IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

Criminal Appeal No: AAU 0048 of 2012
(High Court Case No: HAC 49 of 2011)

BETWEEN : **MUSKAN BALAGGAN**

Appellant

AND : **THE STATE**

Respondent

Coram : **Basnayake, JA**
Jayamanne, JA
Wengappuli, JA

Counsel : **Ms. T. Draunidalo for the Appellant**
Ms. S. Puamau for the Respondent

Date of Hearing : **10 May 2016**

Date of Judgment : **27 May 2016**

JUDGMENT

Basnayake JA

[1] The appellant was jointly charged with one Elton Xhemali for attempted exportation of the illicit drug, namely, cocaine contrary to Sections 9 and 4 of the Illicit Drugs Control Act, 2004. The appellant was also charged with unlawful possession of illicit drugs

contrary to section 5 (a) of the Illicit Drugs Control Act 2004. After trial the appellant was convicted by the learned High Court Judge after accepting the unanimous opinion of the Assessors. The appellant was sentenced to 11 years and 6 months on each count which was made concurrent, with a non- parole period of 9 years. The appellant appealed against the conviction and the sentence by a notice of appeal dated 27 June 2012. Thereafter the appellant had filed two other amended notices. On the date of the hearing for leave the appellant relied on the grounds set out in the notice dated 30 June 2014.

Ruling dated 4 December 2014

[2] By a ruling dated 4 December 2014, a single Judge of the Court of Appeal had granted leave on grounds 1, 2, 3, 5, 6 & 11 of the grounds of appeal against the conviction and 1 to 5 grounds of appeal against the sentence. Written submissions had been filed on behalf of the appellant and the respondent thereafter. When this case was taken up for hearing on 10 May 2016, the learned counsel appearing for the appellant moved for a date for argument on the ground of ill-health of counsel, Mr. Nandan. Two medical certificates too were tendered to court. The medical certificates tendered were not in conformity with the format prescribed by the Criminal Procedure Decree. As the court was not satisfied with the application a postponement was refused. Counsel for both parties were given the opportunity to make oral submissions. However no oral submissions were made for the appellant by counsel. Ms. Puamau too confined herself to written submissions to the comfort of the counsel for the appellant who would have otherwise felt disadvantaged. Hence the court informed both the parties that the appeal would be decided on the written submissions. At this stage the learned counsel appearing for the appellant said that she is ready to meet any clarifications the court may require. However there were no such clarifications.

The evidence

[3] The prosecution case as stated in the ruling of 4 December 2014 is as follows. The appellant and the co-accused were guests at Hexagon Hotel in Nadi. The 2nd accused had

checked in on 12 January 2011 and the appellant, the 1st accused, had checked in on 24 January 2011. When the 1st accused had arrived at the front desk of the hotel to check in, the 2nd accused had paid for the room and had wanted a room next to his for the 1st accused, but no such room was available. On 26 January 2011 the 1st accused had been seen in the 2nd accused' room. On that day both accused had come to the front desk to check out and the 1st accused had paid the remaining balance for the two rooms with her credit card. That evening the two accused had been seen leaving the hotel in different taxis at the same time.

[4] The two accused had checked in separately on an outbound flight to Melbourne which was to depart at 6.25 p.m. The 1st accused had been the last passenger to check in, with one bag. A search was done of the bags of the two accused. When the 1st accused' bag was opened, a powdery substance had been noticed on the clothes inside her bag. When asked about the contents, she had stated that the bag belonged to the 2nd accused. The 2nd accused had denied any knowledge of the bag. The Police had thereafter taken photographs of the contents of the 1st accused' bag. Crystal like deposits on the clothes had been noted and the clothes had been unusually stiff. Thereafter the 1st accused was escorted from the airport to the border police station, detained and thereafter arrested. When the clothes in the bag were chemically tested in Australia, it had been revealed that the substance on the clothes was cocaine. The quantity of cocaine that was found was a minimum of 521.6 grams of pure cocaine.

[5] The grounds of appeal against the conviction and the sentence as allowed by the ruling of the single Judge are as follows:

<u>Against the conviction</u>

1. The learned trial judge has erred in law by not adopting to section 14 (2) (d) of the Constitution of Fiji and/ or the common law that preceded the Constitution, in that the appellant had a right to be represented by counsel and/or a legal aid lawyer provided, as the charge was serious and issues were complex; the failure thereof led to a miscarriage of justice;

2. The learned trial judge has erred in law in his interpretation of section 214 (9) of the Criminal Procedure Decree 2009 and by not allowing the adjournment to the appellant to consider her objection and preparation of her defense, the learned Judge had caused the trial to miscarry and the prejudice that resulted is unfair and the conviction recorded must be set aside;
3. The learned trial judge has erred in law in not assisting the appellant with the provision of a lawyer and/or legal aid as the learned Judge by his exercise of discretion has inferred that the counsel engaged was incompetent to represent the appellant and that without representation, the appellant would not get a fair trial and as such a grave miscarriage of justice has resulted;
5. The learned trial judge has erred in law as he failed to give proper directions in law and failed to assist an unrepresented accused facing a serious charge in a complex case involving cross examination of expert witnesses thereby causing a miscarriage of justice;
6. The learned trial Judge has erred in law as he did not exercise his discretion in a judicial manner when refusing the appellant an adjournment to engage counsel and erred thereby causing a miscarriage of justice;
11. The learned trial judge has erred in law in not assisting an unrepresented foreign national without counselor access in the presentation of her case thereby causing the trial to miscarry and as such was in breach of section 15 (1) of the Constitution and or the common law preceding the Constitution;

Against the sentence

1. The appellant is appealing against the sentence for being manifestly harsh and excessive and wrong in principle in all the circumstances of the case;
2. The learned trial judge has erred in law and in fact in his sentencing exercise by not using the case of Sulua as its starting point; the guideline judgment had a significant persuasive value as cannabis is the more problematic drug in Fiji;

3. The learned Trail Judge has erred in law and in fact by not giving the appellant any order of prospects of rehabilitation, hardship, immaturity;
4. The learned trial judge has erred in law and in fact in not considering the young age of the appellant and her future as a young person when sentencing;
5. The learned Trial Judge has erred in law and in fact in taking irrelevant matters into consideration when sentencing the appellant and not taking into account relevant considerations.

Conviction

Ground 1 - Submission for the appellant

[6] The appellant's counsel was disqualified on 16 March 2012 after the *voir dire* and the trial had been set for. The *voir dire* had been set for 26 April 2012 and the trial date for 21 to 31 May 2012. It was submitted that this allowed the appellant little time to find and properly brief an alternative counsel and the conduct of the learned Judge had prejudiced the appellant as she was unrepresented. The learned counsel also relied on section 14 (2) (d) of the Constitution relating to the right to counsel. The learned counsel relied on **Dietrich v R** [1992] HCA 57; (1992) 177 CLR 292, where the High Court of Australia held that the trial of a person for a serious offence may be vitiated by unfairness if he is (otherwise than voluntarily) unrepresented by counsel. This authority was relied on by the learned Judge himself which I would discuss later for the reason that it is the appellant who voluntarily chose to be unrepresented.

[7] The above case was followed in **Navunigasau v State** [1997] FJCA 52; AAU 0012.1996S (14 November 1997). The Court of Appeal however justified the refusal of an adjournment on the ground that there was no realistic prospect that the appellant would obtain legal aid if an adjournment was granted. The learned counsel in the written submissions has stated that it was unreasonable to allow the amended information to be filed on the trial date without any prior notice and not allowing the appellant time to seek advice of counsel on the amended information. One should also bear in mind that the appellant voluntarily denied the right to counsel and therefore the necessity to seek the advice of counsel does not arise.

The Information and the Amended Information

[8] Although both accused were produced in court, that is the appellant and the co-accused, the information filed by the DPP on 1 April 2011 was against the appellant for possession of the illicit drug, namely, "cocaine". On the trial date that is on 21 May 2012, the DPP had filed an amended information by which both the appellant and the co-accused were charged for attempted exportation of the illicit drug contrary to sections 9 and 4 of the Illicit Drugs Control Act, 2004. The appellant was separately charged for the unlawful possession contrary to section 5 (a) of the Illicit Drugs Control Act, 2004.

[9] The learned counsel for the appellant submitted that it was the 1st application for an adjournment. The learned counsel relied on the case of **Ledua v State** [2008] FJSC 59 CAV 0004.2007 (25 February 2008) where special leave was granted against a conviction on the basis that the appellant was unrepresented at the trial and that the issue was the right to be represented at the trial. **Asesela Drotini v State** [2006] Cr App No. 0001.2005 (24 March 2006) the question was whether the appellant was prejudiced by lack of representation (also **Rusiate Tuitravu v State** [2006] Cr. App AAU 0035.2005 (10 November 2006); **Mcinnis v The Queen** [1979] HCA 65; [1979] 143 CLR 575).

Submissions for the respondent

The Right to Counsel

10] With regard to the submission on the Constitution the learned counsel for the respondent submitted that the Constitution was promulgated after this case and thus has no application. However the right to counsel had already been recognised although it was not an absolute one (**Nalawa v State** [2010] FJSC 2; CAV 0002.2009 (13 August 2010) where the Supreme Court held after considering the Crimes Decree 2009 that;

> *"The courts here have shown at all levels their respect for the right of accused persons to a fair trial, that is a trial according to law. This includes the right to counsel, the right to disclosure, the right to adequate time and facilities in order to prepare a defence, the right to remain silent, and the right to trial without delay..."*

[11] The learned counsel submitted that this right is not absolute. In **Jope Ramalasou v State** (Cr. App No. AAU 0085/07) the Court of Appeal held that the right to counsel is not absolute. The Court of Appeal held that, "The question for this court is whether there is a possibility that he was adversely prejudiced by his lack of representation. In the present case, the record shows that the he was given more than adequate time to find counsel, he was advised correctly of his rights by the trial Judge and conducted his case competently".

[12] In **Balelala v State** [2004] FJCA 49; AAU 0003.2004S (11 November 2004) again the Court of Appeal held that although it is desirable for the accused to have legal representation this right is not absolute. The Court of Appeal held in that case that, "The desirability of any accused person having legal representation at a trial is obvious, for the reasons stated in **Dietrich v The Queen** (supra); but it is not an absolute right-**Robinson v The Queen** (1985) AC 956. The absence of counsel is not necessarily fatal to a conviction which is obtained after a trial which is fairly conducted. In this case, the appellant sought, but was refused legal aid by reason of an assessment of lack of merits in his defence. The decision was properly reviewed and dismissed. Section 28 of the Constitution does not require the provision of legal aid in absolute terms. The obligation which is implicit in that respect is one which arises where "the interests of justice so requires".

[13] In **Esala Tabaloa v The State** (Cr. App No. AAU 0058/08 (15 July 2010) the Court of Appeal held that, "It is well established that the right to counsel is not an absolute right (**Eliki Mototabua v The State** CAV 004 of 2005S) and the absence of counsel is not necessarily fatal to a conviction which is obtained after a trial which is fairly conducted (**Seremaia Balelala v State** Cr. App No. AAU of 2004). The question is whether the trial miscarried as a result of the appellant being unrepresented (**Samuela Ledua v The State** Cr. App CAV 0004). The learned counsel submitted that that the learned High Court Judge had given the appellant ample time and opportunity to secure a counsel of her own choice but she had not done so. Instead she had insisted that she be represented by her counsel whom the court had disqualified.

The learned High Court Judge in his Ruling pronounced on 21 May 2012 stated as follows:

> *"Balagan seeks to vacate the trial to engage counsel. After the Court disqualified Balagan's counsel, she was advised to instruct new counsel. Balagan insisted that she be represented by former counsel and elected not to instruct a new counsel for trial. Surely she has an ability to engage new counsel. She instructed Ms. Vaniqi to represent her in an appeal in an unrelated case. She instructed Mr. Jasveel Singh to seek my disqualification before the commencement of the trial within the trial. Balagan has been given ample opportunity to engage counsel. She elected not to engage counsel for her trial. The fact that she is unrepresented is her own making. I also have to bear in mind the interests of the co-accused who has been waiting in custody on remand since 26 January 2011 for trial. After taking into account all these factors and the overall interest of justice, I refuse to grant an adjournment."* (para. 8 and 9).

[14] The learned counsel submitted that although the appellant did not exercise her right to cross examine witnesses at the start of the *voir dire* inquiry, the court record from pages 324 to 420 confirms that the appellant was able to cross examine the witnesses in the *voir dire* and the trial. There is nothing in the record to suggest that the appellant's trial miscarried due to the lack of counsel.

Ground 2

Submissions for the appellant

[15] In the information filed on 1 April 2011 the appellant was charged for possession of the illicit drugs, namely, cocaine contrary to section 5 (a) (Tab 14 pg 232). When this case was called on the trial date the respondent moved to amend the information and an amended information was filed (pg. 233 Tab 15). By this amended information an additional count was added. In that information the appellant was charged with another accused as the 2nd accused for attempted exportation of illicit drugs contrary to section 9

and 4 of the Act. The 2nd count is the count that the appellant was originally charged with.

[16] The date for the *voir dire* and for the trial was fixed on 27 February 2011. (pg. 306). Counsel for the appellant was Mr. Chaudhary. He was disqualified by the learned Trial Judge of the High Court on 16 March 2012 (pg. 308). When this case was called on 16 April 2012 to check on the legal representation, the appellant said that she does not want to engage any lawyer and that she is appealing against the recusal decision. On 26 April 2012 Mr. J. Singh appeared to seek the disqualification of the trial Judge. He was retained by the appellant only for this limited issue. The appellant said that she appealed against the recusal order disqualifying her lawyer which is pending. Hence she said that she is not ready for the trial.

[17] The learned counsel submitted that the learned Judge has erred by not allowing an adjournment upon the State filing a fresh information. In **Johal** [1973] QB 475 and **Harden** [1963] 1 QB 8 held that an amendment that substantially substitutes another offence for that originally charged can never be after arraignment, agreed that such amendment would usually cause injustice.

Submissions of the counsel for the respondent

[18] The court said that the proposed amendment does not substantially change the particulars of the allegation against the accused persons. Only the name has been changed (pg. 335). There is no dispute that the appellant and the 2nd accused were taken into custody at Nadi Air Port prior to boarding a flight to Australia. A suit-case containing clothes soaked in cocaine was found in the possession of the appellant.

[19] Over this originally the appellant was charged on 4 April 2011 (pg. 294) for possession. The 2nd accused was charged for transportation. On 1 September 2011 a proposal was made by the respondent for the amalgamation of the two charges. Leave was granted for the consolidation on 17 October 2011 (pg. 303). The amendment to the Information was

made prior to the arraignment on 21 May 2012. The appellant was arraigned thereafter. The Court of Appeal (England) in **Johal** (supra) allowed an amendment that substantially substituted another offence for that originally charged and rejected the opposite view taken in **Harden** (supra).

[20] On the facts of **Johal** there was no injustice caused to the accused because the amendment was made immediately after the arraignment. The Court of Appeal held that "the situation was to all intents and purposes the same as if the application to the amendment had been made before arraignment". In the instant case the amendment was prior to the arraignment and therefore there was no necessity for an adjournment.

Ground 3

Submissions of the counsel for the appellant

[21] The learned counsel for the appellant stated in the written submissions that the learned Judge may not have been in error in law and fact by disqualifying the appellant's lawyer. After disqualifying the lawyer the learned Judge should have provided the appellant with a facility for her to obtain another counsel. The learned counsel suggests that the learned Judge should have obtained the assistance of a lawyer from the Legal Aid. The learned counsel suggests that the learned Judge should have acted on his own judgment without relying on the views of the appellant.

[22] The following paragraphs of the Ruling pronounced on 21 May 2012 of the learned Judge regarding the refusal for an adjournment and also not helping the appellant in obtaining the assistance of a lawyer, might meet the argument of the learned counsel for the appellant. Paragraphs 1, 2, 10, & 11 are reproduced here. Paragraphs 8 and 9 are reproduced in this judgment under paragraph 13.

1. "*The accused Balaggan seeks the following orders:*

I disqualify myself from presiding in her case.
The trial be vacated to allow her to engage counsel.
The proceedings be permanently stayed.

The orders sought are contained in a motion supported by an affidavit from Ballaggan filed on 14 May 2012. The documents are in legal form. On 17 May 2012, the Court enquired from Balaggan how she managed to file legal documents when she is un- represented and is in custody on remand. Balaggan informed the Court that an employee of her former counsel's firm, namely Gordon & Chauhry was assisting her to draft the documents. The Court was further informed that this employee was not a legal practitioner (1 & 2). Balaggan seeks a stay of the proceedings if the disqualification and an adjournment are refused. Stay of criminal proceedings is an extreme step to take only if there is nothing the trial Judge can do to avert an unfair trial arising from lack of legal representation (Dletrich v The Queen [1972] 177 CLR 292). In the present case, Balaggan is unrepresented by her own making. While appearing in person, she filed numerous applications in legal forms demonstrating considerable knowledge of the law. She conducted her own trial within trial. She effectively cross examined the prosecution witnesses in the trial within trial. There is nothing before the court to suggest that her trial will be unfair due to her being unrepresented. In these circumstances, I am not willing to take the extreme step of staying her prosecution."

[23] The learned counsel for the appellant was of the view that the learned trial Judge should have taken a greater interest in persuading the appellant to appoint another counsel without insisting on the counsel disqualified. The learned counsel has stated in the written submissions filed in court in paragraph 3 under the heading GROUND 3 (pg 6) that, "It was the duty of the Judge to assist the appellant quite independent of the conduct of the appellant." When a litigant does not seek any assistance from court but instead looks for opportunities to cripple the administration of justice, taking steps to remove the Judge from hearing the case so that she could have a field day, persuasion may not prove to be so effective. A lawyer also may not wish to appear for a person against that person's will. The learned counsel also does not seem to refute the charges the learned Judge makes of this litigant as evident from the portions quoted from the Ruling of the learned Judge.

Ground 5

Submissions of the learned counsel for the appellant

[24] The learned counsel submitted that the learned Judge has failed to give proper directions in law. The learned counsel does not elaborate on them. The learned counsel further submitted that the learned Judge has failed to give directions on the good character. The

appellant did not give evidence and did not call any witnesses. There is no good character evidence in this case for the learned Judge to give directions. If good character evidence was produced the opponent has the opportunity of bringing bad character evidence which may have jeopardised the defence case.

[25] Grounds 6 and 11 appear to be repetitions of the earlier grounds and need no further comment. Apart from the five grounds above, there seems to be no complaint with regard to the evidence proved. The learned counsel for the respondent has submitted in the written submissions that the evidence in this case is overwhelming.

Sentence

Ground 1

[26] The appellant is appealing against the sentence for being manifestly harsh and excessive and wrong in principle. The 2nd ground is not using "Sulua" as the starting point. Both these grounds could be considered together. The learned counsel submitted in the written submissions that the appellant was merely a courier and that she was manipulated by others. Her level of criminality had been low. However no credit was given for this. The learned counsel also submitted that there was no professionalism involved. The learned counsel submitted in the written submissions that there is no evidence that the appellant was involved in the drug trade and that she had no motive to make profit.

The above submissions have no basis. The appellant never put forward her case. In the written submissions dated 4 June 2012, she claimed that she was under threat to carry a suit case and that she was not aware of the contents. Hence the above submissions will have no value and need no consideration.

Submissions of the learned counsel for the respondent

[27] The respondent submitted in the written submissions that the sentence is not harsh and excessive. There are no guide-lines or tariff for possession of drugs like cocaine, heroin

and methamphetamine. The learned counsel further submitted that the Court of Appeal judgment in **Kini Sulua v State** AAU 0093 of 2008 (31 May 2012) is concerning cannabis. He submitted that some sentences given by the High Courts for cocaine and heroin may be relevant. In **State v Bravo** [2008] FJHC; HAC 145.2007L (12 August 2008) the sentence of 8 years was for the importation and possession of 2.1 kg of cocaine (73.1 pure). **State v Lata** [2013] FJHC; HAC 83.2010 (25 March 2013) the High Court sentenced the accused to 18 years with a non-parole period of 16 years for possession of 1990.4 grams of cocaine. In this case the High Court fixed a tariff between 15 to 20 years. Again in **State v Ethan Kai** [2015] FJHC 665; HAC 01.2015 (16 September 2015) the sentence for unlawful importation of 29.9 kg of heroin was 15 years with a non-parole period of 14 years.

[28] The learned counsel submitted that if the sentencing guideline of the Sentencing Council in the United Kingdom is adopted in this case, the starting point would be 8 years and 6 months. The tariff for category 3 Class A drugs is 6 years and 6 months to 10 years in custody. This is applicable where the weight is 150 grams. In the instant case the quantity of pure cocaine was found to be in the possession of the appellant and therefore the starting point of 10 years is within the tariff applied in the U.K. In **State v Stires** [2014] FJHC 556; HAC 13.2014 (30 July 2014) the sentence for possession of 3.8 kg of methamphetamine was 9 years and 6 months with a 8 years non-parole period. In the above case the learned Judge held that "In ***R v Fatu*** [2006] 2 NZLR 72 (CA) it was held that sentencing brand for cases involving the sale or supply of methamphetamine of very large commercial quantities (500 g or more) is ten years to life imprisonment". In that case the tariff for importation was 12 years.

[29] The trial Judge held that "Under the Illicit Drugs Control Act 2004 the maximum penalty for an attempt to export cocaine is 14 years imprisonment or a fine of $500,000 or both. The learned counsel submits that considering the sentencing pattern the sentence imposed could be considered as reasonable.

Ground 2

[30] The learned counsel submitted that if the Kini Sulua (supra) guidelines were to be considered the sentence imposed would be 3 years. Kini Sulua is concerning cannabis. Cocaine is considered as a hard drug. Therefore Kini Sulua has no application

Ground 3

[31] The learned counsel submitted that the learned Judge had considered the personal circumstances of the appellant before reducing the sentence by 2 years. The learned counsel stressed the importance of the imposition of a deterrent sentence to ensure the protection of the community.

Ground 4

[32] The complaint is that the young age of the appellant was not considered in mitigation. The appellant was 20 years old. In paragraph 20 the learned Judge appears to have given his mind to this fact by referring to the case of **Aramah** (1983) 76 Cr. App. R. 190 the Court of Appeal (England)as follows:

> "*In **Aramah** (supra) the English Court of appeal remarked that the good character of a courier, as he usually was, is of less importance than the good character of the accused in other cases. The court took the view that drug-smuggling organizers deliberately recruit persons who will exercise the sympathy of the court. The point the court makes is that the personal circumstances of an accused are secondary because of the deterrent element to sentences imposed in respect of drug-smuggling offences*".

Ground 5

[33] The Irrelevant matters referred to by the learned counsel for the appellant have not been identified. The learned counsel for the respondent submitted that the evidence in this case is overwhelming. The appellant in the caution statement had admitted to the commission

of this crime. There is direct evidence of the suit-case seized from her which contained clothes soaked in pure cocaine.

[34] The appeal does not seem to contest the evidence in this case. The evidence relates to the caution interview of the appellant and other vast material of evidence relating to events from the time of the appellant arrived Fiji to the time of leaving and the evidence relating to the detection. Apart from that, the finding of the expert witness that, the quantity of cocaine found and its purity. The learned counsel for the appellant did not make any complain about the strong material over which the accused was convicted. The arguments are basically confined to the right to counsel and refusal of postponements. Having considered all the arguments put forward by learned the counsel, I am of the view that this appeal lacks merit. Hence the appeal is dismissed.

Jayamanne JA

[35] I agree with the reasoning and the conclusion of Basnayake JA.

Wengappuli JA

[36] I have read the draft judgment by Basnayake JA and agree that appeal be dismissed.

The Orders of the Court are:

1. *Appeal is dismissed.*

.....
Hon. Mr. Justice E. Basnayake
JUSTICE OF APPEAL

.....
Hon. Mr. Justice S. Jayamanne
JUSTICE OF APPEAL

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Hon. Mr. Justice A. Wengappuli
JUSTICE OF APPEAL