IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO: HAC 126 OF 2015

STATE

v

1. **JOSEPH ABOURIZK**
2. **JOSESE MURIWAQA**

Counsel : Mr. L.J. Burney with Ms. R. Uce and R. Mohammed for Prosecution
Mr. M. Thangaraj with Mr. M. Naivalu for 1st Accused
Mr. J. Rabuku for 2nd Accused

Dates of Hearing : 31 May 2023- 6 June 2023
Date of Ruling : 16 June 2023

JUDGMENT

Introduction

1. This is a historic case for many reasons. Firstly it involves the largest haul of hard drugs ever seized by the police in Fiji. Secondly, it had made upward movements in the hierarchy of appeals to the Supreme Court and descended back to this Court for new trial. In the Supreme Court itself, four decisions have been made and three different panels had sat in judgment before it landed in this Court for new trial. Thirdly, at the re-trial, the Court had to adopt the evidence given by the Accused and one of the Prosecution witnesses to ensure a fair trial.

2. A quantity of 49.9 kilograms of substance which later found to be cocaine was seized from the boot of HM-046, the car (Toyota Fielder) driven by the 2nd Accused -Mr. Muriwaqa (Muriwaqa). He is a Fijian. The 1st Accused Mr. Abourizk (Abourizk) is Australian. He occupied the front passenger seat. (If I refer to the Accused and the witnesses by their first name, I intend no disrespect for them) 34 parcels of cocaine were found packed in a travelling bag and a suitcase. Both Accused deny any knowledge of the illicit drugs.

3. The Accused were jointly charged with one count of Unlawful Possession of Illicit Drugs contrary to Section 5(a) of the Illicit Drugs Control Act 2004 (IDCA). The Accused were convicted after trial by Judge sitting with Assessors at the High Court at Lautoka. They were each sentenced to a term of 14 years' imprisonment. They appealed their conviction to the Court of Appeal. The conviction was affirmed. On the counter appeal filed by the State, their sentence was enhanced to 25 years' imprisonment.

4. They went to the Supreme Court. The Supreme Court by its Judgment dated 28 April 2022 quashed the conviction. The Court however reserved to the Director of Public Prosecutions (DPP) an option to apply for an order for new trial. DPP filed an application seeking a new trial. That application was conditionally granted. In allowing that application, the Supreme Court (by a different panel by its Judgment dated 25 August 2022), ordered a 'limited retrial'.

5. The Supreme Court (a different panel) reviewed its own Judgment for limited re-trial and ordered a full-fledged new trial. Having reached the pinnacle of our justice system this case has now descended to this Court to be tried afresh.

6. A few days ahead of this trial, a second Review Application was filed in the Supreme Court. That application was dismissed.

7. Just two days before the trial, the Court was 'ambushed' with a Permanent Stay Application (PSA). In that application, Abourizk was concerned that he would not get a fair trial. The Accused had already served approximately eight years in prison or in remand and complained of the difficult and depressed situation he had to undergo in incarceration. Annexed to the PSA were the judgment of the previous trial and all the decisions handed down by the Court of Appeal and the Supreme Court.

8. I had to go through all the judgments to make a determination on the PSA. However, I am not swayed by the comments made in other decisions but by the authoritative decisions on the law pronounced by the higher courts. I bear in mind that this is completely a new trial hence I must hear the case with an open mind.

9. At the trial, eight witnesses were physically present in Court to give evidence for Prosecution. Agreed transcript of Inspector Maciu's evidence from the first trial was tendered in evidence. The transcribed evidence of Abourizk from the first trial was tendered in evidence for the Defence.

Background

10. Fiji is attractive to tourists all over the world. It is also attractive to the drug dealers obviously for two reasons. Firstly, it is conveniently located in the South Pacific in the main supply route that links Americas with Australia and New Zealand where illicit drug trade has become a lucrative underground business. In the Australia's eastern cities, a kilogram of cocaine, depending on purity, could sell for as much as 400,000 Australian dollars (US$ 266,000). Secondly, Fiji is still considered to be an unsophisticated jurisdiction in terms of detection, criminal investigations and prosecution. Criminal investigation techniques and tools are comparatively less advanced and the law enforcement agencies are undertrained to face the challenges posed by organised and sophisticated drug cartels.

11. In view of the presumption of innocence, the right to silence entrenched in the Constitution and the covert and unscrupulous nature of drug-related activities, the prosecutors find it extremely difficult to successfully prosecute the culprits and bring about convictions. Even where illicit drugs have been traced and seized, a more difficult problem arises when the drug in question is hidden in some container, such as a box or a bag and the possessor denies any knowledge of the drugs.

12. The problems faced by the prosecutors in drug cases have significantly reduced their scope in many jurisdictions by introducing factual presumptions to the relevant legislation. Section 32 of the Illicit Drugs Control Act is one such intervention. Such interventions are justified on the basis that the relevant facts are usually peculiarly within the knowledge of the possessor of the container and that possession presumptively suggests, in the absence of

exculpatory evidence, that the person in possession of it in fact knew what was in the container.

13. When the drug is not found on the Accused's person or in his house or car in a state or situation from which it is not immediately obvious that it is an illicit drug, the question about the Accused's knowledge of the nature of the substance is often raised as a defence and proof of knowledge becomes extremely difficult. In such situations, out of sheer frustration, police investigators are tempted to introduce concocted evidence to overcome the prosecutorial difficulties and bring about a conviction in good faith. This is one such case. It is ultimately the responsibility of the Court to ascertain the truth in the interest of justice and ensure that only the guilty persons are convicted and punished.

Law relating to the offence

14. Possession of Illicit drugs is penalised under Section 5(a) of the Illicit Drugs Control Act 2004 (IDCA). The relevant part of the section provides:

> Any person who without lawful authority
>
> (a) … possesses …..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.

'Possession' in the context of illicit drugs

15. The IDCA does not contain a definition of possession, except that section 4 provides that for the purposes of the Act the things which a person has in his possession shall be taken to include anything subject to his control which is in the custody of another.

Section 4 of the Crimes Act states that "possession", "be in possession of" or "have in possession" includes —

> (a) 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;

16. There are offences where the mental element or *mens rea* is not explicit in the definition of the offence. Possession in the context of illicit drugs is one such offence. In view of that there was time in England where English judges thought that the Parliament has chosen to

make such offences absolute offences thus they were bound to carry out the will of Parliament. This position was substantially changed in the late sixties after Warner's case [1969] 2 CA and certainly after the House of Lords decision in Sweet Parsley [1970] AC 132.

17. In Fiji, some guidance is provided by Section 23 of the Crimes Act in respect of offences where the *mens rea* is silent. In Lata v State AAU0037 of 2013: 26 May 2017 [2017] FJCA 56 Gounder, JA held that both knowledge and intention are fault elements of possession having regard to section 4 of the Crimes Act and the common law.

18. 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. The Court observed [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.

19. Prematilaka JA in Abourizk v State [2019] FJCA 98; AAU0054.2016 (7 June 2019) having engaged in a detailed discussion on the case law and Section 23 of the Crimes Act, came to the conclusion that in addition to intention and knowledge, recklessness too is part of the fault element of possession under section 05 (a) of the Illicit Drugs Control Act 2004 in Fiji.

20. The Supreme Court in Abourizk v State [2022] FJSC9;CAV 0013.2019 (28 April 2022) authoritatively held:

> the *mens rea* – the mental element – which has to be present before someone can be said to be in possession of something. In cases of possession of illicit drugs, the *mens rea* consists of *knowledge* that what you have in your possession are illicit drugs. It is well established that you do not have to know what kind of drugs they are. But you do have to know that they are illicit drugs of some kind. All of that is settled law: see *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256 and *R v Boyesen* [1982] AC 768.

21. However it is clear that in possession (of illicit drugs) cases, mere proof of knowledge would not be sufficient to prove possession. It is essential to prove that the Accused was in control of the illicit drugs that the prosecution alleges it to be. The intention is an ingredient of possession so far it is relevant to prove control (which is the physical element) over the drugs. For example if an innocent hitchhiker (a common phenomenon in Fiji Highways) comes to know during his ride that the driver is having illicit drugs in the car, he (hitchhiker) cannot be held liable for possession of illicit drugs as he had no intention to exercise control over the drugs even though he had knowledge that the drugs were present in the car. Without knowledge, one cannot be held to be in control. If the drugs had been slipped into the bag without Accused's knowledge he did not know its presence and cannot be held liable for possession of drugs.

22. Even though the IDCA does not contain a definition of possession except that of section 4 (a), it is well settled that the expression embraces both a factual and a mental element. The factual element is that of control. Unless the thing is in the person's control, albeit while it is in the custody of another, it cannot be said to be in his possession. The mental element is that of knowledge.

Joint possession

23. The Prosecution runs this case on the basis that the Accused persons are in joint possession of the drugs. What has to be proved in a case of joint possession? Section 4 of the Crimes Act states that "possession", "be in possession of" or "have in possession" includes —

> (b) …..if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them

24. Mohammed AAU0092 of 2011: 12 December 2014 [2014] FJCA 216 was a case similar to the present one. Drugs were found in a car with the two defendants in it. The allegation was

that they were in joint possession of the drugs. Gamalath JA, giving the main judgment in the Court of Appeal, with which the other two judges agreed, said at para 35.

> According to English Common Law, in attributing criminality for being in joint possession of an illicit drug, it should be based, not on the evidence of having the mere possession of the noxious item, but also on additional material to demonstrate that there had been extra beneficial factors that operate in furtherance of the interest of each confederate to the crime.

25. Prematilaka JA in Abourizk v State [2019] FJCA 98; AAU0054.2016 (7 June 2019) could not agree with this definition and took the view that the common law definition should be read in conformity with Section 4 of the Crimes Act. His Lordship observed at [76]:

> However, section 4 of the Crimes Act, though not exhaustive, interprets what the words "possession", "be in possession of" or "have in possession" include and in my view, any English common law definition of possession should be adopted keeping section 4 also in mind and in a way not inconsistent with section 4. Section 4 of the Crimes Act also defines what joint possession is. In that context, it is my humble view that the additional element of 'extra beneficial factors' recognized in English common law as part of joint possession is not found in section 4 of the Crimes Act and therefore should not be regarded as part of the concept of joint possession in Fiji as stated in Mohammed v State AAU0092 of 2011: 12 December 2014 [2014] FJCA 216.

26. The Supreme Court in Abourizk v State [2022] FJSC9;CAV 0013.2019 (28 April 2022) expressed skepticism over whether Gamalath JA's interpretation represents the correct position of Common Law in view that none of the authorities cited did not speak about 'extra beneficial factor' being part of joint possession. However his Lordship agreed with the definition Gamalath JA had cited from Archbold. Keith J observed:

> Gamalath JA did not identify what those "extra beneficial factors" might be, but he referred to one authority and one textbook. The authority was *R. v Searle* [1971] Crim L R 592 – a case about small quantities of drugs found in a car with a number of people in it. In that case, the Court of Appeal in England said that
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> > "an appropriate direction would be to invite the jury to consider whether the drugs formed a common pool from which all had the right to draw at will, and whether there was a joint enterprise to consume drugs together".
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> Because that case was about the consumption of small amounts of drugs, it is of less help than the other matter to which Gamalath JA referred, which was of more general application. He cited the following passage from the 2012 edition of Archbold at para 27-69:
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> > "An allegation of joint possession of drugs, where they have not been found on the person of any of the joint possessors, entails an allegation that each had the right to say what should be done with the drugs, a right shared with the other joint possessors."

27. Keith J took the view that even if Section 4 of the Crimes Act definition of joint possession were to be applicable to Illicit Drugs Control Act, (as suggested by Prematilaka J) there is no big difference between that and the Archbold definition cited in Mohammed. He said at [33]

> I think that there is a difference between the two. One direction focuses on the need for the defendants to have allowed each other to have the drugs. The other focuses on the need for each defendant to be entitled to do what they want to with the drugs. But that is a very fine distinction, and in the vast majority cases, it would make no practical difference. …..

28. Mr. Thangaraj argues that as Mohammed has not been overturned by the Supreme Court, the element of 'extra beneficial factor' should be read in to the definition of joint possession. I would not agree. The Supreme Court in a polite manner has refused to accept Mr. Thangaraj's argument. If his argument is accepted, it would be extremely difficult for the Prosecution to prove a case of joint possession in Fiji. Therefore, I proceed to decide this case on the assumption that Archbold definition which was accepted by the Supreme Court on joint possession to be the law in Fiji.

Burden of Proof

29. Mr. Burney for Prosecution conceded at a pre-trial hearing and in his opening address that burden under section 32 of the IDCA is mere evidential and therefore this section does not impose a burden of 'proof' on the Defence. Defence concurred with the Prosecution on this point. However, mere agreement of the parties cannot settle a question of law, especially when the Court of Appeal in Abourizk v State has held and the tenor of section suggests otherwise. This topic is very much in controversy in this jurisdiction and involves interpretation of the Constitution. Therefore, I should express my opinion in the light of what Lord Hope in Lambert [2002] 2 AC 545 said-' The change in the nature of the burden is best understood by looking not at the Accused and what he must do, but rather at the state of mind of the judge or jury when they are evaluating the evidence'.

30. The question whether the burden under Section 32 of the IDCA is a legal or evidential one had been raised in the Court of Appeal in Abourizk v State [2018] FJCA 45; AAU0054.2016 (8 May 2018). At the leave stage, Goundar JA certified that it raised a question of law and therefore leave to appeal was not required. Giving the majority judgment of the full Court [Abourizk v State [2019] FJCA 98; AAU0054.2016 (7 June 2019)], Prematilaka JA opined that the burden on the defence is one of legal and that that burden must be discharged on a balance of probabilities. His Lordship observed:

> It is clear that the burden of proof on an Accused when the presumption under section 32 of the Illicit Drugs Control becomes operative is a legal burden in terms of section 60(c) of the Crimes Act due the specific words 'until the contrary is proved' found in section 32. The word 'unless' in section 60(c) of the Crimes Act and the word 'until' in section 32 of the Illicit Drugs Control 2004 have the same meaning here. Legal burden means the

burden of proving the existence of the matter (vide section 57 (3) of the Crimes Act) and the legal burden must be discharged on a balance of probabilities (vide section 61 of the Crimes Act).

That effectively requires the Accused to establish, on the balance of probabilities, that he himself was not in possession of the illicit drug either alone or jointly with some other person. That is the inevitable corollary, it seems to me, of the way in which the final part of s 32 is expressed.

31. On appeal to the Supreme Court [Abourizk v State [2022] FJSC 9; CAV0013.2019 (28 April 2022)], the counsel for 2nd appellant, contended that if the burden was a legal one as Prematilaka JA thought, the question would then arise whether s 32 offends the presumption of innocence guaranteed by s14(2)(a) of the Constitution of the Republic of Fiji (Constitution). The Supreme Court however did not think that the case before it was the appropriate vehicle in which to debate this issue in the light of the direction favourable to the defence that had been given by the trial judge.

32. It should be noted that the Supreme Court has original jurisdiction to hear and determine constitutional questions when they have been referred by the Cabinet under s 91(5) of the Constitution seeking an opinion concerning the interpretation or application of the Constitution [s 98(3)(c)]. Whereas the High Court is vested with original jurisdiction <u>in any</u> matter arising under the Constitution or involving its interpretation. In view of the jurisdiction vested in this Court and the vital issues raised in this case involving interpretation of the Constitution, it is appropriate to deal with this issue in depth as its resolution is critical to the final determination of this case.

33. Section 32 of the Illicit Drugs Control Act 2004 states as follows,

> Where in any prosecution under this Act, it is proved that any illicit drug, controlled chemical or controlled equipment was on or in any premises, craft vehicle or animal 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, controlled chemical or controlled equipment

34. If read in isolation and in conjunction with 60 (c) and 57 (3) of the Crimes Act, there is obviously much force in the contention that this section imposes a legal burden of proof on the Accused, in which case serious arguments arise as to whether this offends the presumption of innocence guaranteed by s 14(2)(a) of the Constitution of the Republic of Fiji (Constitution). Section 14 (2)(a) provides that every person charged with an offence has the right to be presumed innocent until proven guilty according to law. If s 32 imposes a

legal burden that must be discharged on a balance of probabilities, it obviously offends the right to be presumed innocent and imposes a limitation on this right.

35. The question is whether our Constitution permits such a limitation on the presumption of innocence, which is considered by some jurists as being absolute or unqualified. The jurisprudence developed by some jurisdictions (UK and New Zealand) suggests that this right is not unqualified and can be restricted. The methodologies used in each country to support their point may however be different. The most common approach is based on policy considerations and was initiated by the Canadian case of R v Oakes [1986] 2SCR 713 and the second one is based purely on how the Constitution of each country should be interpreted (see: New Zealand Supreme Court decision of Elias CJ: in R v Hansen 3 NZLR (2007). I would prefer to take a hybrid approach to address this issue.

36. In Fiji, the answer to this question in my opinion should be sought primarily in the light of the rules of interpretation provided in s 7 of the Constitution as to how the rights guaranteed in the Bill of Rights should be construed and what impact they would have on subsidiary legislation that limit those rights.

37. The rules of interpretation concerning the Bill of Rights provided in s 7 of the Constitution require compliance with s 3 of the Constitution which stipulates the general principles of constitutional interpretation. Section 3(1) directs any person interpreting or applying the Constitution to promote the spirit, purpose and objects of the Constitution as a whole, and the values that underlie a democratic society based on human dignity, equality and freedom. The same direction is repeated in s 7(1)(a) of the Constitution which specifically deals with the interpretation of Bill of Rights. If a law appears to be inconsistent with a provision of the Constitution, the court must adopt a reasonable interpretation of that law that is consistent with the provisions of the Constitution over an interpretation that is inconsistent with this Constitution [s3(2)].

38. The Constitution is the Supreme law of the State [s 2(1)] and, subject to the provisions of the Constitution, any law inconsistent with the Constitution is invalid to the extent of the inconsistency [s 2(3)]. The Constitution shall be enforced through the courts to ensure that laws and conduct are consistent with the Constitution [s 2(4)(a)].

39. In view of s 7(1)(b) of the Constitution, an interpretation of Bill of Rights would involve international law. That provision warrants the courts, if relevant, to consider international law applicable to the protection of the rights and freedoms in the Bill of Rights Chapter. It is therefore pertinent to examine the status of the international law *vis-a-vis* the presumption of innocence under the common law and the international human rights law regime.

40. The presumption of innocence is a long-standing tenet of the common law criminal jurisprudence. There is a fundamental rule that it is for the Prosecution to prove all elements of the offence charged beyond reasonable doubt. The approach of the common law to the presumption of innocence was memorably stated by Viscount Sankey LC in Woolmington v D.P.P. [1935] AC 462 at p 481 to be that "Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt. . " The Woolmington principle was, however, subject to the presumption of sanity and Parliament legislating to the contrary. Based on Wilmington principle, one could argue that the presumption of innocence can be restricted by statute.

41. In late forties, the human rights movement came into existence. The foundation of which was the Universal Declaration of Human Rights (1948), which has been the starting point of subsequent human rights texts. In article 11(1) it provided: "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law . . ." Borrowing this language almost verbatim, article 6.2 of the European Convention for the Protection of Human Rights (ECHR) and Fundamental Freedoms (1950) provided: "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law". Article 14.2 of the International Covenant on Civil and Political Rights (ICCPR) (1966), to which Fiji is a party, to the same effect.

42. The presumption of innocence is *prima facie* unqualified in the ICCPR. While ICCPR expressly permits restrictions on rights such as freedom of thought, conscience and religion and freedom of expression, and indicates the basis upon which such limitations can be made, no such licence is given in relation to the rights to fair trial and to be presumed innocent. It seems well arguable, from the otherwise unaccountable absence in the International Covenant of any register of values against which limitations can be considered, that these rights cannot be restricted as a matter of international obligation, although they may be subject to derogation in emergencies.

43. That being the position of this presumption in the human rights law regime, it is a fact that the legislatures in many jurisdictions have frequently and sometimes in an arbitrary and indiscriminate manner made inroads on the presumption of innocence. Amidst this trend, in 1972, a most distinguished Criminal Law Revision Committee of the United Kingdom had observed that "we are strongly of the opinion that, both on principle and for the sake of clarity and convenience in practice, burdens on the defence should be evidential only": Eleventh Report, Evidence (General) Cmnd 4991 of 1972, para 140. Nevertheless, the process of enacting legal reverse burden of proof provisions continued unabated.

44. Despite the right of petition to the European Court of Human Rights created for the United Kingdom in 1961, there was no constraint on legislative incursions on the presumption of innocence. Such incursions were often justified where an Accused is well placed to prove a licence or formal qualification, especially if significant criminality is not in issue. It may also be more readily justified where the Accused has assumed a particular risk, offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities; R v Edwards [1975] QB 27; R v Hunt [1987] AC 352; s 5(a) of the IDCA of Fiji.

45. In cases where unrebutted presumption compels a verdict of significant criminal culpability, however, the English courts took the view that the prosecution must always bear the onus of proof and a reverse onus is not justified. Those are the cases where the defence is so closely linked with *mens rea* and moral blameworthiness that it would derogate from the presumption to transfer the legal burden to the Accused, e.g. the hypothetical case of transferring the burden of disproving provocation to an Accused.

46. In Human Rights Act 1998 of the UK, Parliament has provided that, subject to the ultimate constitutional principle of the sovereignty of Parliament, inroads on the presumption of innocence must be compatible with article 6.2 as properly construed. If incompatibility arises, the subtle mechanisms of the Human Rights Act 1998 come into play.

47. The European Court of Human Rights (ECHR) however on several occasions has held that presumption of innocence entrenched in art 6.2 of the European Convention on Human Rights is not absolute. In Salabiaku v France (1988) 13 EHRR 379 and in Janosevic v

Sweden (2004) 38 EHRR 473 it has held that a reverse onus is not incompatible with the Convention right if the means employed are reasonably proportionate to a legitimate aim. On that approach, the contracting states "are required to strike a balance between the importance of what is at stake and the rights of the defence".

48. In striking such a balance, it is important to bear in mind what Sachs J of the South African Constitutional Court has said in State v Coetzee [1997] 2 LRC 593.

> There is a paradox at the heart of all criminal procedure in that the more serious the crime and the greater the public interest in securing convictions of the guilty, the more important do constitutional protections of the Accused become. The starting point of any balancing enquiry where constitutional rights are concerned must be that the public interest in ensuring that innocent people are not convicted and subjected to ignominy and heavy sentences massively outweighs the public interest in ensuring that a particular criminal is brought to book… Hence the presumption of innocence, which serves not only to protect a particular individual on trial, but to maintain public confidence in the enduring integrity and security of the legal system. Reference to the prevalence and severity of a certain crime therefore does not add anything new or special to the balancing exercise. The perniciousness of the offence is one of the givens, against which the presumption of innocence is pitted from the beginning, not a new element to be put into the scales as part of a justificatory balancing exercise. If this were not so, the ubiquity and ugliness argument could be used in relation to murder, rape, car-jacking, housebreaking, drug-smuggling, corruption . . . the list is unfortunately almost endless, and nothing would be left of the presumption of innocence, save, perhaps, for its relic status as a doughty defender of rights in the most trivial of cases.

49. In R v Director of Public Prosecutions, Ex Parte Kebilene [2000] 2 AC 326 in the Divisional Court Bingham LCJ had no doubt that, in the context of a serious offence (terrorism), a reverse legal burden of proof provision on a matter central to the wrongdoing alleged against the defendant would breach article 6.2 of the ECHR. On the appeal to the House a majority suggested that, once the Human Rights Act 1998 was in force, reverse legal burden provisions may have to be interpreted as imposing merely an evidential burden on the defendant. Responding to Kebilene Parliament enacted the Terrorism Act 2000 which in section 118(1) and (2) provides that the reverse onus of proof is satisfied if the person adduces evidence which is sufficient to raise an issue with respect to the matter unless the prosecution can prove the contrary beyond reasonable doubt.

50. Comparative experience in constitutional democracies underlines the vice inherent in transfer of legal burden provisions, and the utility, in appropriate contexts, of evidential presumptions. It is on this backdrop, Lambert, R v. [2001] UKHL 37; [2001] 3 WLR 206 (5th July, 2001) was decided by the House of Lords which I shall advance to support the

argument that, within the framework of the Constitution of Fiji, s 32 of the IDCA could be interpreted to impose only an evidential burden.

51. In Lambert, the defendant was convicted of possession of a controlled drug, cocaine, with intent to supply, contrary to section 5 of the Misuse of Drugs Act 1971. Lambert relied on section 28(3)(b)(i) of that Act asserting that he did not believe or suspect, or have reason to suspect that the bag which he carried contained a controlled drug and in particular cocaine. The judge directed the jury in accordance with what was accepted to be the law at the time that the prosecution had to prove only that he had and knew that he had, the bag in his possession and that the bag contained a controlled drug. To establish the defence under section 28 (3) he had to 'prove' on the balance of probabilities that he did not know that the bag contained a controlled drug. This was thus the legal rather than the merely evidential burden.

52. On appeal to the Court of Appeal, this direction of the trial judge among other grounds was challenged. Having dismissed the appeal, the Court however certified three questions to be decided by the House. One question was whether in a charge contrary to section 5 the judge

was right to direct the jury that the onus of proving the defence under section 28(2) imposed a legal rather than an evidential burden of proof that the Accused neither believed nor suspected nor had reason to suspect that the substance in question was a controlled drug. Before the House, the appellant contended that the direction by the judge, that the burden on the Accused to establish the defence was a legal burden, violated Article 6.2 of the Convention right (presumption of innocence) set out in the Schedule to the Human Rights Act 1998.

53. Section 3 of the 1998 Human Rights Act provides that "so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the convention rights." It raised the question whether it is possible to read section 28 compatibly with Article 6.2 in accordance with section 3(1) of the 1998 Act by holding that the words "if he proves" merely require a defendant to discharge an evidential burden of proof rather than a legal or persuasive burden.

54. The House held that s 28 (2) imposes only an evidential burden on the defence. Lord Steyn took the view (with whom majority agreed) that the legal burden would not be justified under Article 6.2 of the Convention rights. However his Lordship further observed that, in the light of section 3(1) of the 1998 Human Rights Act, it is "possible", without doing violence to the language or to the objective of s 28(2), to read the words as imposing only the evidential burden of proof. His Lordship observed…

> For my part I do not think it is necessary to come to a conclusion on these arguments since even if section 28(2) read alone were thought prima facie to violate Article 6(2) the House must still go on to consider section 3(1) of the 1998 Act. That section provides that "So far as it is possible to do so, primary legislation must be read and given effect in a way which is compatible with the Convention rights". This obligation applies to primary legislation "whenever enacted". Even if the most obvious way to read section 28(2) is that it imposes a legal burden of proof I have no doubt that it is "possible", without doing violence to the language or to the objective of that section, to read the words as imposing only the evidential burden of proof. Such a reading would in my view be compatible with Convention rights since, even if this may create evidential difficulties for the prosecution as I accept, it ensures that the defendant does not have the legal onus of proving the matters referred to in section 28(2) which whether they are regarded as part of the offence or as a riposte to the offence prima facie established are of crucial importance. It is not enough that the defendants in seeking to establish the evidential burden should merely mouth the words of the section. The defendant must still establish that the evidential burden has been satisfied. It seems to me that given that that reading is "possible" courts must give effect to it in cases where Convention rights can be relied on.

55. It is clear that the House has come to its conclusion on the premise that even if the most obvious way to read s 28(2) is that it imposes a legal burden of proof, it is "possible", in the light of s 3(1) of the 1998 Human Rights Act, to read the words of that section as imposing only an evidential burden on the defence.

Position in Fiji

56. Under the Constitution of Fiji, likewise under the international human rights instruments, the presumption of innocence [14(2)(a)] at first blush is unqualified in its own terms. While the Bill of Rights Chapter expressly permits restrictions on some rights such the right to public trial before courts [s14(2)(f)], right to be present in court when being tried [s14(2)(h)], not to have unlawfully obtained evidence adduced s [14(2)(k)] etc., which necessarily require some assessment of the scope of the right, no such assessment is required in relation to the presumption of innocence. It seems well arguable, from the absence in the Bill of Rights Chapter any register of values against which limitations can be considered, that this right cannot be restricted. However, the final determination should be made after a careful consideration of the provisions of the Constitution because any limitation on a right must only be possible within its framework. Therefore, it is apposite to closely examine the

provisions of the Constitution to see if the obvious limitation enunciated by s 32 of IDCA on the presumption of innocence is permitted and, if permitted, to what extent.

What does the Constitution tell about the limitations?

57. According to s 5 of the Constitution, the rights and freedoms set out in the Bill of Rights Chapter apply according to their tenor and may be limited by—

> (a) limitations expressly prescribed, authorised or permitted (whether by or under a written law) in relation to a particular right or freedom in this Chapter;
> (b) limitations prescribed or set out in, or authorised or permitted by, other provisions of this Constitution; or
> (c) limitations which are not expressly set out or authorised (whether by or under a written law) in relation to a particular right or freedom in this Chapter, but which are necessary and are prescribed by a law or provided under a law or authorised or permitted by a law or by actions taken under the authority of a law.

58. (a) and (b) above are out of question because no limitation on the right to be presumed innocent is expressly permitted, prescribed or authorised by written law or other provisions of the Constitution. The question is whether it is possible to read the words in s 32 of the IDCA as imposing a limitation permitted or authorised by (C) above.

59. Section 32 obviously falls under limb (c) because it limits the right to be presumed innocent by implication in that at first blush it places a persuasive burden on the Accused to prove his or her innocence**.** If the Accused fails to discharge that burden on balance of probabilities, he or she runs the risk of being convicted. In other words, the court may convict when a reasonable doubt exists. "If an Accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the Accused." [Dickson CJC in R v Whyte (1988) 51 DLR 4th 481 (at 493): the Canadian Supreme Court]

60. If a limitation to be permitted under limb (c) above, it has to meet the following two requirements:

(a) The limitation must be prescribed by a law or provided under a law or authorised or permitted by a law or by actions taken under the authority of a law and

(b) It must be necessary.

61. In this case, the limit on the right to be presumed innocent (the reverse onus) clearly satisfies the need for prescription by law because it is a specific feature of the legislation, namely, the IDCA. The IDCA provides a legal basis for the measure limiting the right. There remains the need for it to be necessary. Necessary for what? Unfortunately there is no clear guidance in this regard in the Fiji Constitution.

62. In Canadian Charter of Rights and Freedoms, for example, the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. The New Zealand Bill of Rights Act 1990 provides that subject to section 5 of the Bill of Rights, the rights and freedoms contained in the Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. No such guidance as such is provided in our Constitution.

63. Although there is no such overt guidance in our Constitution, in the light of Section 7(1)(a) and Section 3(1) which I have already adverted to in a preceding paragraphs (00), one could reasonably assume that the limitation must be necessary in a 'democratic society based on human dignity, equality and freedom. On that assumption, I would formulate this simple question. Is the prima facie limitation on the presumption of innocence imposed by s 32 of the IDCA necessary and justified to promote the values that underlie a democratic society based on human dignity, equality and freedom?

64. To find the answer to this question, it is helpful to have a cursory look at the Canadian jurisprudence which initiated a well-crafted methodology accepted by many jurisdictions in the contemporary civilised world and by the treaty bodies such as European Court of Human Rights. The leading Canadian case of R v Oakes [1986] 2SCR 713 is a valuable early authority on the general approach to whether limits on rights and freedoms are justified when an enactment, properly interpreted, is inconsistent with the right. It concerned a reverse onus of the present kind. The headnote to Oakes conveniently captures the essence of the Court's methodology:

> Two central criteria must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the objective to be served by the measures limiting a Charter right must be sufficiently important to warrant overriding a constitutionally protected right or freedom. The standard must be high to ensure that trivial objectives or those discordant with the principles of a free and democratic society do not gain protection. At a minimum, an objective must relate to

> societal concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important. Second, the party invoking s1 must show the means to be reasonable and demonstrably justified. This involves a form of proportionality test involving three important components. To begin, the measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective. In addition, the means should impair the right in question as little as possible. Lastly, there must be a proportionality between the effects of the limiting measure and the objective – the more severe the deleterious effects of a measure, the more important the objective must be.

65. In Multani v Commission Scolaire Marguerite-Bourgeoys 156 [2006] 1 SCR 256 Charron J, delivering the judgment of the majority of the Court, summarised the Canadian position in the following succinct paragraph:

> "[43] The onus is on the respondents to prove that, on a balance of probabilities, the infringement is reasonable and can be demonstrably justified in a free and democratic society. To this end, two requirements must be met. First, the legislative objective being pursued must be sufficiently important to warrant limiting a constitutional right. Next, the means chosen by the state authority must be proportional to the objective in question: Oakes; R v Edwards Books and Art Ltd, [1986] 2 SCR 713."

66. In terms of this formulation there are two requirements which must be satisfied under the justification head: a sufficiently important objective, and proportionality of the means chosen to achieve the objective. In Canada the proportionality question has conventionally been further divided into three sub-issues, which can be described as rational connection, minimal impairment, and the balance of social advantage against harm to the right. In England, the first broad criterion, namely that the legislative objective must be sufficiently important to warrant limiting a constitutional right, and the first of the three proportionality issues, namely that of rational connection, are generally regarded as threshold issues.

67. Going by the Oakes methodology, whether a limit on a right or freedom is justified under s 5(c) of the Fiji Constitution is essentially an inquiry into whether a justified end is achieved by proportionate means. The end must be justified and the means adopted to achieve that end must be proportionate to it. Several sub-issues inform that ultimate head issue. They include whether the practical benefits to society of the limit under consideration outweigh the harm done to the individual right or freedom. This test involves a balancing exercise. As stated at p 75 in "Bentham and Human Rights" (2001) CLP61, the balance may be informed by international materials but in the end it is a matter for each country's domestic jurisprudence.

Application of principles to the present case - Importance of objective and rational connection

68. There can be no doubt that the objective to be achieved by s 32 of the IDCA is sufficiently important to justify some limitation on the presumption of innocence. Fiji is located close to Australia and New Zealand where illicit drug trade could reap big profits. It is known among the drug dealers as relatively unsophisticated jurisdiction in terms of detection, investigation and prosecution. Sophisticated drug smugglers, dealers and couriers typically conceal drugs in some container, thereby enabling the person in possession of the container to say that he was unaware of the contents. Such defences are commonplace and they pose real difficulties for the police and prosecuting authorities. To effectively combat drug trafficking locally will have international ramifications. Dealing in illegal drugs is a major social concern and has the capacity to do immeasurable harm to society and its individual citizens.

69. In this context the presumption contained in s 32 of IDCA is obviously designed to make the task of establishing guilt easier for the prosecution. That will indirectly have some deterrent effect also. These interrelated objectives relate to a matter which is one of serious and pressing social concern. There can be no doubt that the limit which the IDCA has placed on the presumption of innocence is rationally connected with that objective. It logically tends to reduce drug dealing. That is, however, not the end of the matter. It must be shown that the legislative means adopted to achieve the objective must not be greater than necessary.

Is the limit greater than reasonably necessary?

70. The legislation must pass the test that the limit imposed by it on the presumption of innocence is no greater than is reasonably necessary to achieve the objective. In practical terms this inquiry involves a consideration whether the Parliament might have sufficiently achieved its objective by another method involving less cost to the presumption of innocence. It follows that a legislative interference with the presumption of innocence requires justification and must not be greater than is necessary.

71. Where there is objective justification for limitation on the presumption of innocence the legislature has a choice. The first is to impose a legal burden of proof on the Accused. If such a burden is created the matter in question must be taken as proved against the Accused unless he or she satisfies the trier of facts on a balance of probabilities to the contrary. The second is to impose an evidential burden only on the Accused. If this technique is adopted the matter must be taken as proved against the Accused unless there is sufficient evidence to

raise an issue on the matter but, if there is sufficient evidence, then the prosecution have the burden of satisfying the trier of facts as to the matter beyond reasonable doubt in the ordinary way.

72. The difference between these two approaches can be explained with reference to the present case. If s 32 of the IDCA imposes a persuasive burden of proof, the Accused must affirmatively satisfy the Court that he was not in possession of the noxious item perhaps by proving that he was not aware that the bag found in his custody contained illicit drugs. The defence of lack of knowledge is so closely linked with *mens rea* of the offence and moral blameworthiness. If the court is in doubt on this issue, the Accused must be convicted. This may occur when an Accused adduces sufficient evidence to raise a doubt about his guilt but the court is not convinced on a balance or probabilities that his account is true. Proof of guilt upon non persuasion by the Accused entails a maximum sentence of life imprisonment. No doubt, the practical benefits to society of the limit outweigh the harm done to the individual right or freedom.

73. The burden of showing that only a reverse legal burden can overcome the difficulties of the prosecution in drugs cases is a heavy one. Lord Steyn in R v Lambert [2002] 2AC 545 explained how the proposed objective of easing prosecutorial difficulties could be achieved without resorting to persuasive burden. I would quote only what is relevant to this case. His Lordship observed at p 39:

> A new realism in regard to the problems faced by the prosecution in drugs cases have significantly reduced their scope. First, the relevant facts are usually peculiarly within the knowledge of the possessor of the container and that possession presumptively suggests, in the absence of exculpatory evidence that the person in possession of it in fact knew what was in the container. This is simply a species of circumstantial evidence. It will usually be a complete answer to a no case submission. It is also a factor which a judge may squarely place before the jury. After all, it is simple common sense that possession of a package containing drugs will generally as a matter of simple common sense demand a full and adequate explanation. …..
>
> Cumulatively, these considerations significantly reduce the difficulties of the prosecution in drugs cases. Specifically, it should not be possible for an Accused, in a case where his conduct calls for an explanation, to advance a submission at the end of the prosecution case that the prosecution have not eliminated a possible innocent explanation. Such submissions should generally in practice receive short shrift.

74. It is difficult to see that evidential difficulties for the prosecution in a drugs cases could not have been sufficiently addressed by a presumption of fact which leaves the onus of proof on the prosecution. As the House of Lords held in R v Lambert (supra), simply making it easier to secure convictions is not a principled basis for imposing a reverse onus of proof.

Logically, the objective of deterrence also can be achieved by prescribing heavy punishments.

75. Under the alternative (evidential burden) the Accused would simply have to point to evidence before the Court raising the issue of lack of knowledge, whereupon the onus passes to the prosecution to establish the knowledge beyond reasonable doubt. The serious preferable candidate for such an alternative would be an evidential rather than a persuasive onus. Instead of placing on the Accused the burden of proving the contrary of the presumption on the balance of probabilities, the lesser burden would result in a conviction unless the Accused could point to evidence which raised a reasonable doubt. The evidential burden gives rise to less risk that a person who had no knowledge would be convicted because he was unable to rebut the presumption. The persuasive burden has a greater capacity to catch those who are not actually guilty of possession of illicit drugs. Indeed, the level of risk that those innocent may be wrongly convicted as a result of the persuasive burden is a major ingredient in the argument that a presumption rebuttable on that basis is an unjustified limit. Hence a legislative approach of a presumption rebuttable on the basis of a persuasive burden limits the right to be presumed innocent to a greater extent than is reasonably necessary to achieve Parliament's objective.

76. The foregoing discussion leads me to the conclusion that the means adopted in s 32 of the IDCA by Parliament by placing a persuasive burden of proof on the defence is disproportionate or greater than is reasonably necessary to achieve the proposed objectives and thus fail the test introduced by Oakes.

The Interpretative Obligation

77. Let me now turn to the rule of interpretation particularly relevant to the limitations of rights and freedoms guaranteed in the Bill of Rights Chapter of the Fiji Constitution. The courts in Fiji after a certain period do not have the power to strike down a legislation even if it is inconsistent with the provisions of the Constitution. What the courts could do is to declare that certain provisions of the legislation, although operative, is inconsistent with the Bill of Rights or where possible to adopt a reasonable interpretation of that law that is consistent with the provisions of the Constitution over an interpretation that is inconsistent with this Constitution_[s 3(2)]. This provision is somewhat similar to section 3(1) of the UK Human Right Act 1998 which in Lambert the House of Lords was called upon to interpret. That

section provides that "So far as it is possible to do so, primary legislation must be read and given effect in a way which is compatible with the Convention rights".

78. The rule of interpretation in s 3(2) of the Fiji Constitution is complemented by s 7(3) which particularly deals with interpretation of Bill of Rights. Accordingly, in addition to passing the test of necessity under s 5 (c) of the Constitution, any law that exceeds the limits imposed by the Bill of Rights Chapter on a right or freedom must comply with s 7 (3) if it to be regarded as being valid. Section 7(3) provides:

> A law that limits a right or freedom set out in this Chapter is not invalid solely because the law exceeds the limits imposed by this Chapter if the law is reasonably capable of a more restricted interpretation that does not exceed those limits, and in that case, the law must be construed in accordance with the more restricted interpretation.

79. This section dictates that for the law that exceeds the limits to retain its validity must be reasonably capable of a more restricted interpretation that does not exceed the limits imposed by the Bill of Rights Chapter. This rule advocates in a different way the proportionality principle, specifically the minimal impairment requirement, formulated by the Canadian Supreme Court in Oakes that the limitation must do minimal harm to the right and be no more than is reasonably necessary to achieve the purpose.

80. As I have adverted to earlier, the constitutional right to be presumed innocent is unqualified in its own terms and no express limitation thereupon is imposed or contemplated by the Bill of Rights Chapter. Therefore any limitation on this right exceeds the limits contemplated by the Bill of Rights Chapter. According to s 7(3), a law that exceeds the limits imposed by the Bill of Rights Chapter is not invalid if the law is reasonably capable of a more restricted interpretation that does not exceed the limits. The question is whether the words *until the contrary is proved* in s 32 of the IDCA are reasonably capable of a more restricted interpretation that does not exceed the limits contemplated by the Bill of Rights Chapter on the presumption of innocence. If the law is capable of such interpretation, it must be construed in accordance with the more restricted interpretation.

81. As was stated before, a legal burden obviously exceeds the limits contemplated by the Bill of Rights Chapter on the presumption of innocence. If the most obvious way to read s 32 is that it imposes a legal burden of proof I have no doubt that it is

"reasonably capable", without doing violence to the language or to the objective of that section, to read the words as imposing only the evidential burden. It is possible to read the words 'until the contrary is proved' in s 32 of the IDCA as 'unless sufficient evidence is given to the contrary' thus imposing only an evidential burden. If s 32 could be interpreted to impose an evidential onus, the limit imposed thereby will not exceed the limits contemplated by the Bill of Rights Chapter. Such a restricted interpretation would be compatible with the Bill of Rights Chapter and the spirit of the Constitution. It seems to me that given that that reading is "reasonably capable" courts must give effect to it.

82. For the aforesaid reasons, I come to the conclusion that the right to be presumed innocent is qualified in Fiji. Section 32 of the IDCA imposes only an evidential burden on the defence.

Adoption of Evidence of the First Trial

83. When the matter was fixed for trial, Mr. Burney informed the Court that the presence of the Investigating Officer Inspector Maciu cannot be secured because he has migrated to the USA and that he could not be accessed even via Skype because his whereabouts could not be located. He had given evidence in the first trial where he was subjected to extensive cross-examination. One of the main concerns of the Defence in the permanent stay application was that, in the absence of Maciu, a fair trial to the Accused will not be possible.

84. As an option, prosecution offered to tender the transcript of the evidence given by Maciu at the first trial. The Defence was in fact arguing before the Supreme Court and this Court, that the entirety of the transcribed evidence of the first trial be tendered as evidence in this trial. Their objection is of course for a piecemeal approach.

85. The Supreme Court (25 August 2022) had in fact approved the Defence proposal to adopt the entire evidence from the first trial at the new trial. Dep J dissented but approved the piecemeal approach. However, we know that that decision has now been overturned by a different panel of the Supreme Court itself. The practice of adoption of evidence given by a witness in a previous judicial proceeding is not uncommon in Commonwealth Jurisdiction. For example, the Indian Evidence Act and the Evidence Ordinance of Ceylon (as it then

was), codified the rules of evidence of the United Kingdom. Section 33 of the Indian Evidence Act (identical to s 33 of the Evidence Ordinance of Ceylon) reads thus :

> Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated :- Evidence given by a witness in a judicial proceeding or before any person authorised by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which under the circumstances of the case, the Court considers unreasonable :
> Provided - that the proceeding was between the same parties or their representatives in interest; that the adverse party in the first proceeding had the right and opportunity to cross-examine; that the questions in issue were substantially the same in the first as in the second proceeding.
>
> Explanation - A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the Accused within the meaning of this Section."

86. This section lays down as to when the evidence of a witness in a previous judicial proceeding relevant. It consists of two parts, the main section, and the proviso. The main section lays down the conditions which are required to be satisfied for the previous statement of a witness in a judicial proceeding to be admitted in evidence in the later proceeding.

87. This section has been interpreted and applied by the Supreme Court of India (V.M. Mathew Vs. V.S. Sharma and others (29/08/1995) (http://JUDIS.NIC.IN SUPREME COURT OF INDIA, Sundara Rajali Vs. Gopala Thevan and Another (AIR 1934 Madras 100) and Brajaballav Ghose and Another Vs. Akhoy Begdi and Others (AIR 1926 Cal. 705) and by the the Judicial Committee of the Privy Council in Dal Bahadur Singh's case (Dal Bahadur Singh and others Vs. Bijai Bahadur Singh and Others, (AIR 1930 PC 79).

88. I am satisfied that all the above mentioned legal requirements are fulfilled and that the adoption of evidence of Inspector Maciu given in the first trial is warranted in this trial.

89. At the end of the Prosecution case, when the right of the Accused in his defence was put to the Accused, both of them elected to remain silent. This decision of the Accused came as a shock and would have been disastrous to the defence in the circumstances of this case, in view that the relevant facts are usually peculiarly within the knowledge of the possessor of the containers and that possession presumptively suggests, in the absence of exculpatory evidence, that the person in possession of them in fact knew what was in the containers. It will usually be a complete answer to a no case submission. After all, it is simple common

sense that possession of a package containing drugs will generally as a matter of simple common sense demand a full and adequate explanation. (See: Lord Steyn in R v Lambert [2002] 2AC 545 at p 39).

90. It is the unbounded duty of this Court to ensure a fair trial to the Accused. Apparently being conscious of a potential attack on the Accused's fair trial rights on the basis of Abourizk's permanent stay application, Mr. Burney offered to allow the evidence of Abourizk from the previous trial to go in as the evidence of this trial if his (Abourizk's) decision to remain silent was purely based on any of the conditions described in his permanent stay application. The Court considered it a reasonable offer so the defence was given sufficient time to reconsider its decision seriously. After much deliberation well over two days, and consultation with his Counsel, Abourizk elected to tender the transcript of his evidence from his previous trial as his evidence in this trial. It was tendered by agreement. No other evidence was called on his behalf. Muriwaqa remained silent and relied on the evidence of the Abourizk.

91. Let me now summarise the salient parts of the evidence led in this trial.

SSP Serupepeli Neiko (Neiko)

92. Neiko currently is a Senior Superintendent of Police and the Director, Narcotics Bureau. On 13 July 2015 he was in Nadi, following up an information on a drug transaction that was to happen in Lautoka. According to the information received, the vehicle involved in the drug transaction was a silver grey Toyota Fielder bearing Reg No.HM 046 (HM 046).

93. After a short briefing at Nadi, his team of four was dispatched at around 6 a.m. in two private vehicles and put themselves on surveillance in Lautoka area. He was in a Mitsubishi Pajero (Pajero) with his driver while Sergeant Meli and his driver in the other vehicle. All the officers were in civilian clothes.

94. When Neiko was on his feet at Navutu Roundabout, he spotted HM 046 heading towards Nadi at around 3.30 p.m. Within three minutes, they started following HM 046, maintaining a five car distance between his vehicle and HM 046. HM 046 made a right turn into Viseisei Road and made another right turn into the road leading to Vuda Marina. They maintained

the five car distance right throughout. HM 046 made another right turn and drove past Vuda Marina, past First Landing and continued to drive towards the end of the road where it met with a gravel road.

95. The distance that they drove from the Navutu Roundabout to the Viseisei junction is approximately 10 kilometres. The distance from Viseisei junction to the road where HM-O46 turned into the Mediterranean Road is approximately 3 kilometres. He was not particularly sure of the distance from that 2nd right turn to Vuda Marina and of the distance from the 2nd right turn to the gravel road.

96. From the gravel road, HM 046 was driven parallel to the rail track past a wooden bridge into an isolated location where it finally stopped. HM 046 reversed as it couldn't move any further due to a loaded sugarcane cart that was sitting on the rail track. The distance from the gravel road to the wooden bridge was approximately 400 metres and from the wooden bridge to where HM 046 finally stopped was approximately 300 metres.

97. HM 046 was reversed towards a Mocemoce tree on his right. HM 046 was facing the gravel road. Two male individuals got out of HM 046. The man alighted from the driver's seat was an iTaukei man and the one alighted from the passenger seat was a Caucasian descendant. Both of them went towards the boot of the car which was facing the Mocemoce tree. The boot was opened and three suitcases were thrown out of the boot. He did not see who threw the suitcases. The two men started repacking some items into a bag and a suitcase on the boot of the car. The boot was then closed and one bag was loaded into the back seat and returned to their seats. The repackaging took place for more than 5 minutes.

98. This observation was made from a distance of 20-23 metres while he was still seated in the front passenger seat of the Pajero which was parked at a higher elevation. Nothing was blocking their view. The shrubs there were only up to his knees.

99. Neiko got off the Pajero and approached the two men. He identified himself as a police officer and asked them the purpose of them being there. The Caucasian descendent said they were 'sightseeing'. They requested for his Pajero to be moved back so that they could make their way out from where they were. Neiko directed his driver to reverse towards the

wooden bridge to pave way for HM 046. HM 046 then proceeded towards the wooden bridge until it came to a stop close to the Pajero.

100. Neiko approached HM 046 and ordered the two men to get out and open the boot for him to search the boot. They obeyed and came behind HM 046. When the boot was opened, he saw some bags and a suitcase in the boot. He pulled the suitcase and the bags out of the boot. One of the bags contained clothes and some other items. The suitcase and the black travelling bag were locked with padlocks. Neiko asked for the keys to unlock the padlocks. There was no answer from either of them. Neiko then started searching the vehicle for the keys. He found the keys underneath the front passenger seat.

101. Neiko opened the padlocks on the bag and the suitcase. He saw some wrapped blocks in the suitcase and the travelling bag which he counted. There were 24 blocks in the suitcase and 10 in the traveling bag. When he found those blocks, he contacted Sergeant Meli, who had the field test kit. Within twenty minutes, Sergeant Meli arrived at the scene with his driver Sainivalati. Upon their arrival, Sergeant Meli conducted the preliminary test on one of the blocks. The test turned positive for cocaine and methamphetamine. He approached the two men and advised them that they were under arrest and informed the reason for arrest. After the Accused were arrested, he conducted a search on the individuals. A wallet and a key were seized from the Caucasian individual.

102. In a while, a four member team from Lautoka CID led by Inspector Maciu (Maciu) came to the scene. Colati was one of them. Neiko briefed about the situation and handed the suspects and the items he had seized over to Maciu. Maciu picked up the three suitcases that had been thrown out of the vehicle. Sgt. Rusila took photographs of the scene.

103. The suitcase in which the 24 wrapped parcels were found was identified and tendered in evidence (PE 1A) so did the black travelling bag (PE 1B). [When these containers were produced in Court, 20 blocks were in the suitcase and 14 in the travelling bag]. They were labeled with stickers of the Chemistry Lab. Blocks in the suitcase (PE 2A) and the travelling bag PE 2 (B) were tendered in evidence. He found out the names of the two individuals; the driver was Josese Muriwaqa and the passenger Joseph Abourizk. The witness identified both Accused in Court.

104. Under cross-examination by Mr. Thangaraj, Neiko maintained that there was no one in his vehicle during the pursuit other than the driver despite his admission at the first trial that there were altogether three officers in his vehicle and the third one was seated at the back. He said that nothing was added to the disclosures that were filed for the first trial in 2016.

105. Neiko admitted that, according to Force Standing Orders (FSO), police officers are supposed to carry note books and make notes. He admitted that he never disclosed his notes or those of any member of his team. He did refer to his notes when making his statement. He denied that his claim in the first trial that the notes were destroyed was to pave way for him to say whatever he wanted to say at the trial. He admitted that the facts that the Accused were cautioned, the exact places where the articles were found, that he saw the bags being thrown out were not in his statement. He agreed that there are no statements from any other officers who were with him at the time of arrest. He said he wrote and signed his statement on the 14th of July 2015 between 10 p.m. and 11 p.m. He admitted telling in the first trial that it was written on 13th but the date was mistakenly put as 14th.

106. He did not search the wallets and was not aware how much money was there in Abourizk's wallet. He agreed that in the previous trial he had told the court that he had searched through their wallets. He admitted not following the mandatory protocols designed to prevent police stealing and to establish chain of custody in relation to the property seized from a suspect. He denied that he refrained from following those protocols to steal money from the suspects.

107. He agreed that if the other officers in the vehicle saw the repacking of items and throwing away the bags they would have been direct eye witnesses to those facts. He admitted that none of them had prepared witness statements as to what they saw.

108. Neiko admitted inquiring from Abourizk if he was Canadian. He admitted that he didn't ask the suspects what they were doing at the boot of the car and what they were throwing out from the boot although they were the most obvious questions to ask if he had actually seen the repacking. He agreed that he didn't ask any question about repacking at all.

109. He never took Mr. Muriwaqa to Namaka Police Station the night he was arrested. He admitted telling in the first trial that he took Muriwaqa to Namaka. He never went to Westin Hotel at 9.45 p.m. on the day of the arrest. He admitted testifying at the last trial that he

went to Westin Hotel at 9.45 p.m. with Maciu. He denied having stolen money from Abourizk.

110. Neiko said he did not see 34 parcels being repacked. He admitted telling at the first trial that he saw both Accused repacking 34 parcels from one bag to another. He denied lying to court in previous trial to get a conviction. He agreed that the parcels must have had fingerprints of the Accused if they had re-packed them. He agreed that he did not take any step to have the parcels tested for finger prints although that facility was available in Fiji. He agreed having taken finger prints of the Accused so that nobody in the police station would be suspicious. He denied the proposition that he did not proceed to get finger prints tested because he knew the results will prove the repacking a lie. He agreed that the finger-print expert would have discovered if the Accused had touched the parcels, the keys and the padlock found in the car.

111. He agreed that the property seized would form vital evidence in trial. He agreed that some of the important protocols like preservation of the crime scene and potential evidentiary material, labelling of exhibits, photographing, sketching are important parts of the investigation. He could not confirm if the IO Inspector Maciu had followed those protocols.

112. Neiko agreed that he had not included in his statement that he found keys for padlocks; that Meli tested the parcels; that he had given little information about repacking; about the conversation with the Accused about looking for land for sale. He agreed that his statement is unprofessional.

113. Neiko said he saw HM 046 for the first time at Navutu Roundabout. He agreed having said in the first trial that he saw HM 046 for the first time on the Queens Highway about 1km from the scene of the arrest. Neiko agreed testifying at the first trial that he followed MH 046 for 1 kilometre. He agreed that upon seeing HM 046 he had to call his vehicle to pick him up and that process took about 3 minutes. They could still follow HM 046 because there was a lot of traffic. He agreed that when they started the pursuit, HM 046 would have been 2 kilomtres away and was out of sight. Neiko said he followed HM 046 from Navutu Roundabout right to the scene. Otherwise he would have missed it and headed straight towards Nadi. If he had followed them only 1 kilometre, he would have missed HM 046. He

described the distance from First Landing to the scene as being about more than 2 kilometres.

114. Neiko admitted having agreed at the first trial that he saw HM 046 by chance on the Queens Highway, about 1 km from the scene of the arrest. He admitted having said at the first trial that he was on stationary for 6 hrs. outside of Lautoka City. He denied the proposition that he had not seen HM 046 until it had gone past First Landing. He said that HM 046 never went in to First Landing.

115. The distance from the wooden bridge to where the HM 046 had finally stopped was about 300m. There were no cars in between and they were just 23 metres behind HM 046. He agreed having said at the first trial that the distance between the two vehicles had been only two metres and that they saw 34 parcels being transferred into another bag and that that process lasted only a few seconds. He agreed having said in the first trial that the two men transferred 50 kilos of drugs from some bags to another bags within few seconds while they were right there watching them. Neiko denied that he changed his evidence and increased the distance (to 23 mitres) because he was trying to pretend that he was far away to make out who actually threw the bags.

116. Neiko admitted that when he gave evidence in the *voir dire* he had not mentioned anything about the bags being thrown out. No reference in the search list or his statement about locks or keys being found in the car. He never said in the first trial that the keys to the padlocks were found underneath the front passenger seat.

117. Under cross examination by Mr. Rabuku, Neiko admitted that the evidence he has given in three separate proceedings is different to each other on critical aspects. He admitted that hard drugs are not produced locally. He was advised on the 12th of July 2015 that a drug exchange transaction was to happen in Lautoka involving HM 046 on 13th of July, 2015. He was not advised as to the persons involved in the drug exchange. He knew an exchange does happen between two people.

118. The Accused mentioned nothing about that the drugs belonged to Simon or somebody else or that they didn’t know actually what was in the bags. None of his officers advised him about it at all even after the suspects were interviewed under caution. He denied that the

Accused dropped Simon at First Landing and then proceeding to the railroad to look for a land. He denied that police had ignored to pursue Simon because Simon was working in his International Crime Unit. He denied that the police had decided to have Simon eliminated from the car before approaching the Accused. He denied that he had known who the owner and possessor of the drugs was. He agreed that the 2nd Accused was not capable of manufacturing 50 kilograms of cocaine. He was not aware if the 2nd Accused had previous convictions or he was in the herbal medicine business.

119. He agreed that Sgt. Meli has not given a statement although he had conducted the presumptive test on the drugs and that that lacuna is against protocol. He called Sgt. Meli first to verify the drugs and then called IO Maciu who took over the responsibility of calling the police photographer into the scene.

PW 2 - ASP Rusila Cakacaka

120. In July 2015, Rusila was based at the Crime Scene Investigation Unit at Lautoka Police Station. Her duties included attendance to Scenes of Crime, sketching of scenes, photographing, dusting of finger prints and uplifting exhibits from the scene.

121. On 13th July, 2015, at around 1740hrs, she received instructions from Inspector Maciu to attend to a scene at Saweni. She proceeded to the scene with two officers including Sergeant Josateki. Upon her arrival at the scene, she took photographs. She photographed the three suitcases that were abandoned on the left side of the road. After taking the photographs of the empty suitcases, she walked further down 15 metres ahead, towards the Marina where the grey Fielder was parked. She photographed the grey Fielder that was parked, the bags that were loaded at the back and the contents of the bags. She also took photographs of the contents of the bags that were laying outside at the back of the Fielder. Inspector Maciu and his team re-packed the contents and placed them at the back of the vehicle as seen in photograph 12. Apart from the police officers, the two people who had come in the grey Fielder were also there at the scene.

122. On the 14th of July, she took photographs of the contents of the bags at a room in the CID Office in Lautoka Police Station in the presence of Inspector Maciu. She made a booklet of all photographs and gave it to Inspector Maciu. She recognised the photograph booklet she

prepared and tendered it in evidence (PE3). She recognised the bag, the suitcases and the wrapped blocks she had seen at the scene [MFI 1(a), (b) and (c)].

PW 3 Simione Vadugu

123. Simione was dismissed from Fiji Police Force in March 2020 on disciplinary grounds. In 2015, he was based at the Lautoka Police Station as a CID Constable. On 13th July 2015, he received instruction from Inspector Maciu to attend a briefing in regard to a drug case in

Lautoka of which information had been received. After the briefing, at around 4 p.m., they (DC Colati, DC Silio, DC Vilimoni and DC Netava) all went with Inspector Maciu to where the drugs was believe to be. When they arrived at Vuda Point, they came to know of the location and proceeded to the crime scene where a vehicle with two suspects Josese Muriwaqa and Joseph Abourizk were present. There were vehicle of other police personal who had been following up the case.

124. Having preserved the scene they waited for the CSI team to come. After the photographs were taken by Sergeant Rusila, they left the scene after 7 pm. back for the Lautoka Police Station with the two suspects and their vehicle with the drugs. At the station, relevant entries were made regarding the suspects and at 1955 hours, they left out to Nadi with both the suspects.

125. Muriwaqa was kept in custody at Namaka Police Station. Inspector Maciu and his team comprising himself, DC Silio and DC Vilimoni proceeded to the Westin Hotel with Joseph Abourizk for a search to be conducted at his room. Certain items like cash were found inside Abourizk's room at Westin Hotel. The items found were entered in a search list and Joseph was escorted back to the Lautoka Police Station where he was kept in custody. His team was tasked to guard the drugs until they were escorted down to Suva. While his team was guarding the drugs, a team came to check on it. He and his team escorted the drugs down to the CID Headquarters at Toorak in Suva and after handing over, his team proceeded back to deal with the suspects.

126. Under cross-examination by Mr Thangaraj, Simione, said that the cash was found in the safe. Abourizk gave the combination to open the safe. Neiko was one of the officers in his team. He admitted that the police officers accompanied Abourizk to Tigers Restaurant before they went

to Westin Hotel. They went to the restaurant on Maciu's instructions because Abourizk wanted to have something to eat. He agreed that, instead of four officers going to the restaurant, Abourizk could have been provided with take away food. Tiger's Restaurant was the only restaurant that was open at that night. He agreed that the fact that they went to a restaurant is not in his statement or in the station diary.

127. He denied that he copied Filimoni's statement. He admitted that apart from his personal details, his statement is identical with Filimoni's statement. Simione said that he could not recall if he escorted the drugs down to Suva because that part is not in his statement. When they arrived at the crime scene in Vuda Point, about 3 to 4 officers were already there.

128. Under re-examination by Mr. Burney, Simione said that Neiko was not included in the team that went to the Westin Hotel. He confirmed that whatever he had stated in his statement is true.

PW 4 Sgt. Colati

129. In July 2015, Colati was stationed at the CID Department of Lautoka Police Station. On13th of July 2015, he received instructions in the afternoon to participate in a briefing by Inspector Maciu at the Lautoka Police Station. He went to the Summer House with Simione, Netava, Vilimoni and Sirilio. At the briefing they were informed that a team of police officers were already pursuing of a vehicle believed to be transporting drugs and it's heading towards Saweni. They all left the Station just before 5 p.m. with Inspector Maciu in the same fleet, they went past the Vuda Police Post until they reached the tramline road. When they arrived at the tramline they were met by SP Neiko and the team of about 4 police officers.

130. They saw a grey Fielder parked a few metres away from Neiko's vehicle. When they arrived at the scene, Neiko and Maciu had a talk and then Inspector Maciu directed to search the suspect's vehicle in which the drugs was found. Abourizk was sitting at the front passenger seat. The boot was open and a suitcase was seen on the ground. Inspector Maciu had called the SCI team. SCI team instructed them to take account of what was there in the bag and the suitcase. The photographer arrived at the scene and she photographed the exhibits. The driver of the Fielder Josese Mureiwaqa was seated in another police vehicle.

131. After photographs were taken, they put the drugs back in to the boot of the vehicle. Aborizk was escorted to the police vehicle. Maciu instructed them to escort the suspects and the drugs to Lautoka Police Station. They came down to Lautoka Police Station and the drugs was kept in the operations room because it was secured. The suspects were at the Crimes Office with Inspector Maciu. Inspector Maciu locked the room and instructed him and Constable Netava to guard the room. They were there the whole night until the next morning when the drug analyst arrived. When he was shown the photographs of the scene he confirmed that they depict the vehicle, the suitcase, the bag and the drugs contained therein.

132. The analyst arrived on 14th July 2015. They were told to open the room for the analyst to come and test the drugs. The analyst conducted the test in the room itself to confirm the drugs. Then they repacked the parcels and kept them in the same room which was locked. On 15th night they escorted the drugs down to Suva for safe keeping. The drugs was in Inspector Maciu's vehicle. When they arrived at Totogo Police Station, Inspector Neiko was already there. The drugs was locked up in the safe at Totogo Police Station. He identified both the Accused in Court.

133. Under Cross-examination by Mr. Thangaraj, Colati admitted that he had to make a fresh statement before his evidence as the full statement made in July 2015 had not been disclosed to the Defence.

134. Under cross-examination by Mr Rabuku, Colati admitted that the first time he heard about this drug operation was around 4.00 p.m .

PW 5 Inspector Sainivalati

135. On the 13th day of July, 2015, when he was based at Nadi Trans-National Crime Office, he received instructions from ASP Neiko to collect information in regards to a drug exchange that was to take place in the Western Division. They left the Nadi office for Lautoka after a briefing to follow up on the information. He was one of the drivers in the fleet. The officer with him was Sergeant Meli. Neiko told him to go down to Vuda Marina where they saw a vehicle parked at the tramline with the suspects standing near Neiko. He came to know them to be Josese and Abourizk.

136. Upon arrival at the scene, they were told to test the drugs that was laid out by Seru Neiko. Sergeant Meli conducted the initial testing with a field test kit where the the result came out positive for cocaine. He was told to get in touch with CID Lautoka and the CID team and the forensic team which arrived at the scene and contacted the forensic investigation. Sergeant Rusila of the forensic team took the photographs at the scene. The two suspects, the drugs and the two suitcases that had been dumped at the scene were taken by the CID officers. He recognised the two suitcases (PE4) and the photographs taken of the suitcases at the scene by Sergeant Rusila.

137. He was part of the escort team of the Investigation Officer that took the drugs down to Suva on the 15th of July. The Investigation Officer took the drugs out of the vehicle and took it in to Totogo Police Station.

138. Under cross-examination by Mr Rabuku, Sainivalati admitted that the briefing in Nadi was about a drug exchange. The source of the information did not reveal who was holding the drugs at that particular time. He did not carry a notebook for the surveillance operation. He was contacted by Inspector Neiko later in the afternoon when Neiko was on his way down to the tramline at the Vuda Marina area. By the time they reached the railway road, Niko had not opened the bags.

PW 6 DC 4655 Waisea Bolabiu

139. DC Waisea was stationed at the Narcotic Unit as at 29 May 2023. He received instructions from ASP Neiko to pick the drugs from DC Ritesh who is the Crime and Exhibit Writer at the Totogo Police Station. At around 1000 hrs., he picked a suitcase and a bag that were sealed and labeled by Forensic Lab and put notes in the Station Diary of Totogo Police Station. ASP Naiko accompanied him. They arrived at the Namaka Police Station at 1400hrs. The two suitcases was received by Inspector Nilesh of Border of Police who put the suitcase and the bag in the safe in their presence. On the next day, (30th)), he went with ASP Neiko to the Namaka Police Station and picked the suitcase and the bag from Inspector Nilesh. He brought them down straight to Lautoka High Court No. 2. On the 30th of May, 2023 afternoon he took the bag and suitcase for safe custody at Lautoka Police Station. WDC 6171 Talei kept them in the exhibit room. They were taken back to the court room in

the morning. He recognised in Court the suitcase and the bag he had brought down from Suva.

PW 7 -Miliana Raravuso Verebainona

140. Miliana has been the Principal's Scientific Officer at the Forensic Chemistry Lab since June of 2012. She obtained a Bachelor's degree of Technology, majoring in Forensic and Analytical Chemistry in 2002 from the Flinders University of South Australia. In 2015, she was based at the Fiji Police Forensic Chemistry Lab in Nasova in Suva.

141. In the evening of 13th of July 2015, she received a call from Inspector Maciu who had informed her that there had been a case of substance that was suspected to be illicit drugs that required analysis. She travelled to Lautoka on the next day, (14th of July 2015) to conduct the preliminary tests. She arrived at the Lautoka Police Station on 14 July 2015. Upon her arrival, Inspector Maciu handed over the substance that required testing. The case was allocated a job number and registered with the Lab in Suva. The preliminary examination of the samples was conducted on the substance. The description of the samples had been filled by Inspector Maciu. There were 34 items in total which she labeled with identification numbers. She identified in Court the suitcase, the bag and the parcels with the labels she had put.

142. After the preliminary examination for descriptions and weighing the parcels, the samples were noted and extracted for the colour test which will give an indication what it is. Then the sample were further analysed in the lab at stage two for the structure. After the samples were extracted the parcels were re-sealed. Extracted samples were taken to the Lab in Suva for further testing. The samples then underwent spectrometer test (FTIR) on the instruments at the lab. The instruments confirmed the results of the colour test and the report was then compiled and given to the Investigating Officer.

143. The colour test concluded that it could be cocaine. Then she proceeded to analysis with the instrument (FTIR) and that analysis further confirmed that it was cocaine. Having put the two results together she compiled a report. At the conclusion of the testing, the samples of white powder tested positive for cocaine and the total weight was 49.9kg. She tendered her report in evidence (PE 5).

144. Under cross-examination by Mr. Rabuku, Miliana further elaborated the testing procedure and said that she first looked at the black suitcase – item no. 1. It had seventeen parcels of white powder wrapped in white tape. Then moved onto three parcels of white powder wrapped in blue tape. She divided the contents of the suitcase into two groups. Then she moved onto the black carry-bag and there were fourteen parcels of white powder wrapped in blue tape. They were divided into three groups. The colour tests were administered at Lautoka Police Station. Not only cocaine alone gives blue colour at the colour test but it indicates that cocaine is also present.

145. The second test (FTIR) which is done with an instrument generates the spectrum for each of the sample. Each of the FTIR generated spectrum is then compared with library of spectrums of accredited forensic drug database of the Canadian Forensic for analysis. The score (0.64) she obtained indicated 64% of the cocaine structure was related to the spectrum of the sample.

146. The first chemical test was not done on each block. Instead, she took samples out of each block and made a composite sample. It was the composite samples that were taken to the lab in Suva to do further testing. She obtained one composite sample for 17 parcels, 1 composite for 3 parcels and 1 composite for 14 parcels in the black carry bag. She used composite samples for two reasons- firstly, because it was time-consuming and, secondly, on her visit to Lautoka, she didn't have enough chemicals to cover all the thirty-four samples.

147. After obtaining results of FTIR, she recommended a purity test or High Performance Liquid Chromatography test (HPLC) to be done to determine the purity or the actual percentage of cocaine in each (composite) sample. Purity test is conducted because cocaine sold in the market is generally mixed with all sorts of substances like baking powder. The purity would be important to determine the sentence. She agreed that the weight (49.9 kg) she obtained included a combination of cocaine plus all other substances that had been added to cocaine. The results of the purity test (HPLC) were also submitted to the Investigating Officer.

148. Since that report had not been disclosed to the Defence in advance, the sitting was adjourned for her to obtain a copy of the report from her phone to enable the Defence to cross-examine on the report. The report which she obtained was tendered in evidence (PE 6). These test results indicated that, in some parcels, the pure cocaine percentage is as high as

76% and in some parcels 62% and in some 54%. She agreed that the total weight of 49.9kg does not reflect the actual or pure weight of cocaine. She did not work out how much pure cocaine was contained in all those parcels.

149. She does not generally recommend HPLC test for every drug case that come to the lab because it is time consuming. The limited staff at the lab handles a large number of cannabis cases that came through every day. The main objective of her lab is to determine whether the substance is illicit drugs or not which she has done in this case.

150. She opined that if some of the parcels did not contain cocaine at all, the purity result obtained from the composite sample would not have been as high as 76%. If the colour test had not given positive results she would have gone on to do samplings for each of the parcels. She did not take samples from each parcel because each parcel had strong reactions at the colour tests indicating that the purity levels were high. She was confident enough to proceed to conduct the testing on composite samples because of the time constrains. Because of the large quantity of drugs involved in this case, the composite sample testing methodology does not produce inaccurate results on HPLC testing process.

151. She denied the proposition that she won't be able to tell whether each parcel in fact contained cocaine, because there is no markings on each block indicating that it contained cocaine. She is confident of the results she has generated. By looking at the levels of the purity of the composite samples she is confident that all of the parcels contained cocaine.

PW 8 Ilaisa Natasere Rabola

152. Rabola is a taxi driver. In the month of July 2015, he was residing at Valeli. He owned the vehicle HM 046 registered with his wife. In July 2015, he gave his car on rental to Muriwaqa's brother, Raikadroka, who was working with him during military time. He gave his car directly to Muriwaqa as he needed his car for two days to pick his friend from Nadi. The rental was $160 for two days. He got his vehicle back from Lautoka Police. Police informed that the vehicle was involved in drugs.

153. Under cross -examination by Mr Rabuku, Rabola said that he knew Muriwaqa used to distribute herbal medicine around Suva area.

154. Before the Prosecution closed its case, the transcript of the evidence (running into 160 pages) given by the Investigating Officer Maciu at the first trial was tendered by agreement along with the exhibits marked through him as evidence in this trial as this witness is not available in Fiji and his presence could not be located.

PW 9 Inspector Maciu (Investigating Officer)

155. In 2015, Maciu was based at CID Lautoka Police Station. On 13 July 2013, he received a call at around 5 p.m. from Sergeant Meli that they had arrested two suspects in a case of drugs. He called CID officers- Constable Elic, Constable Simi and proceeded to Vunda Point where his team met with ASP Neiko and his team- Sgt. Meli, Constable Sainivalati and other officers from TCU. Neiko briefed him of the case which they had arrested the two suspects.

156. After the briefing Neiko showed them the drugs which were in a suitcase and a travelling bag placed in the boot of HM 046. The two suspects were sitting in the TCU vehicle. He saw inside the travelling bag and the suitcase some parcels wrapped with cello tape. There were 14 parcels in the bag and 20 parcels in the suitcase. Padlocks were present on the bags and also the keys. Neiko gave him the padlocks and the keys. Maciu identified in Court the travelling bag, the suitcase and the parcels contained therein.

157. He called Sgt. Rusila to come and take the photographs at the scene. He saw other suitcases in HM 046 containing clothes and a blender. Neiko handed those items over to him. After the photographs were taken, they brought the items and the two suspects to the Police Station. He himself drove HM 046 to Lautoka Police Station. The suspects made no complaints to him at the scene.

158. At the Police Station, he locked all the items- three empty suitcases, two suitcases containing clothes, blender, the suitcase and the travelling bag that contained the drugs in a separate room in the Crimes Office. After locking the main door, he put DC Colati and Netava on guard. He prepared a search list on the same day (13 July 2015) to acknowledge the items which the police seized. He identified his signature and that of Abourizk placed on the search list which was tendered in evidence (in the first trial marked as PE 4). Maciu identified in Court all the bags, and the items seized, one by one, with reference to the

search list he prepared. He said that Abourizk signed the search list to acknowledge that the items found in their possession reconciled with the search list. He did not force Abourizk to sign the search list.

159. On the 14th July 2015, the Analyst Mili called in to test the drugs. In his and Constable Nateva's presence, the tests were done in the same room when the bag and suitcase containing the drugs were handed over to the Analyst. After the tests were done, the travelling bag and the suitcase were sealed by the Analyst with a forensic tape and she retained the samples to be taken with her to the lab. He locked the bags up in the same room. There was no entry made that the drugs was being kept at the Lautoka Police Station.

160. On the night of 15th July, 2015, he escorted the bag, the suitcase and the drugs in a private vehicle driven by Constable Senivalati to Suva. He locked them in the safe at Totogo Police Station and made a record in the Crime Diary (tendered in the first trial as PE5). He got the key and shared its combination with an officer at TCU. He took down the same items back to Lautoka Court House on 11 April 2016 for the trial. He identified in Court the two suspect he took to Lautoka Police Station on 13th July 2015.

161. On the 13th July 2015, he seized some cash and a mobile phone from Abourizk's room at Westin Hotel and prepared another search list (tendered in the first trial as PE 6). It was signed by him and Abourizk. The money was found in Abourizk's room under the bed. He took all the cash into his custody because he believed that it related to the drug case. He kept the cash in the same room where the the drugs were locked and later exhibited to the exhibit writer. He identified the cash and the passport in Court (tendered in first trial as PE 7). No finger prints were done with regards to the parcels because they had already been touched by ASP Neiko. The suitcase containing boxes of items was tendered in evidence. (tendered in the first trial as PE 7)

162. Under cross-examination by Mr Thangaraj, Maciu said that the two page search list (PE4) depicts all the properties taken from the scene and the suspects. He recalls receiving some money from Neiko at the police station which he had seized at the scene from Abourizk. He can't recall the amount because he did not record it. He admitted telling at the *voir dire* that hundreds of Fijian dollars cash which had been seized by Neiko was given to him. The cash taken from Abourizk at the scene is not included in the search list because it's not relevant

to the case. He forgot to bring the items 4 and 5 listed in the search list (PE 4) although they are relevant to the case.

163. Maciu denied that he and Neiko had stolen the cash that was not included in the search list. He admitted that the keys and the padlocks are not included in the search list although they are relevant to the case. He said it's due to a mistake. He denied introducing keys to bolster up their case. He admitted that just above Abourizk's signature on each page there states 'acknowledgement of receipt of copy by the occupant'. He admitted that by signing, Abourizk has admitted receiving a copy of the receipt and that Abourizk has not admitted the accuracy of its content. He admitted that no notes in relation to this case have been disclosed to the Defence.

164. Maciu admitted that Abourizk and Muriwaqa had told the police officers that the person who owned the bags that the drugs were found in was Simon, an American. Abourizk never said that Simon had a boat. Abourizk only told that Simon got off at First Landing. He agreed that this information meant that he had to investigate Simon at First Landing. When Mr. Thangaraj asked the witness whether both the Accused informed that they could take the police to First Landing where Simon was, Maciu's answer was that 'he only told me that Simon got off at First Landing'. He denied that the Accused had told him that they could take him to First Landing because Simon was there. When asked what investigations he had made about Simon or First Landing and whether he had gone there, Maciu said he went there on the following day (Tuesday) and questioned some of the workers who were working outside the hotel for about ten minutes. He agreed that he was inquiring about Simon by his description of his appearance and nationality. He agreed that he did not go to the reception to inquire about a man from Canada or America.

165. Upon being suggested that his investigation into the owner of the bags was inadequate, Maciu said that the other team from TCU was also involved in the investigation to verify the identity of Simon. Maciu agreed that he had never said earlier (in *voir dire*) that TCU was investigating Simon; neither had he mentioned in his statement, Station Diary or Team Crime Diary. Maciu's explanation was that the investigation notes were not disclosed to the Defence because it's only a process of investigation.

166. Maciu agreed that he did not take the clothes found in the bags to First Landing to investigate about Simon. It was not proper to go and show the clothes to the people at First Landing because the police were sure that they will never identify those items. In the investigation, nobody knew a person by the name of Simon. Maciu said he didn't see why he would ever go to the reception at First Landing because of what the Accused had said - Simon got off at the vicinity of First Landing.

167. Maciu agreed that he did not undertake fingerprint analysis. He clarified his explanation why he did not undertake fingerprint analysis, firstly because it was unnecessary in the circumstances, secondly, Neiko had already touched it, and thirdly, it was not possible to get finger prints from the parcels because of the contour and the manner the parcels had been taped. His overall explanation was that it was not relevant to take the fingerprints due to all these circumstances. He agreed that it would have been possible to get fingerprints from the four cardboard boxes found in one of the bags. He agreed that if no fingerprints of the Accused were not present on any of the bags and the parcels, that finding would have supported the defence that the Accused had never touched them. He said that they are not dealing with DNA testing in the cases of drugs.

168. Maciu agreed that he is not aware who owns the bags and the drugs found therein. Their focus was on possession. He cannot say if either of the Accused had touched any of the bags. He admitted that there was an entry made by Abourizk's lawyer in the Station Diary complaining of his conduct and that of his team. He admitted that the pages containing the entry are not present in the Station Diary that was disclosed. He admitted that the entry was with regard to denial of Abourzk's human rights.

169. He could not recall giving evidence at the *voir dire* proceedings to the effect that hundreds of dollars that was taken from Abourizk was given to him by Neiko. He could recall receiving some money at the police station but he could not recall the exact amount which he said was not more than hundred dollars. He doesn't know how much money Neiko found on the two Accused. He did not give a receipt to Neiko when transferring the property to him. No entry was made either in the Station Diary or Crime Diary.

170. Maciu agreed that under item 6 in the two page (scene) search list, it had originally been written that the three suitcases were 'found inside the vehicle' and those words had been

crossed out to replace them with the words 'bush along Vuda Point tramline'. He said that crossing out was done before Abourizk had signed the search list. He could not recall if he had said in the voir dire that he could not recall when the crossing was done.

171. Maciu admitted that he failed to maintain some records as required by Force Standing Orders (FSO) in respect of money seized from a suspect and of issuing receipts to account for the same. His explanation was that he was busy. He thought of putting everything in the search list after the Westin search. His second explanation was that FSO are mere guidelines of good practice and as a matter of practice, they do not issue receipts to the suspects.

172. Maciu told Abourizk that his (Maciu's) money was with him. He denied that he did not follow the FSOs because they had stolen money from the Accused. He did not follow FSOs on transfer of money from one officer to another because Abourizk's money was always in his possession. He admitted having spent Abourizk's money ($ 20 dollars) on Abourizk's request to feed him at the Tiger's Restaurant and also on some other occasions. He bought chicken chips, fruits juice and Fiji water for Abourizk considering the aspect of his human rights. He agreed not making entries in the Station Diary about feeding the suspect at Tiger's.

173. Maciu, under cross-examination, said that the money was found under the mattress of Abourizk's room. He denied that the money was in the safe and that its combination had been provided by Abourizk. He admitted having heard from Abourizk's wife that she withdrew $ 9500/- from Nadi Westpac and receiving a receipt for withdrawal. He said he attached the receipt to the police docket that was sent to the DPP's office. When it was suggested on the premise that the bank showed that the money was withdrawn on the 13th July, from Westpac Nadi, Maciu's reply was that he could not recall the date. (It appears from the record that the basis of cross-examination had been a bank statement which was in Mr Thangaraj's possession allegedly showing a sum of $ 9499.06 had been withdrawn on the 13th July 2015. That document had not been tendered and was withdrawn when a copy was asked for by the Judge and the Prosecutor for inspection). Maciu's evidence was that Abourizk's wife told him about the withdrawal after Abourizk had already been questioned.

174. He admitted that the fact that Neiko was also with him at Westin Hotel is not mentioned in his statement but he remembers putting his name in the search list. The type of currency withdrawn will be better known by Abourizk, his wife and the bank. He included in the search list all the money which he found in Abourizk's room. (It appears from the record that on the following day (16 April 2016) Mr. Thangaraj had sought permission to correct his premise of questioning that the money was withdrawn by Abourzk's wife on 13 July 2015. That permission had been granted). With that permission, Maciu was asked if he knew that when the entry in a bank statement shows that the money was withdrawn on 13th of July, whether that withdrawal could actually have been taken place on 10th July. Maciu's answer was that 'that can be clarified by the bank'.

175. Maciu admitted that he failed to strictly follow the FSO 203 which dealt with crime scene investigation such as taking measurements and sketching, fingerprinting, making notes of the positions of the exhibits and their labelling, etc. and keeping the exhibits in the exhibits room.

176. Under cross-examination by Mr. Anthony, Maciu admitted that Muriwaqa also mentioned Simon being the owner of the bags. There was no property found on Muriwaqa except his purse containing his driving licence. He admitted that no separate search list was prepared for Muriwaqa. But his name was put in the search list.

177. Under re-examination by the Prosecutor, Maciu said that no complaint has been made by Abourizk's lawyer about ill treatments at the hands of police except the Station Diary entry made by Mr. Aman Singh towards the end of the investigation. Abourizk had never made a report against him for stealing his money.

Case for Defence

178. Joseph Abourizk (1st Accused)

Abourizk is Australian and was 30 years old in 2016. After High school, he was involved in number of 'businesses'. He is married and his wife had given birth to a child when he was in remand for this matter. He has no previous convictions or never been charged in a criminal matter.

179. In July 2015, Abourizk was staying in Westin Hotel Denarau. While in Westin, he met a middle aged man from Canada at the Golf Club. This man introduced himself as Simon. He found Simon charismatic, likeable and seemingly well-educated. He started a conversation with Simon where Simon said he owned a yacht which provides chartered services. Simon suggested that he could arrange a day out on his yacht for Abourizk and his wife. Abourizk thought it's a good idea, great to do something for his wife. Simon offered the trip roughly for $1,400. They talked about the details and exchanged telephone numbers. He saved Simon's phone number on his phone that was later seized by police at the arrest.

180. His wife arrived in Fiji on 9 July 2015. On the 10th he and his wife withdrew Fijian dollars from Westpac, Nadi. This money had nothing to do with drugs. Saturday morning (which would have been 11 July) – Simon contacted him and cancelled the trip booked for him and his wife. On Sunday night, (12 July 2015) his wife left Fiji to report for work on Monday. Simon called him again on Monday (13th July). Muriwaqa was with him when Simon called. Simon offered to take them on the trip if he and his wife were still interested to come on the boat. Abourizk informed Simon that his wife had already left Fiji. Simon felt really terrible for letting him and his wife down on the Saturday and offered a trip for free on Monday. He accepted the offer and asked Simon if his friend Muriwaqa could also join the trip. Simon had no problem with that.

181. It was agreed that they would meet up on Monday at the First Landing Beach Resort for the boat trip. On Monday, he went to Fist Landing with Muriwaqa where they met with Simon. Simon informed that there was a slight delay as his crew members had gone up an hour trip to North in the morning to pick up a marine radio for the boat. Simon further informed them that he needed to go and meet his crew to make sure that they brought the correct radio for the boat that was moored at Vuda Marina. Simon asked if they could take him for a half hour drive up North to meet his crew. He agreed and Muriwaqa drove them to the place called Ba town. The car stopped on the main street where the shops were. Simon crossed the road and spoke to the three men of his crew. He took photos on his phone of Simon and his crew.

182. Upon his return to the car, Simon had 'good and bad news' for them. Bad news was that the crew had got the wrong marine radio and the good news was that they would still have time

to make it to the boat trip. To save time, Simon suggested that the crew go and swap the marine radio and that they will take the crew's luggage to the boat. Simon and his crew placed the luggage in the boot and some on the back seat of the car. Neither Muriwaqa nor he touched any of the bags. They didn't know what was in the bags. Simon got into the back seat and they drove back to First Landing. When arrived at First Landing, Simon needed about fifteen minutes to check out of the hotel and in 15 minutes he would meet them at Vuda Marina which is next door. Simon left the crew's bags with them.

183. As he and Muriwaqa came out of the First Landing car park, he just recalled the sign board he had seen at Denarau, advertising a land for sale in First Landing. Having realised they were already at First Landing, he commented to Muriwaqa about this land. Muriwaqa suggested that they quickly go and have a look as it is only one minute drive. Muriwaqa drove to this point and was pointing out the lands. They could not drive as far as they wanted to go as a cane loaded cart was on the track blocking the road. That's where he sighted the car that Inspector Neiko and other two officers had come, at a distance roughly of three metres. As they could not go any further down, they had to wiggle up and down to do a full turn to face the direction from which they came in.

184. Before the police team arrived there, neither he nor Muriwaqa touched the bags that Simon and his crew had loaded into their vehicle. They never threw any luggage from their car, nor repacked anything from the luggage as described by Neiko. He saw Muriwaqa and Neiko in a conversation in Fijian language where Muriwaqa was pointing at the land. Inspector Neiko asked if he was from Canada, Abourizk replied he is Australian. Neiko then asked him what he was doing there. He replied they were looking at the land. Their property- his cash and his phone and Muriwaqa's wallet and phone were taken by police. The money was never returned to him. No food was bought from the money took from them. They were asked to 'shut- up' and sit in the car, wearing the seat belts. He or Muriwaqa never touched or saw any keys or padlocks.

185. Sometimes later, Inspector Maciu and other police officers arrived. Maciu was in a conversation with other police officers and then asked him who the bags belong to. He told them that Simon was at First landing and would still be there if they could go there. Maciu asked him where he was staying. He said at Westin. They then asked if he had drugs in his room. He replied in the negative. Then asked if he had any money in his room he said 'yes'

he had AU$ 8000 of his holiday money and more than FJD 14000/- which he and his wife withdrew from Westpac Nadi.

186. Then they were driven away from the scene. He thought they were heading to First Landing. But they never stopped at First Landing. Officers said they were going to buy food from his money. On their way, the car was parked right outside Tiger's Restaurant and the food was brought back to the car. They stopped at a service station and ate the food they bought.

187. Then Abourizk gave a detailed description of how bad the condition of the cell at Lautoka Police Station was and how bad he was treated by the police officers. According to this description, the officers had gone to the extent of stripping him naked, making him squat up and down and lift up his testicles to search for drugs.

188. Later at night, he was taken to the room at Westin where he was staying. Maciu was already there. He agreed that the money was seized from his room but the money, his passport and the purse were in the safe which they opened when he gave the combination. He did not take the wallet with him because he was about to go on a boat.

189. After the search at Westin, he was taken back to Lautoka Police Station where he was made to stay without food until Tuesday night. He again described the bad condition of the cell and of the ill treatments he received. He was never accessed by a lawyer by the name of Sharma. He was not allowed to contact his wife until Wednesday when she rang up the police station.

190. He was shown two bags at the police station and asked to pick and have a close look at the parcels in the bags. They asked if he knew what the content was. Maciu took him to downstairs and demanded money. He asked Maciu to use the money he had already seized. But Maciu said he could not use that money for some procedural reason. Then his wife transferred money through Western Union. Still he did not receive any benefit or his money back.

191. Under cross-examination by the Prosecutor, Abourizk testified that he knew Muriwaqa through his friend Saul who lives in Australia. Saul is Muriwaqa's cousin. This was his third trip to Fiji. The first time he came with Saul to look at the land Saul had inherited. His

second trip was for business, and the third trip was for business with Muriwaqa and a holiday for himself and his wife. On this trip, the first time he met Muriwaqa was for lunch on Wednesday (That would have been Wednesday 8th July 2015), the same day he had met Simon at night. They were supposed to go to First Landing for the boat trip on Monday the 13th July 2015. They were to meet Simon on Monday at the reception area of First Landing.

192. Abourizk admitted that Simon was a complete stranger to him when he first met Simon. They had reached Ba town sometimes after lunch. He was not frustrated when he heard the 'bad news' from Simon. Simon told him that the luggage that was loaded into HM 046 was the crew's luggage. The crew did not follow them from Ba. Simon did not tell them where he was going after his check-out. From Ba, they returned to First Landing probably between 3 and 3. 30 p.m. The plan was to drop off the crew's bags at Simon's boat and Simon was to travel with them in the boat after his check out. Simon said he will be dropping them off at Fijian Resort at Sigatoka after the trip. That's why he brought cash with him to catch a taxi to come back to Vuda. Simon never gave money to take them to Ba to pick the radio.

193. It took them only 2-3 minutes to drive from First Landing to where they finally stopped. He never looked back to see if anyone was following. Abourizk agreed that Neiko had told Court in his evidence that HM-046 never made a stop at First Landing. He agreed that if Neiko was following them, he (Neiko) would have seen them but he could not say if Neiko was following them or not. He or Muriwaqa never got out of the car at any time after dropping Simon off at First Landing. He never discussed Neiko's car with Muriwaqa at any time before coming to their final destination.

194. His wife withdrew AU$ 9500.00, the conversion to Fijian was roughly FJD 14,216. Abourizk then said his wife withdrew FJD (and not AU$) from Westpac bank. The money was withdrawn on 10th (July) to be given to Muriwaqa so that he can set up a business. He had (?) 8800/- in his room. He denied that the money was given to him by Simon to pick up items from Ba. Abourizk said he was never arrested by Neiko when they were stopped by police and no rights were given at that time by Neiko. He was just sitting in the car until the Lautoka police team led by Maciu arrived at the scene, that was roughly about one hour after the stoppage. Maciu ordered him to get out of the car and showed him the opened suitcases. That's when he was arrested and taken to a police vehicle. When they left the scene, it was dark. He admitted that he had saved Simon's phone number on his phone and it

was with him until it was taken by police. He wouldn't know if Simon called on his phone because it was with the police. He agreed that when Maciu was giving evidence it was never put to him (Maciu) that he was stripped naked, and made him squat and his testicles lift. He agreed that he has never made any complaint against Maciu alleging that he (Maciu) stole money from him. He was waiting for his Sydney Counsel to advise him on the complaint. He agreed that he never made a complaint to the High Court Judge when he was represented by a Counsel.

195. Abourizk denied that he was aware that the bags contained drugs. He denied that there was a deal that he would be paid money by Simon. He denied that the reason police could not get Simon was because he had never stopped at Fist landing to drop Simon there.

196. Under re-examination, Abourzik said it took not more than 20 minutes from when Simon got off at First Landing and when Neiko took his phone.

Analysis

197. The Prosecution ran its case on the basis that the substance found in the bag and the suitcase (the bag and the suitcase will herein after be referred to as containers for the purpose of convenience) contained 49.9 kilograms of illicit drugs, namely cocaine, and that the Accused were in joint possession of the illicit drugs to the exclusion of any other person except each other.

198. There are no admissions in this case. However, there is no dispute that the two containers containing 49.9 kilograms of the substance, later found to be cocaine, were found in HM 046 driven by the 2nd Accused Muriwaqa. There is also no dispute that the 1st Accused Abourizk had been travelling with Muriwaqa in HM 046 for a considerable distance and time with the knowledge that those containers were in their vehicle. Therefore, the two containers were physically in the possession and custody of the two Accused. The crucial issue that this Court is called upon to decide is whether the Accused persons, in its legal sense, were in joint possession of the illicit drugs found in the containers to the exclusion of any other person except each other.

199. To establish this charge, the Prosecution must make me sure that the Accused had the containers with something in it in their custody or control; and that the Accused knew that the containers were in their custody or control and that the something in the containers was illicit drug, namely cocaine. Once these elements are satisfied it is not necessary for the prosecution to prove that the Accused knew that the substance was illicit drug let alone a particular illicit drug until sufficient narrative is available in evidence raising the issue of

lack of knowledge and control on the part of the Accused. If sufficient evidence to that effect is available, the Prosecution must prove beyond reasonable doubt that each Accused in fact knew that the bags contained illicit drugs.

200. Both Accused raised the issue of lack of knowledge by way of cross-examination and, the 1st Accused, by adducing evidence. Therefore, the Prosecution at the end of the day must make me sure beyond reasonable doubt that the Accused did not know that the containers found in their custody contained illicit drugs. The overall burden of proof is on the Prosecution.

201. The 1st Accused did not challenge the finding of the Analyst that the substance contained in the containers is illicit drug, namely cocaine. He did not challenge the evidence adduced to prove the chain of custody. Mr. Rabuku cross-examined the Analyst for a considerable time, but it is clear that his challenge is not focused on the finding of the Analyst that the substance found in the containers is illicit drugs, but its purity. The purity may be relevant to the sentence if the Accused are convicted but not to the determination of guilt. I am satisfied that the Prosecution proved beyond reasonable doubt the chain of custody and that the substance found in HM 046 is cocaine. I will explain later why I find the chain of custody or continuity proved in my analysis of Maciu's evidence.

202. Both Accused deny that they were in control of the illicit drugs and that they had any knowledge that the two containers contained illicit drugs. There are two Accused and I must find the facts in respect of each Accused separately.

203. The Prosecution case is that both Accused are presumed to be in joint possession of the illicit drugs by virtue of their joint control of HM046 at the material time. The 2nd Accused

Muriwaqa admits that he was the driver of HM 046 at the material time. He had taken this car for rent from Rabola (PW -8) for two days to pick his friend from Nadi. There is no doubt the friend he referred to is the 2nd Accused, Abourizk. Muriwaqa has paid FJD 160.00 for two days and was driving this vehicle at the material time. Therefore, he was in control of HM 046 at the material time. In view of Section 32 presumption of the IDCA, it shall be presumed, until the contrary is' proved' that he was in possession of the illicit drugs.

204. I have already concluded that the nature of the burden on the Defence under Section 32 is evidential. Therefore, the Accused can raise the defence of lack of knowledge and control by an assertion in his police statement or by adducing evidence or by pointing to the evidence of other witnesses that is consistent with his defence.

205. In this case, the 2nd Accused elected to exercise his right to remain silent. As I said, giving evidence is not strictly required to raise the issue of lack of knowledge and control. He can raise his defence by pointing to the evidence adduced either by the Prosecution or the Defence that is consistent with his defence. The 1st Accused produced evidence raising the issue of lack of knowledge and control. Muriwaqa's Counsel Mr. Rabuku in the process of cross-examination and by pointing to the evidence of the 2nd Accused raised his defence adequately.

206. However, raising the issue *per se* is not sufficient to discharge his (evidential) burden. The evidence pointed to should be sufficient so as to be capable of supporting his defence. In other words, the evidence pointed to should be credible and believable so as to create a reasonable doubt in the Prosecution case.

207. It is therefore necessary to draw logical inferences from the proved facts to determine whether the Accused have discharged their (evidential) burden. Once they have discharged their evidential burden, it is for the Prosecution to prove that the Accused were in fact in control and that they had knowledge of the illicit drugs beyond reasonable doubt.

208. The 1st Accused was a passenger of HM 046 at the material time. Is he a mere passenger or someone who had control over the vehicle? The Prosecution argues that Abourizk is also in control of this vehicle. It invites the Court to draw necessary inferences from the facts

proved in this regard. Muriwaqa rented this car to pick Abourizk from Nadi. Abourizk associated himself with Muriwaqa, whom he described as his trusted friend and business partner in Fiji. It is on his instructions that Muriwaqa had driven this vehicle to Ba town where these containers were loaded into that car. He was travelling in this car with Muriwaqa for a considerable period of time and distance. The car had been driven to its final destination on Aborizk's instructions. He knew that the containers existed in the car and were therefore in their custody. I am satisfied that the 1st Accused was in control of HM 046 with Muriwaqa at the material time.

209. It is therefore necessary to draw logical inferences from the proved facts to determine whether each Accused has discharged the evidential burden in the manner described above as to the issue of lack of knowledge. It is undisputed that both Accused with the knowledge that the containers were in their vehicle, had driven HM 046 from Ba town to an isolated and impassable gravel road in Vunda where it finally came to an abrupt stop. The main plank in the Prosecution case is the inherent implausibility that both Accused, who were alone in HM 046, could possibly be unaware that there was a huge consignment of illicit drugs inside their vehicle.

210. In addition to that, in support of its argument that both Accused had knowledge and control of illicit drugs, the Prosecution invites the Court to draw necessary inference from the following strands of evidence:

(1). Both Accused transported the bags containing the illicit drugs over a significant distance;

(ii). Both Accused were observed to be present at the rear of HM 046 as bags were repacked

(iii) The keys to the locks on the two bags containing the illicit drugs were found inside HM 046

(iv) A large sum of cash was found in the hotel room occupied by the 1st Accused which they say was wholly incompatible with the 1st Accused being in Fiji solely for the purpose of tourism.

211. The Defence attack on the Prosecution case is twofold; Firstly, the Defence endeavours to create a reasonable doubt about the possession of the illicit drugs *vis-a vis* the Accused on

the basis that the Accused may have been duped into transporting the bags containing illicit drugs by making them believe that the bags contained legitimate items, by a person named Simon who allowed the Accused to drive away with those bags (innocent dupe defence). The second attack, launched basically by the 2nd Accused, was based on police fabrication. One may find the two theories inconsistent to each other. I would assume that the attack based on alleged police corruption /stealing launched by the 1st Accused is aimed at discrediting the version of police witnesses.

212. There is no dispute that both Accused transported the bags containing the illicit drugs over a significant distance. The dispute is basically over the other strands. Let me begin by analysing the evidence on strands (ii) and (iii) mentioned above.

213. Prosecution substantially relies on SP Neiko's evidence to prove its case. Neiko's evidence is extremely important for the Prosecution for two reasons. Firstly he is the only eye witness called by the Prosecution to testify to the 'repacking saga', and locating the keys to the locks on the two bags underneath the passenger seat, which evidence if believed, would have directly linked the Accused to the illicit drugs. Secondly, his evidence is important to discredit the innocent dupe defence raised by the Accused that the bags were left in the car by the man called Simon. I would divide the analysis of Neiko's evidence into two parts on those lines for the purpose of evaluating its credibility.

214. Firstly, I would deal with Neiko's evidence on 'repacking saga' and locating the keys to the bags in HM 046. The Defence says that there is an implausibility at the heart of SP Neiko's evidence and that Neiko fabricated that evidence because he knew that without that evidence there was absolutely nothing to contradict the Defence version that the Accused knew nothing about the drugs in the bags.

215. It is not implausible that the Accused transported a large consignment of drugs to an isolated place and there they repacked the consignment. It is Neiko's evidence in this trial that this observation was made from a distance of 20-23 metres while he was still seated in the front passenger seat of the Pajero which was parked at a higher elevation; nothing was blocking his view; the repackaging took place for more than 5 minutes. If this evidence is true, it is not implausible that this observation having been made from a distance of 20-23 meters without their presence being noticed by the Accused.

216. However, Neiko agreed having testified at the first trial that the distance between the two vehicles was only two metres and that they saw 34 parcels being transferred into another bag and that that process lasted only a few seconds. He agreed having said in the first trial that the two men transferred 50 kgs of drugs from some bags to another bags within few second while they were right there watching them. It is implausible that the Accused repacked the consignment in full view of others, not to mention police officers.

217. There is obviously material inconsistency between these two versions. Neiko denied that he changed his evidence and increased the distance between the two vehicles to 20-23 mitres because he was trying to pretend that he was far away to make out who actually threw the bags. However, in view of those material inconsistencies, I am unable to reject the Defence argument that Neiko changed his evidence at this trial in a damage control move to make his implausible evidence more credible.

218. SP Neiko had received information that a drug exchange was to take place in Lautoka. The surveillance operation was specifically planned accordingly. It is expected of him as an experienced senior police officer to accompany at least one other officer in the drug operation to facilitate corroboration. His evidence in this trial is that he had only his driver with him when this vital observation was made. His evidence was uncorroborated when it would have been easy for the Prosecution to call at least the driver of the vehicle. The driver's name was not even mentioned in Neiko's evidence. Neiko agreed that there were no statements from any other officers who were with him at the time of repacking. The suggestion was that they must have been unwilling to make their own witness statements because they knew that what he proposed to say was untrue.

219. It is noteworthy that, at the first trial, Neiko had said that he was with two other officers at all material times. This significant shift in his evidence would have been to avoid criticism and embarrassment he must have faced at the first trial about lack of corroboration on this crucial point. Although there is no rule that corroboration is required for the Court to believe a witness, the lack of corroboration in a case of this nature is something to be reckoned with. For example in a rape case, the offence often happens in a secretive environment leaving no chance of corroboration. Whereas this is a well-planned drug operation.

220. Neiko admitted that, according to Force Standing Orders (FSO), police officers were supposed to carry note books and make notes. He has never disclosed his notes or those of any member of his team. He did not refer to his notes in his testimony to refresh his memory which he is entitled to do as a police officer. The contention of the Defence is that he chose this unprofessional course to pave way for him to say whatever he wanted to say at the trial and that he had conveniently disappeared the notes because had they been disclosed they would have revealed a version of events very different from that being advanced by his evidence. This argument cannot easily be dismissed.

221. Admittedly there are noteworthy omissions *vis-a-vis* his previous statement with regards to the Accused being cautioned, the exact places where the articles were found, that he saw the bags being thrown out of the car, that there were padlocks on the containers, that the keys to the padlocks were found underneath the front passenger seat etc. The suggestion was that because they did not feature in his witness statement, they could not have been true.

222. Neiko's admitted mistake as to the date of his statement at the previous trial also raises doubt about the contemporaneity of his statement.

223. Neiko said that the Accused were cautioned soon after Sgt. Meli confirmed that the bags contained illicit drugs. Being an experienced police officer, it is sensible, as Mr. Burney argued, for him to wait for the test results to put the caution even if he had seen the repacking. The question is why he would have to wait to know the test results when he already knew about the drug exchange involving this particular vehicle. I do not see any valid reason for him to wait for the test results to put the caution in those circumstances. It is logical to accept the argument that Neiko did not put the caution because he had never seen repacking the drugs.

224. Neiko said at this trial that the repacking took place for about five minutes. He agreed testifying at the first trial that it took only few seconds. It is implausible that the Accused could have repacked with cello tapes a large consignment of drugs in few seconds. The suggestion that Neiko changed his evidence to look it more plausible cannot be ruled out.

225. When Neiko approached the Accused' car, he asked Abourizk what they were doing there. Neiko accepted that he did not ask Abourizk about what he saw the Accused were doing.

That would have been the obvious question to ask if he had actually seen them repacking the items. The suggestion that he did not ask that question because he never saw what he claimed he saw is logical.

226. Neiko accepted that he ordered his driver to reverse the Pajero to pave way for the Accused to move their car forward. It would have been surprising for him to move his car out of the way to let the Accused' car pass in view of his claim that, by then, he had seen repacking and got information about this vehicle.

227. Neiko said he saw three suitcases being thrown out from the boot of HM 046 after the repacking and that those bags, upon his arrival at the scene, were later picked up by Inspector Maciu. There are lots of implausibilities and inconsistencies in this story. Firstly, Maciu did not say that he picked up those bags from the bushes. Maciu's first mention of these suitcases was in relation to the locking them up at the police station. Secondly, Maciu admitted that under item 6 of the search list, it had originally been written that the three suitcases being 'found inside the vehicle' and those words had later been crossed out to replace them with the words 'bush along Vuda Point tramline'. Although Maciu said that crossing out was done before Abourizk had signed the search list, he in the *voir dire* had said that he could not recall when the crossing was done. It is reasonable to assume that the words 'bush along Vuda Point tramline', have been added later.

228. The photographer Rucila had captured these suitcases in her camera about 15 meters away from where HM 046 was parked. It is implausible that those big suitcases were thrown away to such long distance. Fourthly, it is implausible that all these three suitcases with other suitcases and the bag could possibly fit in to the boot of HM 46. Those three suitcases had not been tendered by Maciu in his evidence at the first trial. Inspector Sainivalti said that he saw only two suitcases being dumped at the scene. He identified only two suitcases in Court. Neiko admitted that at the *voir dire* in the first trial, nothing was mentioned about the throwing of bags. In view of these inconsistencies and implausibilities, the Defence suggestion that those three suitcases have later been introduced to bolster up the Prosecution case cannot be ruled out.

229. With regard to the evidence on the keys and the padlocks also, there exists a number of implausibilities and inconsistencies. None of those items are included in the search list and,

not tendered in evidence. If the padlocks were present on the containers, there is no reason for them to be removed to a separate place. Maciu admitted that those are important pieces of evidence in the Prosecution case despite them being not tendered in evidence. There is no mention of those items in the witness statements either. According to the evidence at the first trial, the keys to the padlocks had been found in the car, but not specifically underneath the front passenger seat where Abourizk was seated.

230. Neiko agreed that the finger prints were not taken from any of the items. He also admitted that if the Accused had touched the containers, locks, keys or the parcels, a fingerprint analysis would have revealed the truth or otherwise of his evidence relating to repacking of parcels, and throwing away of the empty suitcases. Sgt. Rusila of CSI unit confirmed that finger printing testing facilities are available in Fiji. Therefore, the Defence argument that the fingerprinting was not done in order to suppress the truth about the repacking saga cannot be completely rejected. However a proper conclusion on this must be based on what Maciu had to say because he is the Investigating Officer who would finally decide whether to conduct such an analysis. (We now know from Maciu's evidence that the finger prints analysis was not done and why this was not done will be further analysed with Maciu's evidence).

231. For the reasons given above, I am unable to accept SP Neiko's evidence that he saw some items being repacked into a bag and a suitcase on the boot of HM 046 and after the repacking, three suitcases were thrown into the bush. I am also not in a position to accept that the bag and the suitcase that contained cocaine were padlocked and that the keys to the padlocks were found inside the car. (This finding on the padlocks and keys will later be used to analyse the version of the Defence). I cannot help but to reject that part of SP Neiko's evidence.

232. The second important aspect of SP Neiko's evidence relates to his claim that he undertook a hot pursuit for HM 046 from Navutu roundabout right up to where it finally stopped in the gravel road at Vuda Marina. This part of Neiko's evidence is important to my assessment of Abourizk's evidence that a man by the name of Simon was dropped off at the First Landing before HM 046 reached its final destination.

233. Neiko's evidence is that he sighted HM 046 for the first time at Navuto roundabout and his Pajero maintained five car distance right up to the gravel road where it finally stopped. He was sure that at no time HM 046 turned into First Landing. On the other hand, Abourizk's evidence is that they went into First Landing to drop Simon off at the car park. Who is telling the truth? Bearing in mind that the overall burden of proof squarely rests on the Prosecution right throughout, I would embark upon an exercise to determine where the truth lies. If I find the version of events of the Defence case to be true or may be true, both Accused are entitled to be acquitted because it leaves a reasonable doubt in the Prosecution case.

234. There is no dispute that HM 046's starting point with the drugs had been Ba town and the destination, the rail track running across the gravel road at Vuda Marina. As to the time of the meeting of the two vehicles, there is no big difference in the two versions. According to Abourizk, they had reached Ba town somewhere after lunch and returned to First Landing approximately 3-3.30 p.m. According to Neiko, he first sighted HM 046 at around 3-3.30 p.m. It is also not disputed that Neiko must have sighted HM 046 somewhere between First Landing and the gravel road. Therefore, the divergence is mainly focused on the exact location at which HM 046 was first sighted by Neiko. The resolution of this dispute is important because if Neiko had first sighted HM 046 somewhere between First landing and the gravel road, it is possible that he had no chance to see HM 046 going into First Landing.

235. According to Neiko, he was standing at Navutu Roundabout, when he first sighted HM 046 heading towards Nadi at around 3.30 p.m. After sighting HM 046, he had to wait there for three minutes, until his driver brought the Pajero to initiate the pursuit. It was suggested that within that three minutes, HM 046 would have gone out of sight. Neiko agreed that it would have gone about two kilometres. However, they were still able to catch up HM 046 because of the traffic along the Queens High Way. He further argued that if they had missed HM 046 in that stretch, they would have headed right up to Nadi without turning into Viseisei road. That argument is sound. According to Neiko, the distance between Navutu Roundabout and Viseisei junction is approximately 10 kilometres and it is not impossible for the Pajero to catch up the Fielder, especially during traffic hours, before it turned into Viseisei road even if it had gone out of sight. (It is noteworthy that it was a Monday and 3-30 p.m. is school traffic time).

236. Abourizk had agreed at the first trial that Neiko had told Court in his evidence that HM-046 never made a stop at first landing. He had also agreed that if Neiko was following them, he (Neiko) would have seen them but he could not say if Neiko was following them or not.

237. It appears that there are some inconsistencies in Neiko's evidence in relation to his previous evidence as to the distance between the location at which he first sighted HM 046 and its final destination. He admitted having agreed at the first trial that he saw HM 046 for the first time on the Queens Highway about 1km from the scene of the arrest. He also admitted having agreed (at the first trial) that he followed MH 046 for 1 kilometre.

238. It is obvious that Neiko's reading or assessment (at the first trial) of the distance between Navutu Roundabout and Vuda Marina cannot be correct. Anybody travelling along the Queen's High Way would realise that the distance between Navutu roundabout and Viseivesi junction alone is more than five kilometres, (according to Neiko's estimation it is approximately 10 kilometres), certainly much more than one kilometre. The correct distance and the picture of the crime scene could have been revealed if the proposal for a scene visit was not opposed by the Defence. It would not be incorrect to say that as to the distance between one place to another in a main and only Queens Highway of this country is something which even judicial notice could be taken of.

239. According to Abourizk's evidence, a drive between First Landing and where his vehicle finally stopped alone takes 2-3 minutes, or next door. Neiko described this distance as being about 2 kilometres. What is important is that Neiko in both trials has maintained that the first sighting took place somewhere on the Queens Highway and that the final destination was the gravel road (detination is undisputed). Certainly that distance is more than one kilometre. Therefore the obvious mistake which Neiko corrected in this trial does not allow me to reject that part of his evidence.

240. Evidence of Sgt. Colati and Inspector Sainivalati confirmed that they were contacted by Neiko while he (Neiko) was still pursuing the suspected vehicle. The evidence of Colati was almost unchallenged. Only deficiency was that his full witness statement had not been disclosed to the Defence prior to the trial. However, the crucial part of his evidence was that by the time he was called to the briefing by Inspector Maciu at around 4 p.m, the team of police officers led by Neiko were still pursuing the vehicle believed to be transporting illicit

drugs and was heading towards Saweni which is on the Queens Highway. That evidence was not challenged by the Defence on the basis of his previous statement which was disclosed to the Defence. The crucial part of Sainivalati's evidence was also not challenged. When he received the information from Neiko later in the afternoon, Neiko was still on his way down to Vuda Marina.

241. According to Abourizk, the distance between First Land and their final destination is 2-3 minutes' drive. According to Neiko, it was about two kilometres. It is obvious that the first sighting of HM 046 cannot take place within this short stretch.

242. I accept that Neiko had first sighted HM 046 on the Queens High Way and from there he had followed it to its final destination which is the gravel road at Vuda Marina. As a result of which, I accept that SP Neiko would be in a position to rebut Abourizk's claim that he had dropped Simon off at First Landing. I accept Neiko's evidence that he effectively monitored the movement of HM 046 from Queen's High Way to its destination at Vuda Mariana and that it never turned into First Landing. I also accept the undisputed Neiko's evidence that the bag and the suitcase containing 34 blocks of cocaine were found in HM 046 in which the Accused were travelling together.

243. I shall now give my reasons on what basis I accepted some part of Neiko's evidence and rejected the other parts. When the Judge sat with the assessors, we used to go give the assessors the direction that in assessing the evidence, they were at liberty to accept the whole of the witness's evidence or part of it and reject the other part or reject the whole. The judge sitting alone should be guided by the same direction in evaluating evidence.

244. In Chandra v State [2015] FJSC 32; CAV21.2015 (10 December 2015) Dep J observed as follows:

> In the past, the courts applied the maxim '*Falses in Uno Falses in Omnibus*' - meaning "He who speaks falsely in one point will speak falsely upon all" - to a witness who gives false evidence. The present trend is instead of rejecting the totality of evidence, to act on that part of evidence which is true and reliable. This approach is known as divisibility of credibility. The learned judge should have impressed upon the assessors that due to serious inconsistencies and infirmities in David's testimony he is an unreliable witness and not worthy of credit and it is unsafe to act on his evidence. However the assessors should be informed that they are free to act on his evidence provided he had given a satisfactory explanation or can act on parts of evidence corroborated by independent evidence. The trial judge had failed to give adequate directions regarding this matter.

245. The parts I have accepted are plausible in the circumstances of this case and are consistent with other evidence led in the trial. I concede that there are some infirmities in the investigation process and some basic guidelines in the Force Standing Orders have not been followed. However, that does not prevent me from ascertaining the truth in this case. The fact that Neiko gave evidence without his notes eight years after the incident and his frail memory over the years had to be given some recognition. The Defence was in an advantageous position in the process of cross-examination because they were equipped with Neiko's previous statement and evidence in two proceedings recorded approximately eight years ago.

246. The police officers, for various reasons, fabricate stories to bolster up their case to ensure a conviction, on the basis of the martial discovered at the investigation, when they are sure that the suspect has committed the offence. This happens in all the jurisdictions and especially in illicit drugs cases because of the difficulty they face in proving knowledge. As I have already said, when innocent dupe defence is advanced by the Accused despite the fact that he was found in possession of the illicit drugs hidden in a bag or container in a manner that was not obvious to anyone handling the container that it contains illicit drugs. That is why the factual presumptions in the nature of Section 32 of IDCA have been statutorily introduced in other jurisdictions as well like England. I am sure, Neiko did not have any ulterior motive to fabricate evidence and bring about a conviction at all cost for an innocent person.

247. Now I turn to Maciu's evidence. His evidence is important for several reasons. He is the investigating officer; he is the one who took custody from Neiko the exhibits that were uplifted from the scene, seized from Abourizk and HM 046, transported them and prepared the search list (PE 4). He is the officer who led the team that searched Abourizk's room in Westin and seized cash and prepared the search list (PE6) for the property taken. He is also the first person to receive information from the Accused about Simon.

248. It is not my intention to deal with all the aspects of his evidence in this part. I have already touched upon his evidence on the two page search list (PE4) and the three suitcases so far it is relevant to the repacking saga. His evidence relating to chain of custody and failure to undertake a fingerprint analysis will also be dealt with separately, albeit briefly. The most important parts are the ones that relate to cash and Simon.

249. Let me discuss the seizure of cash first. There is no dispute that Maciu searched Abourizk's room on the night of 13 July 2015 and seized from there a large amount of cash as itemised in the search list (PE6) and that a receipt of acknowledgement for which was issued to Abourizk. The reason Maciu gave for the seizure is that he thought the money was relevant to this case. One dispute concerns the particular place from which the cash was recovered. This dispute is significant because it sheds some light on the application of Grant ([1996] 1Cr App. R.

250. Maciu in his evidence-in-chief said that the money was hidden under the bed. In cross-examination, he said it was under the mattress. If the money was hidden somewhere when a safe is present in the room that would give rise to an inference that the money was hidden in a suspected place because it was tainted.

251. The position of the Defence and evidence of Abourizk is that the money was in the safe and the safe was opened when the combination key was provided by Abourizk. Defence position was confirmed by Simione. It is implausible that a large amount of money will be hidden under a mattress or bed of a hotel room which is generally serviced by the hotel staff on a daily basis. I accept that the money as per PE 6 was seized by Maciu and that money was in the safe.

252. Now I turn to the information Maciu received about Simon. Maciu admitted that both Abourizk and Muriwaqa had told the police offices that the person who owned the bags in which the drugs were found was Simon, an American. Simon's nationality is significant because Abourizk says Simon is Canadian. Abourizk never said that Simon had a boat. Only thing Abourizk told him was that Simon got off at First Landing.

253. Although Maciu agreed that the information provided by Abourizk is worthy of investigation, it appears that he was not convinced at all at that particular moment that Simon alighted at First Landing or that Simon was staying in First Landing Hotel. He was in a discussion with Neiko soon after his arrival at the scene and if Abourizk had told Neiko about Simon, there is no reason for Neiko not to pass that information to Maciu.

254. Abourizk only told Maciu that Simon got off at First Landing. He didn't see why he should ever go to the reception at First Landing Hotel because of what the Accused had told -

'Simon got off at the vicinity of First Landing'. He denied that the Accused had ever told him that they could take him to First Landing because Simon was there. Had he ever been told about Simon's presence in the First Landing Hotel, I don't believe that a police officer of his rank would ever fail to go and investigate Simon at the Hotel. Maciu did not take the clothes found in the bags to First Landing to investigate Simon because he was sure that no one will ever identify those items. In the whole investigation, nobody had identified a person by the name of Simon.

255. Upon being repeatedly questioned by Mr. Thangaraj on the basis that his investigation into the owner of the bags was inadequate, and whether he had ever gone to the reception of the hotel to investigate Simon, Maciu said that he went there on the following day and questioned some of the workers who were working outside the hotel for about ten minutes. That degree of investigation in the vicinity of the hotel is consistent with the information he had received- that 'Simon got off in the vicinity of First Landing'.

256. Apparently being felt guilty at the inadequacy of his own investigation, Maciu finally said that another team from TCU was also involved in the investigation to verify the identity of Simon. However Maciu's admission that he had never told about such an investigation at the *void dire* neither had he mentioned in his statement or Station Diary or Team Crime Diary suggests that no such investigation had been conducted about Simon. I accept Maciu's evidence that Abourizk never told him that Simon was staying at First Landing Hotel and that they could take him to First Landing because Simon was there.

257. Now I turn to Maciu's reasoning for not doing a fingerprint analysis. He provided three explanations, firstly because it was unnecessary in the circumstances, secondly, Neiko had already touched it, and thirdly, it was not possible to get finger prints from the parcels because of the contour and the manner the parcels had been taped.

258. On the basis of his evidence under cross examination, I am unable to accept these explanation except the first one. It is open for him to think in the circumstances why he should ever proceed to do a finger print analysis when he saw for himself the two men in a car with bags full of drugs. Since I have already rejected Neiko's evidence on the repacking saga, his failure to do a fingerprinting analysis does not affect the outcome of my decision.

259. Maciu admitted that he failed to follow some of the guidelines in the Force Standing Orders in the continuity process. However, he had been in control of the parcels of drugs ever since they were handed over to him by Neiko until the analysis was done on the following day at the Lautoka Police Station itself. He has taken all precautionary measures to ensure that the parcels are not tampered with at any stage of the continuity. His evidence was corroborated by other officers who were involved in the transportation and guarding. I accept his evidence on the chain of custody.

260. An explanation from the Accused is extremely important for my judgment because they were arrested while they were travelling together in a vehicle with two containers (a bag and a suitcase) which contained a large consignment of illicit drugs in a circumstance where they knew that the containers were present in their vehicle. The necessary inference that the Court can draw from these facts is that the Accused were aware that the bags contained illicit drugs. The explanation of the defence should be evidence based and it should support their defence and be capable of creating a reasonable doubt in the Prosecution case.

261. That evidence was produced in this case only by the 1st Accused Abourizk. However, his evidence would be sufficient for the defence of both Accused if it is capable of creating a reasonable doubt in my mind as to their guilt. The essence of Abourizk's evidence is that none of the Accused was aware that the bags contained illicit drugs. Let me now analyse Abourizk's evidence to ascertain the truth.

262. Abourizk's evidence from his previous trial was adopted for this trial. I missed the benefit of watching him give evidence and Mr. Burney and his team missed the opportunity to cross-examine him as they wished. However, his evidence was subjected to cross examination in the previous trial and his evidence transcribed in the document tendered in evidence speaks volumes.

263. Abourzk is no doubt a man of good character. He was involved in number of 'businesses' but he did not say what type of businesses they were. The first meeting with Simon is a chance meeting at the Denarau Golf Club. That was on 8 July 2015. Simon was a complete stranger to Abourizk when they first met. The cost of the boat trip Simon offered for Abourizk was roughly $1,400. The offer was accepted because Abourizk thought it was a great idea to do something for his wife who was to fly to Fiji the next day for a short

holiday. Saturday morning (which would have been 11 July) – the trip is abruptly cancelled by Simon. It is after Abourizk's wife had flown out on 12th July that the second boat trip is offered. This time the trip is offered for free as Simon felt really terrible for letting Abourizk and his wife down on Saturday. Why would Simon offer $ 1400 worth boat ride for free for a complete stranger even if he felt terrible for letting Abourizk's family down? Why would Abourizk accept this offer, even for free, when his wife, the reason for accepting the trip, had already flown out?

264. On Monday, when he went to Fist Landing with Muriwaqa, Simon informs that there was a slight delay as his crew members had gone to the North to pick up a marine radio for the boat. Simon wanted them to accompany him to meet his crew to make sure that they brought the correct radio. It was a one hour drive. Why would he take all the trouble to go that far with Simon who had already let him down once? Why did the crew go to Ba town when two main commercial cities in the West were located in Lautoka and Nadi.

265. They had reached Ba town sometime after lunch. At Ba town, Simon spoke to the three men of his crew and returned to the car, with 'good and bad news'. The bad news was that the crew had not picked the correct radio. Why was Abourizk not frustrated when he heard the bad news form Simon when Simon had already eaten his holiday time? The very reason Simon had to go to Ba was to ensure that the crew buys the correct radio. Then why did Simon decide to return to First landing with the crew's bags without picking the correct radio? How Simon was going to save time for the boat trip without the correct radio being bought and when his crew members were still at Ba. Will Simon ever travel in this car if his intention was to use the Accused as mules to transport a large consignment of drugs?

266. When arrived at First Landing, it was already late (3-30 pm). Why did they go to see a land when Simon needed only about fifteen minutes to check out from hotel? How did Muriwaqa, a man from Lami, know about a land for sale in First Landing which had been advertised on a bill board in Denarau?

267. Why Muriwaqa drove to an impassable rail track if he knew that the land for sale is within two minutes' drive.

268. Abourizk's evidence was that he informed Neiko that they were there looking for a land. Then there is no reason for Neiko to detain a foreigner and make him sit in the car with his driver for approximately one hour until another police team arrived to the scene. Abourizk pretended that nothing was happening during this period. Should I believe that Neiko didn't check the boot during this period? I am sure he did and he found the parcels of drugs. That's why he detained Abourizk and his driver. That's why his cash and phone and Muriwaqa's wallet and phone were taken by police.

269. There is no evidence that Abourizk had informed Neiko that the containers belonged to Simon. That was the first thing he should have done when the police found suspected parcels in his car. He knew Simon was to check-out from hotel in fifteen minutes. If the containers belonged to Simon why didn't he pass this information to Neiko as soon as he realised that the bags contained suspected parcels.

270. Abourizk said his phone number was shared with Simon at the very first day of their meeting. Then why didn't he give Simon's phone number either to Neiko or Maciu? Simon should have realised that they had gone missing with the bags within that fifteen minutes. Why didn't Abourizk's phone receive any call from Simon who had left a large consignment of cocaine in their vehicle? Why did Simon was prepared to allow the Accused to drive away with an extremely valuable consignment of illicit drugs contained in unlocked containers at least for short period totally unsupervised? It is unrealistic for a drug dealer to leave such a valuable parcels of drugs to a stranger.

271. Abourizk gave the information about Simon to Inspector Maciu for the first time when Maciu arrived at the scene approximately one hour after his detention. He knew the containers belonged to Simon's crew and not to Simon. This is what he learnt from Simon himself when they were in Ba. Then why he made a false representation to Maciu that the bags belonged to Simon?

272. The transcript of the *voir dire* proceeding of the first trial was used by Mr. Thangaraj to cross-examine to test the credibility of police witnesses. We now know that the admissibility of the caution statement has been challenged by the Defence. If the Accused knew that the bags containing cocaine belonged to Simon, they must certainly have told that to police in

their respective caution interviews. Then why did they challenge their caution interviews that could have been called to support their defence?

273. Abourizk alleged that his money taken at the arrest was stolen by police officers. I must say something about this allegation, although it is not directly relevant to the central issue at hand, as it raises a serious question about the integrity of the Fiji Police Force, His counsel was repeatedly questioning about hundreds of money stolen. Abourizk in his evidence-in-chief said that he left his purse in the hotel room because they were going to the sea in a boat. It is sensible also for him to do so as he knew that the boat ride was for free. Then why would he take hundreds of dollars cash with him to the sea? Abourizk under cross-examination apparently realised his mistake and, in a damge control move, came up with the story about Simon's plan to drop them off at Fijian Resort in Sigatoka. I am unable to accept that Abourizk had hundreds of dollars in his possession at the time of his arrest.

274. Maciu frankly admitted that he used Abourizk's money (less than hundred dollars) to buy some food for Abourizk at Tiger's Restaurant. That was done on humanitarian grounds. Simione confirmed this evidence. The visit to the Tiger's restaurant had occurred on their way to Westin on the night of the arrest. According to Abourizk, he had not been escorted to the restaurant. The food had been served at the vehicle. Still it may not be correct for the police officers to use suspect's money even to feed him. That is any way a peripheral issue.

275. Of course, Abourizk had thousands of dollars in his hotel room. No complaint had been made in this regard to any authority, certainly not to the High Court Judge when Abourizk was represented by a counsel. Abourizk in fact admitted that the money seized from the hotel room was intact. According to Abourizk, Maciu had even refused to touch seized money, on 'procedural grounds', even when he gave permission to Maciu to use that money in exchange of his release back to the hotel. Abourizk further said that his wife sent some money through Western Union still he didn't receive any benefit for the money sent. Where is evidence that money was sent through Western Union to Maciu or any police officer? Even his counsel Mr. Khan was anxious to see this evidence before lodging a formal complaint against police. There is no evidence that the police officers had stolen money from Abourizk. The next question is why would Abourizk want to offer money to a police officer if he was clean and innocent?

276. The inability to give plausible answers to any of those question which I have raised above means that the story related by Aborizk cannot be not true.

Application of Grant directions

277. R v Grant [1996] 1Cr App R 73 which I have quoted below concerned a charge of possession of controlled drug with intent to supply. In R v Guney [1998] 2 Crim App R 242, the Court of Appeal of England held that in limited circumstances Grant directions might also be relevant to the issue of possession only. The admissibility of evidence contemplated in Grant depends on the particular circumstances of the case (for example, the defendant was not knowingly in possession).

278. The essence of directions in Grant can be summarized as follows:

> The finding of money either in the Accused's home or in his possession when away from his home and in conjunction with a substantial quantity of drugs is capable of being relevant to the issue of whether an intent to supply was proved. It is a matter for the jury to decide whether the presence of money, in all the circumstances, is indicative of an ongoing trade in the drugs, so that the presence of the drugs at the time of the arrest is capable of being construed as possession with intent to supply. However, where such evidence is admitted the judge must direct the jury as to how to approach the question of whether the finding of the money is probative of the necessary intent. The jury should be directed that any innocent explanation put forward by the Accused must be rejected before they can regard the finding of the money as relevant to the offence. Further, if it is possible that the Accused possessed the money other than for dealing, the evidence is not probative. If, on the other hand, the jury were to conclude that the presence of the money indicated not merely past dealing but an ongoing dealing in drugs, then finding the money, together with the drugs in question, is a matter which the jury can take into account in considering whether the necessary intent has been proved.

279. For an investigator, it is sensible question to ask from a suspect-where are you staying. However, would that sensibility extend to ask whether he had any money or drugs in his hotel room? Why would Abourizk have to say at the time of his arrest that he had AU$ 8,000 of his holiday money and more than FJD 14,000/- which he and his wife withdrawn from Westpac Nadi?

280. Answer to this question in my mind is clear. Abourizk did not say anything to police about the money at the time of his arrest. The money was recovered by police at the search at the hotel room. It was never put to Maciu whether he heard from Abourizk say, at the time of arrest, something about the source of money found in the hotel. He had never informed the police officers the source of that money at the search or when his statement was being recorded. Maciu confirmed this. Maciu admitted that Abourizk's wife came up with this

withdrawal saga at a later stage of the investigation even after Abourzk's statement had been recorded.

281. Where is evidence that Abourizk and his wife had withdrawn FJD 14,000.00 odd cash from Westpac Nadi on 10 July 2015? Mr. Thangaraj was blaming initially the police officers for disappearing the bank statement and not disclosing it to the Court. On the next day, he apologised and withdrew that allegation and sought permission to cross examine on a different premise that the money was withdrawn on the 10 July 2015. It is easy to throw a piece of paper on the bar table to create an impression in the minds of the assessors and the Court that the money was withdrawn and that the withdrawal happened on the 10 July. However, it is not easy to prove a fact without tendering the document in evidence and not being given an opportunity to cross examine on it, otherwise it is not worth the paper it is written on.

282. The bank statement had certainly come from the custody of the Defence and a copy of which is supposed to be retained by the Defence Counsel. The record shows that the Mr Thangaraj indeed had a copy of that so called bank statement in his possession and his line of cross-examination that the money was withdrawn on 13 July 2015 was based on that document. But it was not shown to the Judge or to the Prosecutor when it was requested for their observation. This document was later withdrawn.

283. Why was this document withdrawn? Answer is in my mind is clear. The bank statement would have revealed that the money was withdrawn on 13 July 2015. Abourizk's wife had flown out on 12 July 2015 and she was certainly not in Nadi to withdraw money on the 13th. The tendering of this document would have been disastrous to the credibility of the defence stance as to the source of the money.

284. The explanations given by Abourizk for the large amount of money found in his hotel room are also implausible. He said AU$ 8000.00 is for his holiday and FJD 14,000.00 was to be given to Muriwaqa to setup his business. Why would a foreigner keep such a large amount of cash in his possession in this cashless era to spend his holiday? He had met Muriwaqa for lunch on 8 July 2015 and then on the morning of 13 July 2015. Why did he keep such a large amount of cash for so long even if it were in fact withdrawn on 10th July?

285. Although Abourizk said that the money had nothing to do with the drugs. I am unable to accept that such a large sum of cash was retained in his hotel room solely for the purpose for tourism or to be given to Muriwaqa. Given the false representations given by Abourizk to police about cash and also in his evidence to Court, the only inference I can draw from the proved facts is that the money is tainted or involved with illicit drugs found in the car in which he was travelling.

286. The Accused persons charged with an offence tell lies under oath for many reasons. They sometimes lie to bolster up their defence. They sometimes lie to avoid embarrassment. However, I am sure, Aborizk lied only because he was guilty.

Conclusion

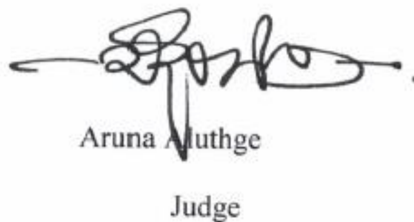
287. There is no plausible explanation in Aborizk's evidence as to why the Accused drove to an isolated and impassable gravel road when they were supposed to be in the Marina in 15 minutes to embark on a boat trip. There is no plausible explanation why a large consignment of cocaine is present in the car that they were travelling together. There is no plausible explanation why a large amount of local and foreign currency was retained in Abourizk's hotel room. The detailed story of Abourizk stretches judicial credibility beyond breaking point. The only inference I can draw from the proved facts is that the Accused persons knowingly were in joint possession of illicit drugs, namely cocaine.

288. Mr. Thangaraj in support of Abourizk's permanent stay application argued that the Prosecution in the first trial had accepted the existence of Simon and that the bags belonged to Simon in view of certain questions put by the prosecutor at the first trial and therefore the Prosecution cannot deviate from that position in this trial.

289. I am unable to accept that the Prosecution at the first trial had accepted that Simon existed or that the containers belonged to Simon merely because of the couple of questions suggesting that somebody would have been the mastermind or the owner or the funder of the illicit drug dealing. It is the possession of illicit drugs and not its ownership that is prosecuted in this trial. If the investigators could find the owner or the funding source of the drug dealing, that's fine. But that is not what this case is about. There is no basis for Mr. Thangaraj's argument.

290. Mr. Rabuku in his cross-examination and his closing address came up with a conspiracy theory and suggested that Neiko and his team, having fully known who the real owner of the drugs was, acted in collusion with the owner and that the whole investigation was a frame up to ensure that the police continue to protect the source of the information. That is a serious allegation unfounded and illogical. I am unable to accept that theory. As a Judge who has sent senior police officers to jail for long term prison terms, I can confidently say the case before me is not a made up case although there were some infirmities in the police investigation process.

291. I am satisfied that the Prosecution proved the charge beyond reasonable doubt. Each Accused is found guilty of Possession of Illicit Drugs as charged. The Accused are convicted accordingly.



Aruna Aluthge

Judge

16 June 2023

<u>Solicitors</u>:

Office of the Director of Public Prosecutions for State
Naivalu Law and John Rabuku Lawyers for Defence