality of incriminating evidence available against the Appellant no substantial miscarriage of justice has occurred. Therefore, I would apply the proviso to section 23(1) of the Court of Appeal Act and dismiss the appeal.

[54] Therefore, I conclude that the appeal should stand dismissed and the conviction be affirmed.


Rajasinghe, JA

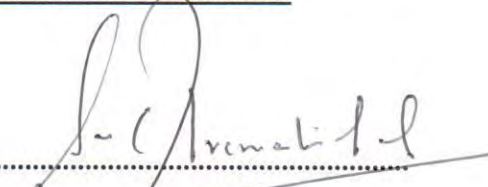
[55] I agree with the reasons and conclusions reached by Prematilaka JA.

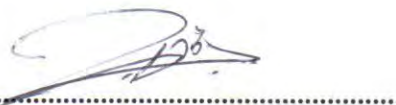
The Orders of the Court are:

1. *Appeal is dismissed.*
2. *Conviction is affirmed.*




.....
Hon. Mr. Justice W. Calanchini
JUSTICE OF APPEAL


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


.....
Hon. Mr. Justice T. Rajasinghe
JUSTICE OF APPEAL