

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL AAU 0037 OF 2013
(High Court HAC0083 OF 2010(Lautoka))

BETWEEN : ROSHNI LATA

Appellant

AND : THE STATE

Respondent

Coram : Chandra JA
A. Fernando JA
Temo JA

Counsel : Mr T. Lee for the Appellant
Mr L J Burney for the Respondent

Date of Hearing : 8 May 2017

Date of Judgment : 26 May 2017

JUDGMENT

Chandra JA

[1] I agree with the reasons and conclusions of Fernando JA.

Fernando JA

- [2] The Appellant has appealed against her conviction for unlawful possession of 1990.4 grams of Cocaine, contrary to section 5(a) of the Illicit Drugs Control Act, 2004 and the sentence of 18 years of imprisonment with a non-parole period of 16 years, imposed on her by the High Court of Fiji, sitting at Lautoka. By way of relief, she had sought to have her conviction and sentence quashed and for an order of acquittal or a re-trial.

The Charge

- [3] The Appellant had been charged before the High Court as follows:

"Statement of Offence

Unlawful Possession of Illicit Drugs: Contrary to section 5(a) of the Illicit Drugs Control Act, No 9 of 2004.

Particulars of offence

Roshni Lata, on the 13th day of June, 2010 at Nadi in the Western Division, without lawful authority was found in possession of 1990.4 grams of Cocaine which is an illicit drug."

The Law in relation to Illicit Drugs

- [4] The relevant provision of the **Illicit Drugs Control Act of 2004**, namely, **section 5(a)**, states as follows:

"Any person who, without lawful authority ... possesses an illicit drug... commits an offence and is liable on conviction to a fine not exceeding \$ 1 million or imprisonment for life or both."

Cocaine is listed as an illicit drug in Schedule 1 of the Illicit Drugs Control Act 2004.

- [5] On evidentiary matters **section 32 of the Illicit Drugs Control Act of 2004** deals with factual presumption, relating to possession of illicit drugs thus:

"Where in any prosecution under this Act it is proved that an illicit drug, ... was on or in any premises... under the control of the accused, it shall be presumed until the contrary is proved, that the accused was in possession of such illicit drug... ."

- [6] On an application for leave to appeal against conviction and sentence before a single Justice of Appeal of the Court of Appeal, leave had been granted to appeal only against some of the grounds, while leave had been refused as against the others. The Appellant in his written submissions filed before this Court had stated: "For the purpose of this hearing, the appellant wishes to rely on those grounds where leave is granted." The grounds, upon which leave had been granted, are set down below verbatim, as stated in the Ruling of the Justice of Appeal.

Grounds of Appeal

- [7] Appeal Against Conviction:

- "(1) The Learned Trial Judge failed to give adequate directions on the Defence of Duress as he erroneously read the English Dictionary meaning of the word duress and then he gave erroneous direction in law thereby causing a miscarriage of justice.*
- (2) The Learned Trial Judge despite requests for re-direction failed to adequately direct the Assessors on the onus that it was for the Prosecution to negate the defence of Duress and in particular he failed to direct the Assessors that the Defence was raised in the Record of Interview and that it was part of the State's case and further, the fact that the Appellant was under fear which was corroborated by the Second Prosecution Witness.*
- (3) The Learned Trial Judge erroneously disallowed the Appellant from giving evidence on the issues of Duress, stating that she would need to call the persons who threatened the Appellant when he knew or ought to have known that there was no such requirement of the Appellant.*
- (4) The Learned Trial Judge erred in directing himself and the Assessors by stating that there were only four listed elements the prosecution had to prove in that he failed to direct the Assessors and himself that there is a presumption that Mens Rea and evil intention or a knowledge of wrongfulness of the act, is an essential element of every offence and that presumption is liable to be displaced either by words of a statute creating the offence or by the subject matter with which it deals, and both must be considered the failure of the Trial Judge thereby caused a miscarriage of Justice.*
- (5) The Learned Trial Judge failed to direct the Assessors and himself on the issue of Mens Rea that before there can be a conviction, the act of the accused must be accompanied by a guilty mind and further he failed to inform the Assessors and himself that intention is a fault element of the offence and possession is the physical element of the offence and that the*

prosecution had to prove beyond reasonable doubt before a conviction could be entered, thereby the Learned Trial Judge made a fatal misdirection causing a grave miscarriage of Justice.

- (6) The Learned Trial Judge failed to direct himself and the Assessors and that there was a requirement in this case for them to be satisfied beyond reasonable doubt that the Appellant knew that the bag contained illicit drugs and that they were satisfied that she did not receive the bag fleetingly and unwittingly.*
- (7) The Learned Trial Judge failed to direct the Assessors that they had to be satisfied beyond reasonable doubt and that they were not satisfied that the Appellant did not have any intention to do anything wrong and no knowledge that she was doing anything wrong thereby the Learned Trial Judge caused a miscarriage of Justice.*
- (8) The Learned Trial Judge failed to direct the Assessors that the Prosecution had to provide that the Appellant knew that she was doing the criminal act which is charged against her, that she knew that all the facts constituting the elements necessary to make the Act criminal were involved in what she was doing and therefore by his omission caused a grave miscarriage of Justice.*
- (9) The Learned Trial Judge failed to direct the Assessors that the Appellant would not be guilty if she acted under an honest or reasonable mistake as to the existence of facts.*
- (10) The Learned Trial Judge erred in giving directions on the issue of Good Character as he was required by law to direct the Assessors that they must bear in mind the Accused's Good Character when considering the Questions of the Accused's guilt and that the Assessors should also consider good character as a factor alleging the likelihood of the Accused committing the crime charged and in particular the Assessors should have considered the good character of the Accused in assessing the credibility of the explanations offered by the Appellant to police and the credibility of the Appellant as a witness.*
- (11) The Learned Trial Judge at the end of the address by the Defence Counsel erroneously instructed the Assessors that don't worry about what has been said to you, it is too difficult, I will explain to you in simple terms the Learned Trial Judge ought to have known that this was an incorrect statement to make and that that statement could have had the effect of the Assessors not placing any weight on counsels submission."*

[8] Appeal against Sentence:

- “(1) The Learned Trial Judge failed to consider the tariff in the two more serious cases which he referred to concerning importation of Cocaine as*

compared to the case before him concerning possession simpliciter, thereby imposing a sentence that was manifestly harsh and excessive.

- (2) *The Learned Trial Judge erroneously took collective social harm as an excessive important factor thereby increasing the starting point substantially thereby causing a miscarriage of justice.*
- (3) *The Learned Trial Judge erroneously stated that the offence of possessing drugs was more serious than murder as in murder one life is lost whereas in supply of drugs many lives are lost.*
- (4) *The Learned Trial Judge failed to consider that the prosecution had not provided the purity of the drug and as such he was in error to assume that it was of a high purity and thereby failed to give the Appellant any benefit of the fact that it could have been of low purity as the certificate stated no more than it was positive for cocaine.*
- (5) *The Learned Trial Judge failed to give the Appellant any credit to her pre-sentence custody.*
- (6) *The Sentencing imposed by the Learned Trial Judge was manifestly excessive having regards to all the circumstances of the case." (verbatim)*

Prosecution Evidence

- [9] PW 1, A. Kelera Miriama, was a neighbour of the Appellant and worked as a laundry attendant at Prestige Laundry. She had stated that in March 2010 the Appellant had called her at her place of work and requested her to meet the Appellant at the Appellant's home after work. As requested she had gone to the Appellant's house after work when the Appellant had given her a knapsack black bag and asked her to keep it. The Appellant had told her, that it contained Shalen's books. As requested Kelera had taken the bag and kept it in a room inside her house. According to Kelera she had not checked what was inside the bag as it "*was locked. The zip was together and locked.*" Two months thereafter, the Appellant had come to her house, taken the bag, opened it and taken something from it. Kelera had not seen what the Appellant had taken from the bag. The next day the Appellant had requested Kelera to go to town and send a parcel through Pacific Transport and given her \$5.00. It had been a small carton and Kelera had claimed that she did not know what was inside it. The Appellant had waited at the service station while Kelera went to Pacific Transport. Kelera had thereafter stated, somewhere in the year 2010, when she returned home from work, her parents had informed her that the Police had come looking for her.

Kelera had not informed anyone about the bag that the Appellant had given her. Under cross examination Kelera had stated, that she and the Appellant were good friends, that she lives 700 yards away from the house of the Appellant and that her house was "*hidden by bushes and trees looking from the road,*" and that one cannot see the Appellant's house from her house. She had also said that her house is not visible from the inter-section of the drive way. According to Kelera, the Appellant lived with her young child and grandchild. The grand child's father was a man called Shalen Sinha. Kelera had worked for a while at the Appellant's house as a baby sitter. The Appellant had paid her and also given her groceries for her services. Shalen too had paid her.

- [10] PW 2 Cpl 3231 Timoci Vuli, a police officer attached to the Drug Intelligence Enforcement Unit, had stated that on the 12th of June 2010, on information received about drugs, he had arrested the Appellant. On being questioned the Appellant had admitted that she had kept the drugs at some place and had led him and two other police officers to Kelera's house. Arriving at Kelera's house they had been informed by Kelera's mother that Kelera had gone to work. The Appellant had then informed Kelera's mother that she had come to take the bag and gone inside the house and brought it outside while the police remained outside. According to Vuli, "*The bag was a Roxy black leather bag. It was closed with a pad lock. After she brought the bag she voluntarily opened the bag with a key. The bag contained four parcels of white substance. The parcels were packed in PIL Supermarket and RIL Supermarket white plastics and a pillow case. Nothing else...In the bag all these things were wrapped in a black garbage bag*". The bag and its contents had been seized by one of the police officers and kept in his custody. The garbage bag, the pillow case, the plastics and the four parcels of white substances had been produced before the Court. Under cross-examination Vuli had admitted, that the Appellant had assisted the police in bringing the parcel containing the drugs at Kelera's house, that the Appellant had said, that she feared for her safety and two children, and had sought police protection after her arrest.

- [11] PW 3 Jone Sauvakacolo, a police officer who had been attached to the Drug Intelligence Enforcement Unit, had corroborated Vuli as regards the arrest and the manner the drugs came to be detected in Kelera's house. He had been the officer who

had seized the drugs and later taken them to the Government Analyst, for purposes of analysis. He had produced the Government Analyst's Report before the Court under section 133 of the Criminal Procedure Decree. There is no challenge before us, as to the chain of custody, the expertise of the Government Analyst, or his report pertaining to the analysis. The only issue raised is, in the grounds of appeal against sentence, that is, that the certificate did not state the purity of the cocaine, save for the fact that it was positive for cocaine. Under cross-examination Sauvakacolo had stated, that the Appellant cooperated with the police but had denied that the Appellant had told him about any threats extended to her by certain named persons. Both the handwritten (P 10) and typed version (P 10 A) of the caution interview and charged statement (P11 & P11A) had been produced as part of the Prosecution case without objection from the Defence.

- [12] According to the Cautioned Interview statement of the Appellant, produced as an exhibit without objection from the Defence, the police had come to her house on the 12th of June 2010 and asked her to accompany them. On being questioned about a bag and a *"packet that was taken to Suva by Jai and Ramzan"* she had stated that she placed the bag with the packet that was brought to her by Alvin Raj and Jai, at Kelera's place as she was threatened by Alvin Raj *"that some Fijian men will come from mountain and they will either kill me or kidnap my daughters."* The bag had been brought to her about a month prior to the 12th of June. Alvin Raj had threatened her by a call on her mobile phone after giving her the bag containing the substances. The Appellant had said, that one Jai Roko had also threatened her saying that if she opened her mouth regarding the parcel he will murder her. The Appellant had said that she *"knew that something was illegal in that parcel"* and that on the first night she had kept it *"in the bush"* beside her house. Thereafter she had called Kelera and told her that she had *"a bag with papers"* and she wanted Kelera to keep it at her place. Kelera had come and picked up the bag the next day and prior to giving it to Kelera the Appellant had opened the bag and had seen *"8 plastic packets with white substances like salt"* inside the bag. The Appellant had also stated *"I placed a padlock on the bag as I thought that kelera won't be able to open the bag and see the contents"*, and kept the key at her place. It was a globe brand padlock. According to the Appellant she had given two parcels from the bag to Jai, a week after it had been given to her by Raj, on being instructed by Raj. About a week after she had handed

over the two parcels to Jai, the Appellant had sent two other parcels to Suva by Pacific Transport again on the instructions of Raj. On being questioned as to how it was sent, the Appellant had said *"I placed 2 parcels in a small box and taped it properly and put the name Fijian girl on top of that box which had been written and given to her by Raj."* She had stated that it was Kelera who took the parcel to Pacific Transport to be sent to Suva. After Kelera had handed over the parcel at Pacific Transport she had rung Jai in Suva and told him that *"Pacific Transport has left Nadi at 9.00am and it will reach Suva at 3.00pm"*. When questioned as to why she kept the bag at Kelera's place and not at her place, the Appellant had said *"I was scared of my father –in - Law and ex-husband"*.

Defence Evidence

- [13] The Appellant testifying before the Court on oath, had stated, that she is 40 years old and a mother of three girls aged 22, 19 and 4 years. She was taking care of her grandchild, her eldest daughter's child who was 4 years old. Her eldest daughter's husband was Shalen Sinha and was an inmate of Natabua Prison. She had said that the police had come to her place on the 12th of June 2010 and asked her to accompany them. She had been questioned on that day and the questioning had continued to the next day. She had said that when she was given the "stuff" she was threatened that she will be killed or her children would be kidnapped, if she opens her mouth. On the 13th of June she had accompanied the police to Kelera's house and taken the bag that she had given Kelera and handed it over to the police. The bag had been padlocked and she had opened it with a key that was in the side pocket of the bag. She had said that there was something looking like salt inside the bag, but did not know what it was. On the 14th of June she had made a statement to the police and that was in question and answers form. She had said that the bag was given to her by Alvin Raj four weeks prior to the 12th of June. Alvin Raj had been in the company of Jai Roko, when he gave her the bag. Roko was an ex-convict, against whom, a murder case was pending. Alvin Raj is a friend of her son-in-law Shalen Sinha. Prior to Alvin Raj bringing the bag, her son-in-law Shalen had called her from prison and told her that Alvin Raj will bring a bag and asked the Appellant to give it to Kelera. She had called Kelera and Kelera had come and collected the bag the following day. She had said that before giving the bag to Kelera she had looked inside the bag and seen 8 parcels which

looked like salt. The Appellant had said that she was acting under threat and feared for her safety and that of her children. She had not complained to the police as she thought that they cannot give her 24 hour protection. The Appellant under cross-examination was challenged when she denied that she received a bag in April 2010. In the Charged statement, the Appellant made to the police on the 17th of June 2010, that was marked as a contradiction (P12), the Appellant had stated that Alvin Raj had given her the bag "*sometimes in April 2010.*" The Charged statement had been produced without objection from the defence. She had admitted that before she gave the bag to Kelera, she had locked the bag with a padlock. She had also admitted that she had told Kelera that there were books inside the bag. She had said that when she handed over the bag to the police there were only 4 parcels.

[14] The following uncontroverted facts, emerge from the prosecution and defence evidence:

- a) The Appellant had given the bag containing the cocaine to PW 1 Kelera Miriama to keep it at her place saying it contained books, about three months prior to its detection. The house of PW 1 was hidden by bushes and trees looking from the road, and not visible from the inter-section of the drive way.
- b) The bag had been secured with a padlock when the Appellant gave it to PW 1. The Appellant had stated that she placed a padlock on the bag to prevent PW 1 from opening the bag and seeing the contents, and had kept the key at her place.
- c) Prior to giving it to PW 1 the Appellant had opened the bag and had seen 8 plastic packets with white substances like salt inside the bag. The Appellant in her Cautioned Interview Statement had said that she knew that something was illegal in that parcel and that on the first night she had kept it in the bush beside her house.
- d) The Appellant had come and taken something out of the bag about two months after she gave it to PW 1.

- e) On the following day the Appellant had requested PW 1 to go to town and send a parcel through Pacific Transport and given her \$5.00. It had been a small carton. The Appellant had waited at the service station while PW 1 went to Pacific Transport.
- f) It was the Appellant who had placed two parcels of the white substances in the carton that was sent through Pacific Transport and had taped it properly and on top of that box the name Fijian girl had been written.
- g) After PW 1 had handed over the parcel at Pacific Transport, the Appellant had rung Jai Roko in Suva to tell him that the parcel had been sent and when it was likely to reach Suva.
- h) The Appellant had admitted to PW 2 T. Vuli, that she had kept the drugs at PW 1's place and had led him and two other police officers to PW 1's house. The Appellant had said that she kept the bag at PW 1's place and not at her place, as she was scared of her father –in - Law and ex-husband.
- i) After the Appellant had gone inside PW 1's house and brought the bag out she had voluntarily opened the bag with a key.
- j) The Appellant had sought police protection after her arrest saying that she feared for her safety and two children. The Appellant had said that she did not seek police protection earlier because she thought that the police could not provide her 24 hour protection.
- k) In her Cautioned Interview Statement the Appellant had said that she was threatened by Alvin Raj, that some Fijian men will come from mountain and they will either kill her or kidnap her daughters. She had not said this in her evidence before the Court.

Determination of appeals by the Court of Appeal

- [15] Provisions relating to determination of appeals in **section 23 of the Court of Appeal Act, 1949**, relevant to the instant case, have been set down below:

*“23 (1) – The Court of Appeal – (a) on any such appeal against conviction shall allow the appeal if they think that the verdict should be set aside on the ground that **it is unreasonable or cannot be supported having regard to the evidence** or that the judgment of the court before whom the Appellant was convicted should be set aside on the ground of **a wrong decision of any question of law or that on any ground there was a miscarriage of justice**, and in any other case shall dismiss the appeal; and (b)...*

*Provided that the Court may, notwithstanding that they are of opinion that **the point raised in the appeal against conviction... might be decided in favour of the appellant**, dismiss the appeal if they consider that **no substantial miscarriage of justice has occurred**.*

(2) (a) Subject to the special provisions of this Act, the Court of Appeal shall, if they allow an appeal against conviction, either quash the conviction and direct a judgment and verdict of acquittal to be entered, or if the interests of justice so require, order a new trial, and (b)...

(3) On an appeal against sentence, the Court of Appeal shall, if they think that a different sentence should have been passed at the trial, quash the sentence passed at the trial, and pass such other sentence warranted by law by the verdict (whether more or less severe) in substitution therefore as they think ought to have been passed, or may dismiss the appeal or make such other order as they think just.

(4) ... ” (emphasis added by me).

- [16] It is clear from the above provisions that an appeal against conviction shall be allowed and the verdict set aside where the Court thinks that the verdict is unreasonable or cannot be supported having regard to the evidence or that there had been a wrong decision of any question of law or on any ground there was a miscarriage of justice. It is clear from the proviso to section 23 (1) the duty of the Court of Appeal is to satisfy itself that there has been no miscarriage of justice at the trial before the court from which the appeal has been brought. In view of this proviso and the supplemental powers of the court set out in section 28, it is clear that an appeal amounts to a rehearing of the case before the Court of Appeal. Thus if the Court finds that the verdict is reasonable and the conviction can be supported having regard to the evidence, the appeal may be dismissed, despite any non-direction or misdirection on the law by the court below. The test to be applied by the Court of Appeal is, whether there was evidence before the Court on which reasonably minded assessors could

have convicted. In **RB Patel Group Ltd v Mac Patel Investment Ltd** [2011] ABU 49/10 it was held that if the “*Court comes to the conclusion that, on the whole of the facts and with a correct direction, the only reasonable and proper verdict would be one of guilty, there is no miscarriage of justice, or at all events no substantial miscarriage of justice within the meaning of the proviso.*” In **Rusila Vuki v State** [2009] AAU 65/05 that “*the application of the proviso must, of necessity, be a very fact and circumstance-specific exercise. Here, evidence is strongly against the appellant and if assessors were correctly directed, they would have readily rejected the testimony of the appellant.*” The interest of justice are not confined to the interests of the accused or the prosecution alone, they include the interests of the legal system administering justice and the public. If appeals were to be allowed for every mistake or a wrong decision a Trial Judge makes in the course of a trial, which has no effect on the innocence of an accused, that itself would amount to a substantial miscarriage of justice.

Appeal against Conviction

- [17] Most of the grounds of appeal against conviction make reference to failure or inadequate directions to the Assessors. I therefore wish to point out that one must not confuse the functions of the assessors with those of a jury in a trial. In the case of **King v Joseph** [1948] Appeal Case 215 the Privy Council pointed out that the assessors have no power to try or to convict and their duty is to offer opinions which might help the trial judge. The responsibility of arriving at a decision and of giving judgment in a trial by the High Court sitting with assessors is that of the trial judge and the trial judge alone and in terms of the **Criminal Procedure Act section 237(4)** he is not bound to follow the opinion of the assessors. This was confirmed by the Court of Appeal in **Ram Dulare, Chandar Bhan and Permal Naidu v Reginam** [1955] 5 FLR 1. In **Sakiusa Rokonabete v The State** Criminal Appeal No AAU0048/05 it was said “*In Fiji, the assessors are not the sole judges of fact. The judge is the sole judge of fact in respect of guilt and the assessors are there only to offer their opinions based on their views of the facts.*”
- [18] The 11 grounds of appeal raised in this case against conviction and referred to at paragraph 7 above can be encapsulated into four grounds, namely duress (grounds 1-

3), mental element of possession (grounds 4 -9), good character of the Appellant (ground 10) and the Learned Trial Judge's directions having an effect on the Assessors not to place any weight on counsel's submission (ground 11).

- [19] At the very outset I wish to state that there is a certain contradiction between the Appellant's defences of mental element of possession and duress. On the one hand the Appellant argues that she did not know that the parcels contained cocaine and thought it was salt, while contradicting herself and admitting in her Cautioned Interview Statement that she knew it was an illegal substance and on the other hand attempting to make out that she kept the illicit drugs in her possession as she was threatened by Alvin Raj and one Roko, that she would be killed and her children abducted. The simple issue is was it reasonable for her to have believed and be frightened of any threats, if as she says, she thought that the bag contained salt.

Duress

- [20] The alleged Duress that the Appellant speaks of is the threat extended to her to keep the bag in her possession. The threat, according to her Charged Statement to the police, was made "*sometimes in April 2010*", i.e. two months prior to its detection by the police. There is no evidence that the threat was renewed or repeated. There is no cogent evidence that the threat continued to have an effect on her or affected her on the 12th of June 2010, prior to her arrest by the police. Alvin Raj's threat to her was that 'some Fijian men' will come from the mountain and they will either kill her or kidnap her daughters. The identity of these men or the specific place from where they would come, or their connection to the parcel had not been disclosed by Alvin Raj, factors which would have given a semblance of the threat being serious and having an effect in the mind of any reasonable person. There is no evidence that Kelera was threatened. If as the Appellant says Shalen had asked her to give the bag to Kelera, there was no necessity to use the Appellant as an intermediary. The Appellant had not stated that it was part of the threat that she gives two parcels from the bag to Jai Roko, that she gets Kelera to send two parcels to Suva by Pacific Transport, that she informs Jai Roko once the parcel is handed over to Pacific Transport for dispatch and keeps him informed of its possible arrival time in Suva. She had only said that the giving of the two parcels to Jai Roko and the posting of another two parcels, were done on the

instructions of Alvin Raj. The Appellant has not explained the reason for her expressed fear of keeping the bag at her place, namely her fear of her father-in-law and ex-husband. One wonders why she had not informed her father-in-law and ex-husband about the threats extended to her by Raj and Roko, if in fact they were men to be feared and who could have put her alleged fears arising out of the threats of Alvin Raj and Roko to rest.

The law relating to Duress

[21] According to **section 40 of the Crimes Act 2009**:

“(1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence under duress.

(2) A person carries out conduct under duress if and only if he or she reasonably believes that –

(a) a threat to cause death or serious harm has been made that will be carried out unless an offence is committed; and

(b) there is no reasonable way that the threat can be rendered ineffective; and

(c) the conduct is a reasonable response to the threat.

(3) This section does not apply if the threat is made by or on behalf of a person with whom the person under duress is voluntarily associating for the purpose of carrying out conduct of the kind actually carried out.” (emphasis added by me)

[22] Acts done by reason of duress are voluntary, conscious and willed. It has been recognized by the Court of Appeal and the House of Lords in the cases of **Fisher [2004] EWCA Crim 1190** and **Hasan [2005] UK HL** that the defence of Duress is not a denial of *mens rea*, but a true defence operating despite the existence of the *actus reus* and *mens rea* of the offence.

[23] All three elements set out in section 40(2) of the Crimes Decree must be satisfied before an accused could avail himself of the defence of duress, in view of the conjunctive use of the word ‘and’ at the end of sub-paragraphs (a) and (b). As it has been held in the cases of **Hasan [2005] UKHL 22**; **Gill [1963] 2 AER 688**; **Giaquinto [2001] EWCA Crim. 2696**; **Bianco [2001] EWCA Crim. 2156** and **Bloomfield [2007] EWCA Crim. 1873** the onus of disproving duress is on the State. It is stated at **Blackstone’s Criminal Practice 2011 F3.31** that “*If the accused places before the court such material as makes duress a live issue, fit and proper to be left to*

the jury, it is for the Crown to destroy that defence in such a manner as to leave in the jury's mind no reasonable doubt that the accused cannot be absolved on the grounds of the alleged compulsion." (emphasis added by me). There is no need in my view to address the Assessors on a fairy tale of an alleged duress.

- [24] There is both a subjective and an objective element to the defence of duress. The objective element was highlighted in **Howe [1987] 1 AER 777** where the House of Lords held that the defence would fail if a person of reasonable firmness sharing the characteristics of the defendant would not have given way to the threats as did the defendant. In other words the Appellant's response must be one which might have been expected of a sober person of reasonable firmness. If the defence of duress were to succeed the evidence should show that the Appellant's will was 'overborne' with the threat, which means so far as the instant case is concerned that the Appellant would not have continued to possess the drugs given to her in April 2010 up to the 13th of June 2010 'but for' the threat. In **Hudson [1971] 2 QB 202** it was stated: "*It is essential to the defence of duress that the threat shall be effective at the moment when the crime is committed. The threat must be a 'present' threat in the sense that it is effective to neutralise the will of the accused at that time.*" The wording in section 40 indicates that an accused who seeks to rely on the defence of duress should have reasonably believed that the threat is one which will be carried out immediately or before the accused can obtain some form of protection. A similar view has been expressed in the UK case of **Hurst [1995] 1 Cr App R 82**. In **Hassan [2005] 2 AC 467**, **Lord Bingham**, thought that it should "*be made clear to juries that if the retribution threatened against the defendant or his family or a person for whom he reasonably feels responsible is not such as he reasonably expects to follow immediately or almost immediately on his failure to comply with the threat, there may be little if any room for doubt that he could have taken evasive action, whether by going to the police or in some other way, to avoid committing the crime with which he is charged.*" The question whether an accused had a reasonable opportunity to take evasive action ought not to be subsumed within the question whether the accused had a reasonable belief in the existence of the threat and whether a reasonable person in the circumstances of the accused would have responded as the accused did.

- [25] As regards inadequate directions on duress referred to in paragraph 7 (1) above I find that the learned Trial Judge had said in his Summing Up that *"the 3rd defence the Accused put forward was very serious, that is she kept the parcels under duress. In criminal law the defence of duress is a full defence. This means if any person does anything under duress is not an offence."* He had then given the definition of duress as found in section 40 of the Crimes Decree and set out the meaning of duress as found in the Chambers and Oxford dictionaries. Simplifying its meaning the Learned Trial Judge had said duress is when one does something due to threat of harm to oneself or a member of his family, which one would not do under normal circumstances. He had then gone on to say who threatened her, spoken of her fears and as to why she did not complain to the police. I do not find any inadequacy or error in these directions.
- [26] As regards the contention that that there was no direction to the assessors that it was the duty of the Prosecution to negate the defence of Duress referred to in paragraph 7 (2), I find that the Learned Trial Judge had in his Summing Up said: "In criminal cases the prosecution has the burden to prove the case. This burden never shifts to the Accused. In other words the Accused is presumed innocent until she is proven guilty". Regarding the standard of proof the Learned Trial Judge had said: *"the Prosecution should prove the case beyond reasonable doubt,"* and gone on to explain what reasonable doubt means and to whom the benefit of such a doubt should be given. He had also said *"Further the Accused says she kept this substance under duress. It is up to you to analyse her evidence and accept. I have to tell you that the accused has no burden to prove her innocence."* It is correct that Counsel for the Defence had requested for a re-direction on the prosecution's burden on negating the defence of duress, but when the Learned Trial Judge having re-directed the Assessors as requested, questioned Defence Counsel whether they need to address further, his answer had been *"I am satisfied, thanks."* The Assessors too, on being asked whether they need any clarification had informed Court, that they were satisfied with the summing up.
- [27] It is incorrect and misleading to state that the Learned Trial Judge had *"erroneously disallowed the Appellant from giving evidence on the issue of Duress..."* as referred to at paragraph 7(3) above. All that the Learned Trial Judge had done and in my view

correctly, stopped the Appellant from giving evidence about what Alvin Raj had told her over the phone, since the Defence had indicated that they will not be calling Alvin Raj. To have admitted as evidence what Alvin Raj had told the Appellant would be '*Hearsay*'. Alvin Raj had not been called as a defence as a witness. The Appellant had given evidence of duress and had referred to the names of the persons who threatened her. Even in the Cautioned Interview statement there was reference to duress and the persons who threatened the Appellant.

- [28] As stated at paragraph 17 above, the Trial Judge is the ultimate and sole arbiter of facts and the one to determine the guilt of the accused. He in his Judgment had dealt with the defence of duress and the burden of proof in relation to duress, quoting extensively from Halsbury's laws of England. However in view of the matters set out in paragraph 20 above I am of the view that the Appellant had not placed sufficient material to make duress a live issue fit and proper to be left to the Assessors, although the Learned Trial Judge had sufficiently dealt with it in his Summing Up and Judgment. The Appellant's story of duress is nothing but a fairy tale. Further in view of the powers of the Court of Appeal, in the determination of appeals enumerated in paragraphs 15 and 16 above I am of the view that this a fit case for the application of the proviso, even if one were to think that duress was an issue in this case. I therefore dismiss grounds 1, 2, and 3 of appeal against conviction.

Possession

- [29] The Appellants defence that she did not know that the bag contained cocaine and thus did not intend to possess it, although she had in her cautioned statement admitted that she knew that it contained an illegal substance, flies in the face of the conduct of the Appellant in hiding the bag in the bushes beside her house on the night she received it from Alvin Raj, leaving the bag in Kelera's house which was hidden away from bushes, in locking the bag with a padlock before giving it to Kelera to ensure that Kelera will not be able to see its contents, informing Kelera that the bag contained books, subsequently removing two parcels from the bag and giving them to Roko, using Kelera to send a small carton containing two parcels from the bag through Pacific Transport while she remained at the Service station, packing the carton herself

in order to conceal the identity of its contents, informing Roko about the sending of the parcel by Pacific Transport and its possible arrival time in Suva.

Law relating to Possession

- [30] **Lord Hope** in the House of Lords in **Lambert [2002] 2 AC 545**, stated that “*there are two elements to possession. There is a physical element, and there is the mental element.*” The physical element involves proof that the thing is in the custody of the accused or subject to his control. The facts of this case show and the Appellant herself accepts that she had constructive possession of the bag containing the illicit drugs on the 13th of June 2010, which satisfies the *actus reus* element of the offence. In the absence of a definition of ‘possession’ in the Illicit Drugs Control Act guidance can be obtained from the Crimes Act 2009 as regards ‘possession’. As per the **definition of possession in the Crimes Act 2009** ‘Possession’ includes “*not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person;...*”. In **Korovuki v State [2013] FJCA 15 AAU 0018.2010** the Court of Appeal adopted a similar approach by stating: “*Possession is proven if the accused intentionally had the drugs in his physical custody or control to the exclusion of others...*”. The offence of unlawful possession necessarily requires proof of the requisite mental or fault element before a conviction can be entered.
- [31] The law separates the physical element of possession (the corpus) from the mental element (the animus possidendi), i.e. the intention to possess. The fault element of possession is knowledge and intention. A person has knowledge of something if he or she is aware that it exists or will exist in the ordinary course of events. There are circumstances in which the requisite knowledge may be imputed. Knowledge includes deliberately shutting one's eyes to the truth. Mere knowledge of the presence of illicit drugs cannot be equated with control. A person has intention with respect to possession if he or she means to engage himself or herself in possessing the substance. It is therefore implicit that in every case of possession, a person must know of the existence of the thing which he or she has or controls, although it may not be apparent whether a person knew of the quality of the thing in question. A

person will not be liable if he neither believed, nor suspected, nor had any reason to suspect that the substance was an illicit drug. **Lord Scarman remarked in Boyesen [1982] 2 A.E.R 161** adopting the description of possession given by **Lord Wilberforce in Warner v Metropolitan Police Commissioner [1969] 2 AC 256** said: *“The question to which an answer is required...is whether in the circumstances the accused should be held to have possession of the substance rather than mere control. In order to decide between these two, the jury should, in my opinion, be invited to consider all the circumstances...the manner and circumstances in which the substance, or something which contains it, has been received, what knowledge or means of knowledge or guilty knowledge as to the presence of the substance, or as to the nature of what has been received, he had at the time of receipt or thereafter up to the moment when he is found with it...”* I would venture out to say the manner in which the substance was dealt with by the accused, after it has been received, like in this case, would also be indicative of the intention of the person who received it.

- [32] All the grounds of appeal against conviction referred to at paragraph 7 (4 – 9) revolves around the failure of the Learned Trial Judge to direct the Assessors and himself adequately on the mental element of possession. Counsel are advised against repetition of the same matter in different forms. I have stated at paragraph 14 above that in view of proviso to section 23 (1) and the supplemental powers of the court set out in section 28 of the Court of Appeal Act, it is clear that an appeal amounts to a rehearing of the case. Thus if this Court finds that the verdict is reasonable and the conviction can be supported having regard to the evidence, the appeal may be dismissed, despite any non-direction or misdirection on the law by the court below. It is abundantly clear from the facts of this case and as summarised at paragraph 29 above that the conduct of the Appellant satisfied the mental or fault element of possession, as required by the law referred to at paragraphs 30 - 31 above. The Learned Trial Judge had in his Summing Up made reference to the Appellant giving the bag containing the illicit drugs to Kelera saying it contains books, the fact that it had been locked with a padlock, the Appellant removing parcels from it on a subsequent date and getting Kelera to send some of it through Pacific Transport. On the issue of knowledge the Learned Trial Judge had in his Summing Up, posed the question would a person protect salt under lock and key. The defence argument that the Appellant possessed the bag containing the illicit drugs *“fleetingly and*

unwittingly” is misconceived for according to Kelera the Appellant gave her the bag on a date in March 2010 and according to the Appellant’s Cautioned Statement she had received it from Alvin Raj in April 2010, well before its detection on 13th June 2010. The Appellant’s admission in her Cautioned Statement that she knew there was something illegal in the bag and the manner she dealt with the bag shows that it was not held by her unwittingly. I therefore dismiss the grounds of appeal against conviction referred to at paragraph 7 (4 – 9).

Good Character of the Appellant

- [33] The ground of appeal against conviction referred to at paragraph 7 (10) is about the Learned Trial Judge not directing the Assessors to consider the good character of the Appellant in relation to the likelihood of her committing the offence and her credibility as a witness. The only evidence on record at the trial in this regard is that the Appellant had no previous convictions. Good character of the Appellant had not been specifically raised by the defence. There is nothing on record of the Trial Court proceedings, to indicate that the defence relied on her not having any previous convictions as amounting to good character. Counsel for the defence had not asked for any direction on good character when asked by the Learned Trial Judge at the conclusion of his Summing Up whether he should address the Assessors on any other matters. At the trial, good character had been referred to by Defence Counsel only in relation to mitigation of sentence. I am therefore of the view, the evidence of not having any previous convictions, emanating from the Appellant by way of an answer to a question put to her by her Counsel did not require a specific direction on good character. I am also of the view that the fact that an accused has no previous convictions does not inevitably mean that he is of good character; for any criminal activity has to start at some stage of a person’s life. This idea finds support in the judgment of **Gilbert v The Queen (Practice Note) [2006] 1 WLR 2108**. The Learned Trial Judge had in his Summing Up anyhow stated, that: “*the accused gave evidence and said she is innocent*” and that the “*defence claims that the she does not have any previous convictions*”.

- [34] **Blackstone’s Criminal Practice, 2011 at F 13.1** states: “*The practice of permitting an accused person to raise evidence of good character as part of his defence has been*

described as an anomaly (Rowton [1865] Le & Ca 520, per Martin B, at 537), and so it is, particularly when viewed in the light of the more restrictive rules restraining the prosecution from introducing bad character as part of the case against him.”

[35] In Balson v The State [2005] UKPC 2; Jagdeo Singh v The State of Trinidad Tobago [2006] 1 WLR 146; Maye v The Queen [2008] UKPC 35; and Muirhead v The Queen [2008] UKPC 40; it has been said that failure to give an appropriate direction of good character may not be decisive, standing alone, if the prosecution case is strong and there are no other successful grounds of appeal. In Gilbert v The Queen [2006] 1 WLR 2108 it was said that the omission of a good character direction was not fatal to a conviction based on very substantial evidence.

[36] As stated earlier good character of the Appellant had not been specifically raised by the defence at the trial. In **Blackstone’s Criminal Practice, 2011 at F 13.3** it is stated: *“There is, however, no obligation for the trial judge to deal with good character unless the issue has been raised by the defence (Thompson V R [1998] AC 811: Brown v The Queen [2006] 1 AC 1,, where it was noted that a judge would be ‘ill-advised’ to mention good character unless he had been given information from which he could properly and safely do so). It follows that the defence counsel is under an obligation to raise the issue in an appropriate case, so that the accused does not lose the benefit that the direction is designed to confer (Teeluck v The State of Trinidad and Tobago [2005] 1 WLR 2421]. As with judicial failure to direct, however, counsel’s omission will only be critical if good character would have made a difference to the outcome (Smith V R [2008] UKPC 34)”*. In **Archbold 2011 at 4-406** it is stated: *“it is up to defence Counsel to ensure that the judge is aware that the defendant is relying on his good character...”*.

[37] In the case of State v Muskan Balaggan and Elton Xhemali, Criminal Case HAC 049 of 2011(Ltka) the Sentencing Judge referring to the fact that the two accused were both first time offenders cited the English Court of Appeal case of **Aramah [1983] 76 Cr. App. R. 190**, where the court had remarked that the good character of a courier, as he usually was, is of less importance than the good character of an accused in other cases. The Court took the view that drug smuggling organizers deliberately recruit persons who will exercise sympathy of the court. The point the court makes is

that the personal circumstances of an accused are secondary because the deterrent element to sentences imposed in respect of drug smuggling cases.

[38] In view of the substantial evidence highlighted at paragraphs 14, 20 and 29 above and the lack of any merit in the other grounds of appeal, I am of the view this ground of appeal too has no merit and therefore should be dismissed.

[39] The ground of appeal against conviction referred to at paragraph 7 (11) is not borne out by the Court Record. Even if the Learned Trial Judge had said what is attributed to him I am of the view that a such a statement could not have had the effect on the Assessors not placing any weight on counsel's submissions, as argued by the Appellant's Counsel. Further Counsel for the Appellant has in his Written Submissions filed before us stated: "*Without proper recording, it is difficult to say what effect, if in effect the statement was made, could have had on the assessors...*" This therefore is a frivolous ground and Counsel are advised against filing such grounds. The ground of appeal against conviction referred to at paragraph 7 (11) is dismissed.

[40] For the reasons set out above I have no hesitation in dismissing the appeal against conviction.

Appeal against Sentence

[41] As regards appeals against sentence **Section 23(3) of the Court of Appeal Act, 1949** states:

"On an appeal against sentence, the Court of Appeal shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other sentence warranted by law by the verdict (whether more or less severe) in substitution therefore as they think ought to have been passed, or may dismiss the appeal or make such other order as they think just."

[42] The Appellant's Counsel in his written submission on behalf of the Appellant to appeal against sentence, has relied on **Simeli Bili Naisua v The State Criminal Appeal No CAV 0100 of 2013** seeking an intervention on sentence. The Simeli Bili

Naisua case adopted the principles set out in House v The King (1936) 55 CLR 499 and stated that appellate courts will interfere with a sentence if it is demonstrated that the trial judge made one of the following errors:

- i. Acted upon a wrong principle;
- ii. Allowed extraneous or irrelevant matters to guide or affect him;
- iii. Mistook the facts;
- iv. Failed to take into account some relevant consideration.

[43] The Appellant's Counsel has suggested an imposition of a fine of \$ 10,000 or a sentence of less than 3 years which could be suspended or home detention as an appropriate punishment.

[44] The purposes or 'principles' of sentencing have been set out in **section 4 of the Sentencing and Penalties Act 2009**. They are: to denounce the commission of offences and to punish offenders, to protect the community, to deter offenders, and to establish conditions for facilitating rehabilitation of offenders. A court imposing a sentence has to strike a balance in applying these principles.

[45] The Appellant had, as stated earlier at paragraph 6 above, restricted her appeal on sentence, only to those grounds, where leave had been granted. At paragraph 33 of the Written Submissions on behalf of the Appellant to appeal against Conviction and Sentence, filed before this Court, the Appellant had stated:

"The appellant understands that leave is only granted in respect of the following issues;

- a) No establish tariff*
- b) Collective social harm*
- c) Comparison of possession of drug as more serious than murder*
- d) Failure to provide purity of drug*
- e) Remand period*
- f) Excessive sentence "*

[46] Counsel for the Appellant in his Written Submissions, in expounding on excessive sentence, had attempted to argue, that the learned Trial Judge had failed to take into consideration the evidence of two character witnesses and that he failed to give a discount for previous good character of the Appellant. Although these were grounds

when leave to appeal was sought from this Court, the Learned Justice of Appeal who heard the leave to appeal application had not granted leave in respect of these grounds. The Learned Justice of Appeal had stated in his Ruling that this was not arguable. Counsel for the Appellant in his Written Submissions had stated that he “*shall rely upon submissions for appeal on sentence found at pages 50-52 and 66-68 of the CR*” i.e. submissions before the High Court. Pages 66-68 are an exact repetition of pages 50-52. The submissions on sentence found at pages 50-52 are a repetition of all the grounds of appeal against sentence, on which leave was sought. At the hearing before us, Counsel for the Appellant did not adduce any further arguments on sentence. On the issue of ‘excessive sentence’ the learned Justice of Appeal had stated that “*It could be argued that due to the identifiable arguable errors the sentence is manifestly excessive.*” (emphasis added). In view of the fact that the only grounds of appeal on which leave had been granted are those set out in (a) to (e) at paragraph 45 above, they are the only matters that have to be considered in respect of the sentence being excessive in this appeal.

- [47] Grounds 2 and 3 of appeal against the sentence referred to at paragraph 8 above can be dealt with together, as the Appellant’s complaint therein, is that the Learned Trial Judge had erroneously taken into consideration the collective social harm of possessing illicit drugs as an excessively important factor, thereby increasing the starting point of 17 years, by 4 years. Citing passages from the cases of **State v Bravo [2008] FJHC 172, HAC 145 of 2007L**; **State v Balaggan [2012] FJHC, HAC049.112**; **R v Farlane [1992] 3 NZLR 424**; the **UNODC World Drug Report 2012**, the Learned Trial Judge had made reference to the effects of illicit drugs on users, their families, on economic and social development, on public order and the spread of HIV. An examination of the offences set out in the Illicit Drugs Control Act shows, that there is no differentiation made in the law as to the type of illicit drugs or regards to their qualities or quantities. The Act states that any person convicted of the offences of importing, exporting, acquiring, supplying, possessing, producing, manufacturing, cultivating, using, and administering an illicit drug, without lawful authority, ‘*is liable*’ upon conviction to a fine not exceeding \$1,000,000 or to imprisonment for life or both. All the illicit drugs are listed in Schedule 1. The prescribed punishment is the same for all types of offending. There is no mandatory or a minimum mandatory sentence prescribed. Thus the law has left the entire

discretion to the courts to decide on the appropriate sentence, taking into consideration the effects of illicit drugs on users, their families, on economic and social development, on public order and the spread of HIV, among other factors. The 'collective social harm' and individual harm, differs in the case of illicit drugs such as opiates (eg. heroin), psychotropic or hallucinogenic drugs (eg. LSD), addictive stimulants (eg. cocaine), and mood enhancers (cannabis). Counsel for the Appellant in his Written Submissions filed before the High Court had correctly stated: *"It is conceded that drug matters are serious deserving appropriate sentences, when viewed objectively alone. The motivation to profit from the addiction of others deserves retribution. Each case before the courts is different and it is very difficult to have one sentence that fits all. The issues of retribution, deterrence and protection of society are matters that a court is obliged to consider."* (emphasis added). In making this submission he had argued against his ground of appeal.

- [48] The Learned Trial Judge had also made reference to the UNODC World Drug Report 2012, according to which, the third largest cocaine market, in economic terms, is the Oceania region, a factor in my view a Sentencing Judge should bear in mind in sentencing persons convicted of illicit drug offences in order to deter would be offenders. It was stated in the Sentencing Order in the case of **Muskan Balaggan and Elton Xhemali Criminal Case No: HAC 049 of 2011**: *"When sentencing drug-smugglers, regard must be made to the circumstances that exist in Fiji. Fiji does not have a sophisticated intelligence service to detect drug-smuggling. Our boarder security measures are not apt to deal with sophisticated drug smuggling. Unless there is a tip off, it is easy to sneak in and out, hard drugs. In all cases, the hard drugs were for the overseas market. So Fiji is just being used by the drug-smugglers as a transit point for the reasons I have mentioned. Any punishment for dealing in hard drugs must therefore reflect the vulnerability of Fiji becoming a hub for the international drug-smugglers."*

- [49] According to **section 4 of the Sentencing and Penalties Act 2009** in sentencing offenders a court must have regard, amongst other factors, to the nature and gravity of the particular offence and the impact of the offence on any victim of the offence and the injury, loss or damage resulting from the offence. In the case of Class A illicit

drugs the victims are many. I therefore see no merit in grounds 2 and 3 of appeal against sentence and dismiss them.

[50] As regards ground 4 of appeal referred to at paragraph 8 above, I wish to state that the Appellant had not objected at the trial to the contents of the Government Analyst's Report, nor requested that the Government Analyst be called as a witness, by giving notice under **section 133(2)(b) of the Criminal Procedure Act 2009**. He had not given notice of his intention to cross-examine the analyst in accordance with **section 36 of the Illicit Drugs Control Act 2004**. The issue of purity of the drug was not mentioned; leave aside being raised at the trial by the defence. Obviously in view of the defence that the Appellant thought that the substance was 'salt', purity of the drug could not have been an issue. It was only in the '*Sentencing Submission*' of the defence, that reference had been made to the purity of drugs to the effect: "*It is submitted that the purity of the drugs and therefore its effect and market value are unknown...*". The Illicit Drugs Control Act does not make a distinction as to the purity of the illicit substance or its market value. There is no evidence before the Court that the illegal substance was of low purity. There is nothing in the Summing Up or the Sentencing Order which shows that the Learned Trial Judge had assumed that the cocaine found in possession of the Appellant was of a high purity as argued by the Appellant. I therefore see no merit in ground 4 of appeal against sentence and dismiss it.

[51] As regards ground 5 of appeal referred to at paragraph 8 above, namely the failure to give credit to the Appellant's pre-sentence custody, I find from the Record that the Appellant had been arrested on the 12th of June 2010 and had been in police custody until she was produced before the Magistrate's Court of Nadi on the 18th of June 2010. She had thus been in police custody for a period of 6 days. On the 18th of June 2010, the Court had ordered that the Appellant remains in police custody until her bail application was determined. The Magistrate had also ordered that the Appellant "*to have daily shares at her house...twice a day in the company of a female police officer and to breast feed her 2 years old baby daughter . . .*" (verbatim). On the 21st of June 2010 the Appellant had been enlarged on bail and had remained on bail until she was produced before the High Court of Lautoka. By order of the High Court of Lautoka her bail was extended and the Appellant had continued to be on bail until her

conviction on the 1st of March 2010. On the 1st of March she had been remanded up to the date of sentence, namely the 25th of March 2010. Therefore the time spent in custody prior to sentence, adds up to a total period of 34 days.

[52] **Section 24 of the Sentencing and Penalties Act 2009** states:

“If an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of the matter or matters shall, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender.”

This is a long standing practice of Sentencing Courts, to make an appropriate reduction in sentence for time spent in custody prior to sentence of an offender, which was codified in 2009.

[53] In **Tevita Banuve v State [2014] FJCA 209; AAU 0095.2012**; it was held: *“Remand period is a relevant consideration that must be taken into account by the court exercising sentencing discretion. Section 24 of the Sentencing and Penalties Decree endorses the principle of making allowance for remand period in sentence. The failure by the learned magistrate to take the appellant’s remand period was an error”*. This statement was adopted in the case of **Etuate Sugutururaga v State [2014] FJCA 206; AAU0084.2010**. In the case of **Paulasi Mataunitoga v State [2015] FJCA 70; AAU125.2013** this Court held following the decisions in **R v Newman & Simpson (2004) 145 A Crim. R 361** and **R v Youkhana [2005] NSWCCA 231**, that the period spent in custody should be deducted not only from the head sentence but also from the non-parole period fixed by the Sentencing Court. I therefore allow the appeal on ground 5 against sentence.

[54] I wish to place on record that it would be helpful if Counsel for the accused informs the Court of the period of time during which the offender had been held in custody, after necessary calculations, without burdening the court to do the calculation of the period.

[55] Grounds 1 and 6 of appeal against sentence referred to at paragraph 8 above, can be dealt with together, that is, the failure of the Learned Trial Judge to consider the tariff in the two more serious cases which he referred to in the judgment concerning importation of Cocaine and the sentence being manifestly harsh and excessive having regards to all the circumstances of the case. I have already dealt with the issues of social harm (paragraphs 47 – 49), purity of drugs (paragraph 50) and remand period (paragraph 51). The two cases referred to in the judgment are *State v Bravo* and *State v Balaggan*. The Sentencing Judge in the instant case had specifically stated that *“there are no tariffs set in regards to drugs; namely cocaine.”* In the case of *State v Bravo* the Sentencing Judge had stated the same: *“There is no set tariff for the offence of importation and possession of cocaine”*. The Sentencing Judge in *Balaggan* has not sentenced on the basis of any tariff. Acting in accordance to a tariff takes away the discretion, the Legislature has given to the courts, to pass sentences, taking into consideration the infinite variety of circumstances of the offence and of the offender, present from case to case, especially in cases of heroin and cocaine.

[56] Learned Counsel for the State suggested to us that we should give a Guideline Judgment in relation to Sentencing in cases where illicit drugs like cocaine and heroin are involved. **Section 8(1) of the Sentencing and Penalties Act 2009** which deals with matters relevant for giving or reviewing guideline judgments states: *“In considering whether to exercise its power under section 6 (to give Guideline Judgments), a court so empowered shall notify the Director of Public Prosecutions and the Director of the Legal Aid Commission of its intention to consider making a guideline judgment and provide an opportunity for a lawyer representing them to make submissions on the matters”*. Since this provision was not complied with prior to and at the hearing of this appeal, I decline in this case to give a guideline judgment and leave the issue of giving a Guideline Judgment, to be considered on another occasion. This view of mine is shared by the other two Justices of Appeal who heard the case.

[57] I am conscious that in accordance to the Sentencing and Penalties Act 2009, a court must have regard to the current sentencing practice and the terms of any applicable guideline judgment. This has to be viewed however subject to the legislation creating the offence. In **De Havilland [1983] 5 Cr. App.R. (S) 109, Dunn L.J.** fired a

warning shot regarding the increasing practice of citing sentencing decisions of the Court of Appeal when he said: “...*the appropriate sentence is a matter for the discretion of the sentencing judge. It follows that decisions on sentencing are not binding authorities...Indeed they could not be, since the circumstances of the offence and of the offender present an almost infinite variety from case to case...Occasionally this Court suggests guidelines for sentences... But the Sentencer retains his discretion within guidelines, or even to depart from them if the particular circumstances of the case justify departure*”. Most sentences in drug related cases have been based on the quantity of the drugs involved. If we are to adopt a quantity based approach in respect of offences involving Class ‘A’ drugs, there is the possibility of the offenders committing the offences by using smaller quantities at a given time, both to avoid detection and to get smaller punishments, if caught. There are also cases where the role of the offender within the supply network is taken into consideration, namely whether it was a ‘leading’, ‘significant but not leading,’ or ‘lesser’ role, categorised as ‘culpability.’ But this is an area where evidence is hard to find.

- [58] There have been only a few cases in Fiji in respect of possession of cocaine. They are **State v G. G. F. Bravo** [HAC 145 of 2007L] where the convict was sentenced by the High Court to 8 years imprisonment for possession of 2 Kg of cocaine; **State v M. Balaggan** [HAC 049 of 2011] where the convict was sentenced by the High Court to 11 ½ years, for possession of 521.6 grams of cocaine; and **State v J. N. Aburizk and J. Muriwaqa** [HAC 126 of 2015] where both convicts were sentenced by the High Court for periods of 14 years imprisonment, for possession of 49.9 Kg of cocaine. In **State v Ethan Kai** [HAC 01 of 2015] the convict had been sentenced by the High Court to 15 years imprisonment for importation of 29.9 Kg of heroin. This case on appeal before us, is the highest sentence given so far for a Class A drug. I am conscious that there needs to be a consistency in sentencing of those convicted of possession of Class A illicit drugs in commercial quantities, however in basing it purely on the quantity possessed, we may encourage drug dealers to deal in drugs, as stated earlier in smaller quantities at given times.

- [59] In **Martinez** [1984] 6 Cr App R (s) 364, Lord Lane CJ confirmed that cocaine is as dangerous as heroine and falls under Class A drugs. Lord Lane remarked in **Aramah** [1982] 4 Cr App R (S) 407: “*It is not difficult to understand why in some parts of the*

world, traffickers in heroin in any substantial quantity were sentenced to death and executed. Consequently, anything which the courts of this country can do by way of deterrent sentences on those found guilty of crimes involving Class A drugs should be done.” In **McCarthy v The Queen** [1988] 38 A. Crim. R. 407 it was held that those who deal in heroin in substantial quantities must expect to be treated harshly”. In **Ashraf** [1982] Crim. L. R. 132 the accused who was found with 52 grams of heroin was sentenced to 10 years. It was held in Ashraf that beginners or not, anyone who trades in dangerous drugs, particularly heroin, must expect very severe sentences when caught.

[60] As stated earlier I am unable, and do not intend to give a Guideline Judgment, since the circumstances of the offence and of the offender present an almost infinite variety from case to case, especially in cases of heroin and cocaine, unlike in the case of cannabis. I am of the view that persons convicted of the offence of possession of heroin and cocaine, which from the evidence is clear is not for their personal consumption, but for commercial purposes, should be dealt with severely, with a starting point of 12 years as minimum with an upward or downward adjustment dependant on the circumstances of the offence and of the offender. It is generally accepted that the estimated minimal lethal dose of cocaine is 1.2 grams but individuals with hypersensitivity to cocaine have died from as little as 30 milligrams. There are some of course who can consume up to about 5 grams per day. In the Seychelles, a jurisdiction, smaller than Fiji, under their Misuse of Drugs Act of 2016, a person who is proved or presumed to have had in his or her possession or custody or under his or her control 2 grams or more of cocaine shall be presumed until the person proves the contrary to have had the cocaine in his or her possession, with intent to traffic. Even under the earlier Misuse of Drugs Act of 1990 of Seychelles, there was a rebuttable presumption of trafficking if a person had 2 grams or more of cocaine in his possession. The Appellant has not claimed that she is a user for medicinal or other purpose. The Appellant was convicted of possession of 1990.4 grams of cocaine. In view of the amount possessed one does not know whether it was for export or supply to the local market.

[61] I do agree with the Learned Counsel for the State that a re-evaluation of the Appellant’s sentence is necessary having given some consideration to the sentences

handed down in the previous cases. In doing so, I commence with a starting point of 12 years. I am however of the view that in an appropriate case the starting point can be higher. The following factors in my view would have a bearing on an upward or downward adjustment to a sentence, in cases involving possession of cocaine and heroin:

- a) the type of offence committed, namely, whether it is, importation, exportation, acquiring, offering, supplying, transferring, transporting, using, manufacturing, using or possessing,
- b) quantity,
- c) purity and market value, where it has been an issue raised at the trial,
- d) planning, organisation, sophistication and the methods adopted to avoid detection,
- e) Vulnerability of Fiji becoming a hub for traffickers as stated in *State V Muskan Balaggan* (ibid),
- f) whether the drug was intended for the local market,
- g) the purpose of offending, whether commercial or for individual use (There were 4 parcels inside the bag. We are aware that 4 other parcels were taken out of the bag and 2 were given to Jai Roko and 2 were sent by Pacific Transport to Suva by the Appellant.),
- h) the role played by the accused; whether '*leading*,' '*significant but not leading*,' or '*lesser*',
- i) willingness of the accused to co-operate with the authorities,
- j) whether the accused pleaded guilty and if so at what stage of the proceedings.

[62] Having decided on a starting point of 12 years as stated earlier, I now look into the aggravating factors that would have an upward adjustment of the sentence. In this case the Appellant had concealed the 1990.4 grams of cocaine, which undoubtedly could be considered as a commercial quantity inside a bag; and ensured that Kelera does not see it by placing a padlock on it. She first hid the bag 'in the bush' beside her house and thereafter kept it at Kelera's house which was hidden by bushes and trees and not visible from the inter-section of the drive way, for almost a period of 3 months. In view of the quantity involved, it can be assumed that it was either for

export or supply to the local market, both involving dangerous consequences. Although there is no direct evidence as to what was contained in the 4 parcels that the Appellant removed from the bag, the manner in which she dealt with the second batch of two parcels that was sent to Suva through Pacific Transport, namely by taping the box containing the two parcels properly, and pasting on top of it a paper in which was written 'Fijian girl', by craftily making use of Kelera who was ignorant of what was going on, to handle the delivery of the parcel to Pacific Transport, while she remained at the service station to ensure delivery, by calling Jai Roko to tell him that the parcel had been sent and when it was likely to reach Suva; shows that the Appellant was playing a lead role in the planning and organisation of the offence of which she had been convicted. Vulnerability of Fiji becoming a hub for traffickers as stated in State v Muskan Balaggan or the likelihood of the illicit drug spilling over to the local market are factors that have a bearing on the sentence. I consider the above factors as aggravating factors which should increase the sentence of 12 years to 15 years. As regards mitigating factors leave to appeal had been granted only in respect of the grounds set out in paragraph 8 above. Leave had been refused on the rest of the grounds raised. I have already dealt with the grounds upon which leave had been granted and dismissed grounds 2, 3, and 4 referred to at paragraph 8 above. I have in allowing ground 5 of appeal, referred to at paragraph 8 above, held that the pre-sentence period of 34 days the Appellant had been held in custody should have been separately deducted from the head sentence. Therefore the period of imprisonment the Appellant would have to serve will be 14 years and 11 months, which would be subject to a non-parole period of 9 years and 11 months.

Temo JA

[63] I agree with the reasons and conclusions of Fernando JA.

Orders of the Court:

- (i) *The appeal against conviction is dismissed.*
- (ii) *The sentence of 18 years imprisonment ordered by the High Court is quashed and substituted by a sentence of 15 years.*

- (iii) *The Appellant to serve a period of 14 years and 11 months imprisonment operative from the 25th of March 2013.*
- (iv) *The Appellant will not be eligible to be released on parole during the period of 9 years and 11 months operative from the 25th of March 2013.*



Hon Mr Justice Chandra
JUSTICE OF APPEAL



Hon Mr Justice A. Fernando
JUSTICE OF APPEAL



Hon Mr Justice Temo
JUSTICE OF APPEAL