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

CRIMINAL APPEAL NO.AAU132 of 2018
[High Court Criminal Case No. HAC 347 of 2017)

BETWEEN	:	**KRITESH KUMAR**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA** **Mataitoga, JA** **Morgan, JA**
Counsel	:	**Mr. S. Singh and Ms. K. Saumaki for the Appellant** **Ms. J. Fatiaki for the Respondent**
Date of Hearing	:	**11 and 18 July 2023**
Date of Judgment	:	**27 July 2023**

JUDGMENT

Prematilaka, RJA

[1] This appeal arises from the conviction and sentence of the appellant at Suva High Court on the first count of unlawful possession of 1.4 kilograms of Methamphetamine, an illicit drug and the second count of unlawful possession of 0.3 grams of Indian Hemp botanically known as Cannabis Sativa contrary to section 5 (a) of the Illicit Drugs Control Act No. 09 of 2004 (IDCA) on 30 October 2017 at Nasinu in the Central Division.

[2] In addition, he had also been charged with the third count of unlawful possession of 0.8 grams of Cannabis Sativa and the fourth count of unlawful cultivation of 01 plant of Cannabis Sativa contrary to section 5(a) of the Illicit Drugs Control Act, 2004 on

01 November 2017 at Nasinu in the Central Division. After the assessors unanimously opined that the appellant was guilty of all four counts, the learned High Court Judge had convicted the appellant only on the two counts relating to unlawful possession of 1.4 kilograms of Methamphetamine and unlawful possession of 0.3 grams of Cannabis Sativa on 30 October 2017 while acquitting him of the third and fourth counts. On 18 December 2018, the learned trial judge had sentenced the appellant to 11 years of imprisonment with a non-parole period of 09 years on the first count and three months' imprisonment on the second count; both sentences to run concurrently. However, after the remand period was discounted the appellant had been required to serve only 09 years and 10 months of imprisonment subject to a non-parole period of 07 years and 10 months.

[3] Upon considering the appellant's timely appeal against conviction and sentence, a Judge of this court had allowed leave to appeal only on the 01st, 06th, 07th, 08th, 09th, 10th and 12th grounds of appeal against conviction with the 05th ground of appeal not being required leave to appeal as it was considered as raising a question of law alone. Leave to appeal had also been granted on the 13th and 14th grounds of appeal against sentence. At the hearing before the full court, the counsel for the appellant only urged the grounds of appeal where leave was granted and informed court that the appellant had not renewed the rest of the grounds of appeal before the full court.

[4] Accordingly, the grounds of appeal before the full court are as follows.

Conviction

1. *That the Learned Trial Judge erred in law when he failed to order the stay of the proceedings on the grounds that the prosecution had failed to provide the full and sufficient disclosures to assist the Appellant in his defence.*

5. *That the trial Judge erred in law when he ordered the defence counsel to address the Assessors first in the closing address contrary to 128 of the Criminal Procedure Act 2009.*

6. *That the learned Trial Judge erred in law when he refused to redirect the Assessors on the request of the defence regarding the chain of possession and error in his direction on number of remote and house key.*

7. *That the Learned Trial Judge erred in his direction to the Assessors or misdirected himself regarding law on possession, knowledge and lawful authority.*

8. *That the Learned Trial Judge erred in law when he failed to properly direct the Assessors or himself or consider regarding the law of inconsistent or omission, contradiction of prosecution evidence and as such resulted in a miscarriage of justice.*

9. *That the Learned trial judge erred in law and facts when he misdirected himself or failed to direct the Assessors that he or they should take into consideration the entire or totality of the evidence presented in Court to decide whether the accused is guilty of the offence as charged.*

10. *That the Learned Trial Judge failed to direct the Assessors that it was mandatory on the Assessors to carefully examine evidence presented by the defence to decide, not necessarily whether they believe the evidence or not, but whether such evidence is capable of creating a reasonable doubt in Assessors' minds.*

12. *That the learned trial Judge erred in law regarding the chain of possession and failed to properly direct the assessors and/or failed to uphold that the chain of possession was broken in this matter.*

Sentence

13. *That the learned trial Judge erred in law based on R v Fatu (2006) NZLR 72 (CA) and that, given the uncertainty as to the purity of the methamphetamine, the case was more appropriately treated as being on the cusp of bands one and two and attracting a starting point of no more than three years the most.*

14. *That the learned trial judge erred in law when he acted upon a wrong principle."*

Factual matrix

Prosecution

[5] SC Peni had received an information about some drugs at No 21, Vo Place, Valelevu on 30 October 2017 who had then conveyed it to Cpl. Eloni. Cpl. Eloni had then arranged a team of police officers to raid the place. Afterwards, the team consisting of Cpl. Eloni, SC Anare, PC Totoka, PC Eisaki, PC Ifreni, and SC Peni, had gone to 21, Vo Place, Valelevu. The team had found the gate locked and dogs inside the compound. They had called the appellant by his name and after about 15 minutes he

had come out and opened the gate and tied the dogs. Cpl. Eloni had introduced the team and the purpose of the visit to the appellant and entered the house. While searching the house, SC Peni had noticed a wooden cabinet closed with nails except one wooden plank fixed with a screw nail. SC Peni had found a screw driver lying on the floor with which he had unscrewed and opened the cabinet. He had found a white clear plastic bag, containing white powder inside the cabinet. When he questioned the appellant he had replied that it was battery acid. The appellant had admitted that the plastic bag belonged to him. SC Peni handed over the plastic bag containing the white powder to Cpl. Eloni. SC Peni had identified the plastic bag containing white power at the trial marked exhibit 10 as the same plastic bag uplifted from the cabinet on 30 October 2017. He had also identified two photographs of the cabinet with the secret opening. SC Peni had not put his name or any other marks on the plastic bag.

[6] DC Pita had seen SC Peni opening the cabinet and uplifting the clear plastic bag containing white powder. The appellant had been present when SC Peni found the said plastic in the cabinet. According to DC Pita, as per the station diary entry number 141, the team had left the station at 18.45 hours for the raid. The entry No 166 was to the effect that the operation team had brought the appellant to the police station at 20.16 hours. DC Pita had searched one of the two bedrooms and found some dried leaves inside a drawer in the room. Those dried leaves were scattered inside the drawer. He had later clarified that the dried leaves were in two bags and not scattered. He had shown them to Cpl. Eloni and handed them over to him. Cpl. Eloni had then arrested the appellant after explaining him his rights. Cpl. Eloni had also made a search list and got the appellant to sign it. The search list included the plastic bag with white powder and two plastic bags with dried leaves.

[7] Cpl. Eloni had stated that SC Peni informed him at about 6 p.m. about the information that he received regarding this transaction of illicit drugs. According to SC Peni, the drugs were going to be picked from the location in 20 to 30 minutes time. Since the police had no time to properly obtain a search warrant due to the time constrain, he had spoken to the Resident Magistrate Ms. Hamza and obtained her approval to act under section 22 of the Illicit Drugs Control Act. After gaining entry to the appellant's house, Cpl. Eloni had gone out of the house to check the vicinity of the

house in order to make sure that his officers were safe. When he came back, he had seen the appellant seated on the sofa and SC Peni holding a clear plastic bag containing white crystal in his hand. SC Peni had told Cpl. Eloni that he uplifted the said plastic from the cabinet in the house. Cpl. Eloni had taken the plastic bag into his custody. DC Pita then brought him another two small plastic bags containing dried leaves. Cpl. Eloni has identified the plastic bag containing white powder and the plastic bags containing dried leaves as the same plastic bags that were given to him by SC Peni and DC Pita on 30 October 2017. Cpl. Eloni had prepared a search list including three plastic bags (one with white powder and two with dried leaves) and got the signature of the appellant. Cpl. Eloni had then taken the plastic bags containing white powder and the dried leaves to the police station. While travelling back to the police station, Cpl. Eloni was seated on the back seat with the appellant and either DC Pita or SC Peni was on the front passenger seat. When he reached the police station, Cpl. Eloni had entered the details of items recovered in the station diary and locked those items in the locker in the CID room of the Police Station. Cpl. Eloni had used a key to lock the locker and kept the key with him. On the next day, Cpl. Eloni had opened the locker with the same key and taken the items from the locker to take them to the Fiji Police Forensic Laboratory. He had said the key to the locker was with him all the time. Cpl. Eloni had taken the items to the Forensic Laboratory at Nasese, and handed the items over to the Forensic Laboratory for testing. On the following day, Cpl. Eloni had collected the items after they were tested at the Forensic Laboratory. He had obtained the report of the results confirming that the white powder was positive for methamphetamine and that the dried leaves were marijuana. Having collected those items from the Forensic Laboratory, Cpl. Eloni had taken them back to the Police Station. He had then given the report and the items to Cpl. Daniela who conducted the caution interview of the appellant. According to Cpl. Eloni, he had taken the white powder for another test to ascertain the purity level of the substance one or two months after the first testing. Cpl. Eloni had identified the plastic bag containing white power and the plastic bags containing dried leaves as the same white powder and the dried leaves that he obtained from the appellant's house, and then locked in the locker, and subsequently taken for testing at the Forensic Laboratory.

[8] Cpl. Eloni had said that they had no time to arrange a photographer to take photographs during the search due to time constrain. However, he had later gone to the appellant's house with a female officer from the Fiji Police Crimes Stoppers in order to take photographs of the house. During the cross examination, Cpl. Eloni had said that the appellant's house was located five minute-drive away from the police station. The police party had left the police station at 18.45 hours and reached the house of the appellant about 18.50 hours. Cpl. Eloni had informed the appellant that they came to search the house for drugs before the appellant opened the gate. The appellant had then gone back and taken sometime before he opened the gate using the remote controller.

[9] Cpl. Eloni had explained the procedure of searching and seizing items under Force Standing Orders of the Police. He said that neither the signature of SC Peni nor his was placed on the plastic bag containing white powder. Cpl. Eloni said that he did not handover the plastic bags to any other officers, especially SC Paula while they were at the appellant's house. He had further said that no officer took the items away from the house and returned after an hour with the items. Cpl. Eloni had visited the appellant in remand centre after he was charged in respect of the breaking of the appellant's house subsequent to this incident. According to him, he couldn't recall the appellant telling that the white substance was battery acid given to him by one Vikash and that the CCTV camera in the house had the recording of Vikash giving the appellant the battery acid. Cpl. Eloni had explained that the last column of the search list stated that all the items listed in the list were found in the appellant's kitchen and that the police officers were more concerned about the white substance than other items, on that day as it was the biggest amount of methamphetamine found in the division at that time.

[10] DC Daniela Turaga had conducted the caution interview of the appellant in English language and the appellant's answers had been recorded in a laptop computer. The appellant had signed the record of the interview after it was concluded and copies were printed out. DC Daniela had said that the document referred in question number 46 was given to him by Cpl. Eloni who also gave him the white crystal which he referred to in question 47 of the record of the interview. The white crystal was packed

in a white plastic bag and sealed with the forensic lab tape. The tap was red. DC Daniela had identified the plastic bag containing white substance (PE 10) as the same white crystal which he referred to in question number 47 of the record of the interview. During the cross examination, DC Daniela had said that he could not recall whether the plastic bag containing white powder had the writing of 2 k.g. HCL on it. When the appellant was questioned about the white crystal seized by the police at his house in question number 37, he had answered that it was battery acid. After that the appellant had said that he got it from a friend working for Rapco Tyres and Automotive Supplies, a company since closed. When asked why the police made no effort to get a statement from the said friend, DC Daniela had said that the appellant had replied that he did not know the name of the friend and also the company that he worked for had been closed. The witness had denied that the appellant told him that the name of the friend was Vikash working for Pacific Battery. At the conclusion of the recording of the interview, the appellant had been given an opportunity to read the record of the interview but he opted not to do so. DC Daniela had then asked the appellant if he wanted to make any changes, alter or add anything to the record of the interview and the appellant had said 'no".

[11] SC Paula was not questioned by the prosecuting counsel but was presented to the defence for cross examination. He had taken an operation team to attend another crime scene at 19.45 hours and while he was at that location, he had received a call from SC Peni informing him that they raided a house and found methamphetamine. He had then gone to the appellant's house where he had seen Cpl. Eloni having a white substance in his hand. He had said that he did not take that white substance and went away to another location.

[12] The Principal Scientific Officer at the Fiji Police Forensic Laboratory, Ms. Miliana Werebauinona, had tested crystal white substance received for testing. She has conducted two tests, the presumptive colour test (two stages) and the Instrumental Analyst using FTIR. The first and second presumptive colour tests had suggested that the sample was methamphetamine. She had measured the weight of the substance to be 1424g or 1.4kg. The substance had been given to her in a clear plastic bag and was labelled with prisoner's property. After testing was done, the substance had been

repacked in the forensic laboratory clear plastic bag and sealed it with evidence tape and job number. She had recognized PE10 as the same substance that she tested and then packaged though she could not find the job number on it. The substances had been submitted to the laboratory by a police officer. Mrs. Miliana had tested some dried leaves as well. The dried leaves had been brought along with the white substances and confirmed as marijuana weighing 0.30g. The samples had been handed over to one of her staff Venti Chandra at the Forensic Laboratory. Mrs. Miliana had confirmed that those samples were given to her for testing on 31 October 2017. The report of the test had been tendered in evidence as PE12. On a subsequent date, she had conducted a purity test in accordance with the United Nations Drugs and Crimes Office recommendations in order to measure the purity level of the white substance. After the test, she found that the purity level was less than 40%. The remaining 60 % was impurity.

Defense

[13] According to the appellant he was at home in the evening on 30 October 2017 and during the day he had driven his taxi. His gate was an electronic one and could be opened with a remote key. He had three remote keys and three sets of house keys. One of the remote keys and the house key were with Rodney who used to drive his taxi. The appellant had been living in his house with his two kids, nine years old and five years old. His wife has passed away in 2013. On 30 October 2017, his two children had gone to visit his in-laws. After an argument with Rodney over the income of the taxi, the appellant had gone to drop his house girl and upon his return he had called another driver, Rakesh to come and drive his taxi. When Rakesh came, he had given the taxi to him and advised him to drive the taxi till midnight and bring it back. The appellant had also given one of the three remote keys and the house keys to this driver when he took the taxi.

[14] On the more substantive issue, the appellant had said that one of his friends Vikash had given him a plastic bag on which HCL 2 kg was written, containing battery acid, and a Coca-Cola bottle filled with liquid. Vikash had told him to mix the battery acid and the liquid together and put that into the battery of the car. The appellant had kept

this plastic bag and the bottle of liquid inside the wooden cabinet, which was uplifted by SC Peni on 30 October 2017. His explanation was that he kept the plastic bag and the bottle of liquid inside the cabinet and locked it with a screw nail in order to keep it away from his two children as they could have accidentally drunk it. The appellant had so informed the police that when they found it during the search. According to the appellant, he had told Rodney and Rakesh about the battery acid and the bottle of liquid and the place where he had hidden it. Sometimes the drivers used to stay in his visitor's room (which is the first room after the living area) overnight if they would bring the taxi in the night. The appellant had stated that that he believed that the plastic bag contained battery acid when Vikash gave it to him.

[15] The appellant was sleeping in the evening on 30 October 2017 when the police came and called him. He had then checked who was calling through his CCTV camera and found the police officers at the gate. He had then gone to the gate and inquired the reason for their visit and when they informed him that they had come to search his house for drugs, he had gone back to get the remote key. He then realized that he had left his remote key and the house key in his car as he drove the taxi during the day and gone to look for the extra remote in the visitor's room. He had found the key in the drawers. He had taken about ten to fifteen minutes to find the key and opened the gate. Before he opened the gate, he had tied down the two dogs.

[16] When the police came to his house, SC Peni had asked him about $40,000. Then the police had told him to sit in the sitting room and SC Peni had straightaway gone to the cabinet and removed the screw nail with his hand and uplifted the plastic containing battery acid. SC Peni did not use any screw driver to unscrew the nail. Once they uplifted the battery acid, the appellant had told them that they were battery acid given to him by Vikash. The appellant had then seen SC Paula coming and taking the substance with him. He was then taken to the police station.

[17] In respect of his caution interview, the appellant had said that he did not give his answers voluntarily. According to him, he had not read the caution interview when the interviewing officer had offered him to do so and he thought that the interviewing officer had written down what he had said in his answers. The appellant had further

stated that he informed the police that the battery acid was given to him by Vikash, but the police had not properly taken it down in the record of the interview.

[18] During the cross examination, the appellant had said that there were other places in the house more suitable to hide the battery acid and the bottle of liquid than inside the cabinet but he could not keep it in the taxi, as it was a public transport vehicle. The appellant did not know the surname of Vikash. The appellant had admitted that the search list prepared by DC Eliki on the 30 October 2017 accurately reflected the items that were uplifted from his house by the police.

Ground 01

[19] The appellant argues that the trial judge had failed to stay the proceedings on the basis that the prosecution had not disclosed the running sheet and log book of the vehicle relating to the period between 29 October 2017 and 02 November 2017 alleging that it amounts to a violation of the appellant's right to a fair trial. The appellant relies on section 290(1)(c) and the decision in **Takiveikata v State** [2008] FJHC 315; HAM039.2008(12 November 2008) in support of his position. In ***Takiveikata*** it was held at paragraph [12] that before a stay of proceedings could be considered, there must be a factual basis for that and the accused bears the burden of proof of establishing the facts by admissible evidence to the civil standard (balance of probability/preponderance of evidence) which might justify the intervention of the court by way of stay of proceedings.

[20] In ***Takiveikata,*** Andrew Bruce J adopted the following principles on the question of fairness of trial *vis-à-vis* the obligation on the prosecution to disclose material to the defense.

> *'[45] Where the fairness of a trial is in jeopardy, there are circumstances in which a stay of proceedings might be granted to protect this right…..*
>
> *[232] There is an obligation on the prosecution to disclose certain information, whether documentary or otherwise, to the defence in connection with the conduct of a criminal trial….. However, the essence of that obligation is as follows. The prosecution's duty is to disclose to the defence relevant information which may undermine its case or advance the defence case. The duty is not limited to the*

disclosure of admissible evidence. Information not itself admissible may lead by a train of inquiry to evidence which is admissible. Material which is not admissible may be relevant and useful for cross-examination of a prosecution witness as to credit.

[233] In R v Melvin (unreported), Jowitt J (as he then was) described the scope of what had to be disclosed as follows:

'I would judge to be material in the realm of disclosure that which can be seen on a sensible appraisal by the prosecution: (1) to be relevant or possibly relevant to an issue in the case; (2) to raise or possibly raise a new issue whose existence is not apparent from the evidence that the prosecution proposes to use; (3) to hold a real (as opposed to fanciful) prospect of providing a lead on evidence which goes to (1) or (2).'

[235] It is also as well to note the observations of the House of Lords in R v H & R v C [2004] UKHL 3; [2004] 2 AC 134 as follows:

'Fairness ordinarily requires that any material held by the prosecution which weakens its case or strengthens that of the defendant, if not relied on as part of its formal case against the defendant, should be disclosed to the defence. Bitter experience has shown that miscarriages of justice may occur where such material is withheld from disclosure. The golden rule is that full disclosure of such material should be made.'

[21] The appellant has not demonstrated to this court as to how the running sheet and log book of the vehicle used between 29 October 2017 and 02 November 2017 would be material for his defense. If I am to make a guess, this information may be relevant to the defense allegation that SC Paula who arrived at the appellant's house had taken the white substance and went away to another location and returned in about an hour. SC Paula had totally denied that he ever took charge of the white substance and left the crime scene. Therefore, the state counsel submitted that the prosecution could not serve the running sheet and log book relating to the vehicle used by SC Paula as he made no such trip leaving and returning to the appellant's house and thus, no such documents were available. The High Court judge had dealt with this proposition and rejected it as follows in the judgment

'[8] I now take my attention to the contention of the defence that SC Paula had taken the white substance to an unknown location before it was taken to the police station. The learned counsel for the defence during the cross examination of Cpl Eloni, SC Paula and DC Daniela asked them about the entries made into the station diary on the 30th of October

> *2017, in respect of this operation. According to the entry number 153, SC Paula had left the police station with another operation team at 19.45 hours. SC Paula in his evidence explained that while he was attending to another operation, SC Peni called him about this raid. He had then gone to the accused house. However, he denied that he took the possession of the white substance at the accused's house and went to another location with it. According to the entry number 166, the accused and the search team had arrived at the police station at 20.16, which was nearly 30 minutes after SC Paula had left the police station. Therefore, it is not possible that the police had searched the house of the accused for an hour after SC Paula had taken the substance to another location as claimed by the defence.'*

[22] In the circumstances, I hold that there was no factual basis for the appellant's complaint and he had failed to prove it by admissible evidence on a balance of probability justifying the intervention of the court by way of a stay of proceedings.

[23] Sections 15 (1) of the Constitution of the Republic of Fiji guarantees an accused the right to a fair trial. A breach should result in a stay of the proceedings only if a fair trial is no longer possible, or it would for some other compelling reason such as bad faith, executive manipulation and abuse of process be unfair to try the accused (see **Archbold Criminal Pleadings, Evidence and Practice 2020** at 4-80 at page 393. It was held in **Warren v Att.Gen. for Jersey** [2012] 1 A.C. 22, PC that the question to be determined is whether a stay is necessary in order to protect the integrity of the criminal justice system; fairness to the accused, although not irrelevant, is subsumed in this primary consideration. In the circumstances aforesaid, I do not think that the proceedings against the appellant had affected the integrity of the criminal justice system to bring any disrepute upon it.

Ground 05

[24] This ground of appeal though allowed as containing a matter of law, had not been canvassed by the appellant's written submissions filed for the full court hearing or by way of oral submissions. Therefore, the appellant's counsel seems to have decided not to pursue it at the full court hearing. In any event, having considered the matter in issue, I do not think that is any miscarriage of justice resulting from the appellant's

complaint of his counsel being asked to address the assessors before the prosecuting counsel after the evidence of both parties was concluded.

Grounds 06 and 12

[25] Contrary to the assertion in the ground of appeal, I do not find from the summing-up or the trial proceedings that the defense had asked for a redirection on the chain of possession and the number of remote keys.

[26] The prosecution evidence reveals that SC Peni had found a white clear plastic bag containing white powder and handed it over to Cpl. Eloni, the leader of the police team. DC Pita had found two plastic bags containing dried leaves which he gave to Cpl. Eloni. Cpl. Eloni had confirmed in his evidence that he took charge of the said items. He had prepared a search list (PE2) containing these articles and a laptop signed by the appellant. The appellant had admitted in terms of section 135 of the Criminal Procedure Act 2009 that on 30 October 2017 police officers seized a clear plastic bag containing white powder from a wooden cabinet in his kitchen and the portion of the cabinet where the said plastic bag was found inside had been screwed shut. Having returned to the police station, Cpl. Eloni had made an entry in the station diary indicating the details of the recoveries and locked them in a locker in the CID room. Only Cpl. Eloni had the key to the locker. On the next day (31 October 2017) Cpl. Eloni had opened the locker and taken the articles to the Forensic Department at Nasese and handed over the same for testing. The following day (01 November 2017) he received the reports from the lab confirming that the white powder was positive for methamphetamine HCL (PE9) weighing 1.4kg and the dried leaves were marijuana (PE12 - report not available in the appeal brief). Ms. Miliana Werebauinona (PW8), the Principal Scientific Officer (Chemistry) at Fiji Police Forensic Chemistry Laboratory had confirmed that she received the white substance in a clear bag labeled with the prisoner's property and some dried leaves (not sure how they were packed) and stated that the white substance was tested positive for methamphetamine and dried leaves for marijuana as stated in PE9 and PE12 respectively. The second testing had been carried out on 23 March 2018 and it had revealed that the purity of the substance was less then 40% (<40%) (PE11). Ms. Miliana also had said she could

not confirm that the package marked and tendered in evidence as prosecution exhibit 10 was the same substance which she tested on the 31 October 2017 as she could not see the job number she put on it. Obviously, she did not and could not say that PE 10 was the same white substance that was uplifted by SC Peni at the appellant's house. However, what is clear is that she had tested the white powder that was handed over to the lab by Cpl. Eloni. It was for the police officers to testify to that fact as they eventually did at the trial. The trial judge held that as Ms. Miliana had confirmed that she tested the same substance that was brought to her office by the police on the 31 October 2017, he did not find Mrs. Miliana's evidence to have adversely affected the chain of custody of the white substance from the time of the appellant's arrest to the time of testing the white substance.

[27] In criminal cases, the chain of custody refers to the chronological documentation and control of the physical evidence involved in a case. It ensures that the evidence is properly collected, preserved, handled, and accounted for from the moment it is discovered until tested by an analyst but not essentially until it is presented in court, for the absence of physical evidence in court *per se* is not a bar to a successful prosecution. The chain of custody is crucial to maintain the integrity and reliability of the evidence and to prevent tampering, contamination, or loss. By maintaining a clear and documented chain of custody, the legal system aims to ensure that the evidence presented in court is admissible, reliable, and has not been compromised or tampered with. It helps protect the rights of the accused by ensuring that the evidence is handled properly and that its integrity is upheld throughout the investigation and legal proceedings.

[28] The appellant's challenge to the chain of custody seems to be twofold. One is that SC Peni had failed to comply with the Fiji Police Standing Orders by not signing the exhibits with the time and date. Cpl. Eloni admitted in his evidence that neither him nor SC Peni made any marks or signature on the white plastic bag, even though it is required under the Force Standing Orders, However, in my view, the learned trial judge had correctly stated that The Fiji Police Force Standing Orders were not laws but only the guidelines for the best and good practices to be adopted during the investigations and ultimately it wss the court that had to determine whether the

integrity of the substance uplifted at the appellant's house was preserved without any interference or contaminations with any foreign substances until it was tested and documented.

[29] In **Temo v State** [2022] FJCA 63; AAU117.2016 (26 May 2022) the Court of Appeal said

> *'[25] The Standing Orders will have the same effect as 'judges' rules' and it is well recognized that they do not have the force of law and hence their noncompliance by itself would not render a particular act or conduct illegal or incapable of being acted upon. Nevertheless, it is important to bear in mind that their compliance is most desirable since they play a crucial role in determining fairness and breaches of them are generally not condoned….'*

[30] The single Judge of the Court of Appeal held in **Lata v State** [2015] FJCA 120; AAU0037.2013 (13 March 2015) that

> *'[6] The chain of possession rule applies to the illicit substance and not to its storage facility. In the present case, the prosecution relied upon DC Sauvakacolo's evidence to establish the chain of possession. DC Sauvakacolo's evidence was that after seizing the substance, he took it to the Government Analyst for an analysis and obtained a report.'*

[31] Secondly, the appellant submits that the purity level of less than 40% in the white substance may suggest that the material taken from the appellant's house had been contaminated by methamphetamine reducing the purity level coupled with the appellant's position that DC Paula had gone elsewhere with the white substance in issue.

[32] It was never suggested to DC Paula that he had mixed methamphetamine with the white substance which the appellant said only battery acid in order to falsely implicate him in this crime. No similar suggestion had been made to Cpl. Eloni either. If methamphetamine had already been mixed with battery acid before the police raided the appellant's house it was quite possible that the white substance only had a purity rate of less than 40%. Ms. Miliana's evidence that battery acid and methamphetamine have HCL as a common component shows that these two substances could be mixed together where the mixed substance would not have 100% pure methamphetamine but a reduced or diluted level of methamphetamine. It

is not uncommon for illicit drugs to be mixed with similar harmless substances in order to make detection difficult.

[33] The trial judge had dealt with the matter of chain of custody extensively at paragraphs 85-90 and in the judgment at paragraphs 5-16. I do not think that there is any reasonable doubt arising from the totality of evidence that the articles recovered from the appellant's house were the ones examined by the analyst and reported in PE9, PE10 and PE12.

[34] However, before parting with this ground of appeal I wish to make some helpful observations with regard to the steps that may be taken and strived to be achieved by law enforcement agencies to maintain the integrity and reliability of the evidence and to prevent tampering, contamination, or loss. However, these are only key aspects of the chain of custody process and not rules of law or procedure which means that breach of one or more of them alone may not lead to a breach in the chain of custody.

1. *Identification and Documentation: When evidence is collected at a crime scene, it is identified, described, and documented in detail. This includes information such as the date, time, and location of the collection, as well as the names of the individuals involved in the process.*

2. *Sealing and Packaging: The evidence is properly sealed and packaged to protect it from contamination, damage, or loss. Containers, bags, or other appropriate packaging materials are used, and seals or evidence tape are applied to ensure the evidence remains intact.*

3. *Documentation of Custody Transfers: Whenever the evidence changes hands or is transferred from one person to another (e.g., from the crime scene investigator to the evidence technician, or from the evidence technician to the forensic laboratory), each transfer is documented, including the date, time, location, and the individuals involved.*

4. *Storage and Security: The evidence is stored in a secure and controlled environment to prevent unauthorized access, tampering, or degradation. Proper storage conditions, such as temperature and humidity controls, may be required for specific types of evidence.*

5. *Monitoring and Recordkeeping: The chain of custody is continuously monitored and documented throughout the handling process. Each person who comes into contact with the evidence must document their activities, such as examinations, tests, or analyses performed, to maintain a complete record of the evidence's movement and condition.*

6. *Courtroom Presentation: When the case goes to trial, the evidence is presented in court. To establish its authenticity and reliability, the prosecution must demonstrate an unbroken chain of custody. This involves providing detailed testimony and documentation, including all the individuals who had possession of the evidence and the steps taken to preserve its integrity.*

Ground 07

[35] The gist of the complaint under this ground of appeal could be traced to how the learned trial judge had directed the assessors at paragraphs 10, 19-24, 93 and 95 of the summing-up and how he had directed himself at paragraphs 18 and 22 of the judgment. The most relevant paragraphs in the summing-up are as follows.

19. Section 32 of the Illicit Drugs Control Act, states that:

"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 drugs, controlled chemical or controlled equipment."

20. Accordingly, Section 32 has provided a presumption of possession. If you are satisfied beyond reasonable doubt that the prosecution has proven that:

i) The white substances found in the house of the accused is an illicit drugs, namely methamphetamine, and the dried leaves found in the house of the accused are illicit drugs, namely cannabis sativa, and
ii) The house is under the control of the accused,

21. Then you are allowed to presume that the accused was in possession of those illicit drugs, namely methamphetamine and cannabis sativa, until the contrary is proved by the accused. Under such circumstances, the legal burden of proving that the accused was not in possession of those illicit drugs shift to the accused person. The accused is not required to prove beyond reasonable doubt that he was not in possession of those illicit drugs. He is only required to prove it on a balance of probability. Under the balance of probability, the accused has to prove that it is probable that he was not in possession of these drugs, which means his version is more likely than not.

22. According to the admitted facts, the accused does not dispute that the Police seized a clear plastic containing white powder from a wooden cabinet in the accused' house. The portion of the cabinet where the said

plastic was found had been screwed (vide items 5 and 6 of the admitted facts).

23. *If the prosecution has proven beyond reasonable doubt that the white powder that was found inside the cabinet is methamphetamine and the house was under the control of the accused, you are then allowed to presume that the accused was in possession of those methamphetamine, until the contrary is proved by the accused on balance of probability.*

24. *Likewise, if the prosecution has proven beyond reasonable doubt that they found 0.30 g of cannabis sativa on the 30th of October 2017……., you are then allowed to presume that the accused was in possession of those cannabis sativa, until the contrary is proved by the accused on balance of probability.*

[36] The impugned paragraphs in the judgment are:

> *'18. Accordingly, I find that the prosecution has successfully proven beyond reasonable doubt that the police has found methamphetamine and cannabis sativa in the house, which was under the control of the accused. Hence, the court is allowed to presume that the accused was in possession of these illicit drugs, namely methamphetamine and cannabis sativa until the contrary is proved by the accused on the balance of probability (**vide Section 32 of the Illicit Drugs Control Act**).*
>
> *22. Accordingly, I hold that the accused failed to rebut the presumption of possession on the balance of probability as required under Section 32 of the Illicit Drugs Control Act and sections 60 and 61 of the Crimes Act. Therefore, the court can safely presume that the accused was in possession of the methamphetamine and cannabis sativa as charged under count one and two.'*

[37] Though, leave to appeal was not granted, the appellant had raised the 05th ground of appeal on this issue as follows which I think is quite relevant to the matter canvassed under the 07th ground of appeal.

> '*That the Learned Trial Judge erred in law by shifting the persuasive burden to the Accused, contrary to sections 57 and 59 of the Crimes Decree and thereby causing miscarriage of justice.*

[38] The appellant argues that the burden of proof on an accused under section 32 of the Illicit Drugs Control Act, 2004 is an evidential burden and the learned trial judge erred in placing the legal onus of proof on the appellant and that had caused a miscarriage of justice. The appellant has cited the High Court judgment in **State v Abourizk** [2023] FJHC 402; HAC126.2015 (16 June 2023) [***Abourizk (2023)***] in support of the above proposition.

[39] It is clear from the summing-up that the assessors had been directed that they were allowed to presume that the appellant was in possession of methamphetamine and cannabis sativa, if the prosecution had proven beyond reasonable doubt that the white powder found inside the cabinet was methamphetamine and the house was under the control of the appellant until the contrary was proved by him on balance of probability. The trial judge himself had concluded that the prosecution had proven beyond reasonable doubt that methamphetamine and cannabis sativa were found in the house which was under the control of the appellant and therefore the court was allowed to presume that the appellant was in possession of those illicit drugs, until the contrary was proved by the appellant on the balance of probability and that the appellant had failed to rebut the presumption of possession on balance of probability as required under section 32 of the Illicit Drugs Control Act, 2004. Therefore, the trial judge had presumed that the appellant was in possession of methamphetamine and cannabis sativa as charged under count one and two. Thus, it is clear that most probably the assessors and unmistakably the trial judge had presumed that the appellant was in possession of methamphetamine and cannabis sativa based on section 32 of the Illicit Drugs Control Act, 2004 as the appellant had failed to discharge his burden of rebutting the presumption on a balance of probability.

[40] With regard to the fault element, the trial judge had directed the assessors on knowledge as follows

> *'16. A person is in possession of an illicit drug if it is in his actual physical custody or control, with the knowledge or belief that the substance is an illicit drugs. The knowledge should not necessarily be that the substance is the same illicit drugs as charged. It is sufficient that the person had the knowledge or the belief that the substance in his actual physical custody or control is some illicit substance.*
>
> *17. Accordingly, the prosecution is required to prove beyond reasonable doubt that the accused knowingly had these illicit drugs in his actual physical custody or control and had the knowledge that these substances were illicit drugs.'*

[41] In ***Abourizk (2023),*** Mr. L. J. Burney for the Director of Public Prosecutions (DPP) appearing for the prosecution had conceded at the pre-trial stage itself and in the opening address that burden under section 32 of the IDCA is mere evidential and

therefore it does not impose a burden of 'proof' on the defense. The defense had concurred with the prosecution. Not being content with the concession made by the prosecuting counsel and particularly in view of the remarks of Court of Appeal decision in **Abourizk v State** [2019] FJCA 98; AAU0054.2016 (7 June 2019) [***Abourizk (2019)***], that the burden on the defence is one of legal and that burden must be discharged on a balance of probabilities, the learned High Court judge had dealt with this issue at great length and come to the conclusion that the right to be presumed innocent is qualified in Fiji but section 32 of the IDCA imposes only an evidential burden on the defense.

[42] However, in contrast, Mr. Burney in ***Abourizk (2019)*** in his written submissions had submitted that applying an evidential burden as the standard for rebutting a statutory presumption would appear to entirely undermine the utility of the presumption since it merely mirrors the conventional criminal standard of proof (*i.e.* beyond reasonable doubt) and that it explains why section 60 of the Crimes Act imposes a legal burden to rebuttal of presumptions.

[43] The Court of Appeal in ***Abourizk (2019***) observed in response to the argument that the learned trial judge had erred in law by shifting the persuasive burden to the accused contrary to sections 57 and 59 Crimes Act as follows.

> *'[73] 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).'*

[44] The Supreme Court in **Abourizk v State** [2022] FJSC 9; CAV0013.2019 (28 April 2022) [***Abourizk (2022)***] states that possession is an elusive concept in the law and has suggested in answer to the question *'Are you in possession of something which you do not have on you, but is in your home, for example, or in a car in which you are travelling?'* by referring to section 32 that once the prosecution proves beyond

reasonable doubt that the **illicit drugs** were **on the premises or vehicle** which was **under the control of the accused**, it was then for the accused to rebut the presumption by proving – on a balance of probabilities, of course, not beyond reasonable doubt – that he had not been in possession of the drugs (see paragraph [20]). Thus, the Supreme Court too seems to have been of the view that the presumption under section 32 has to be rebutted on balance of probabilities. This is as far as the physical element of the offence of possession of illicit drugs under section 5 of the IDCA is concerned.

[45] However, it would be clear from the Court of Appeal judgment in ***Abourizk (2019***) that the presumption under section 32 of the Illicit Drugs Control Act 2004 is only a factual presumption (see paragraphs [77] & [98] & [101]) and even the title to section 32 states that it deals with a factual presumption relating to possession of illicit drugs. Therefore, section 32 presumption would only be applicable to the physical element of the offence of possession of illicit drugs. The Court said in paragraph [101] that *'Thus, it is clear that the trial judge's conclusion that the prosecution had proved the fault element of the offence of possession of Cocaine under section 05 (a) of the Illicit Drugs Control Act 2004 is not based on the presumption under section 32 of the Illicit Drugs Control Act 2004 which is any way a factual presumption only. He had arrived at that conclusion based on the evidence of the case.'*

Factual presumption and legal presumption

[46] A factual presumption is a presumption that arises when specific facts or evidence are established. It allows a court to infer the existence of a particular fact from other known facts, even though direct evidence may be lacking. Factual presumptions are based on common human experiences or empirical observations. For example in some jurisdictions, there is a factual presumption regarding the ownership of drugs found in a person's possession or if an individual is found to be in possession of a significant amount of illegal drugs, a factual presumption may arise that he possesses the drugs to sell or distribute.

[47] A legal presumption on the other hand is a rule established by law that dictates how a court should decide a particular issue unless sufficient evidence is presented to rebut or overcome the presumption. It is a default assumption that the law creates to make the judicial process more efficient. Legal presumptions are typically based on public policy or practical considerations. For example, the presumption of innocence in criminal law is a legal presumption which means that the accused is presumed innocent until proven guilty.

[48] Thus, a legal presumption is a general rule established by law, whereas a factual presumption is a specific inference made from established facts. Legal presumptions guide the decision-making process, while factual presumptions aid in determining facts based on logical assumptions.

[49] Section 32 of the Illicit Drugs Control Act 2004 creates a factual presumption of possession rather than a legal presumption. Therefore, while the presumption of possession is established by section 32 it does not relieve the prosecution of its burden to prove the mental or fault element of the offense of possession of illicit drugs beyond reasonable doubt. Therefore, even with the presumption of possession, the prosecution still needs to establish the accused's mental state, such as intent, knowledge or recklessness to prove the offense of possession of illicit drugs beyond reasonable doubt. The presumption helps the prosecution in making its case as far as the physical element is concerned by shifting the burden of proof to the accused to provide evidence to the contrary, but it does not negate the need to prove the mental element of the offense.

[50] As for the fault element (mental element) of the offence of possession of illicit drugs, in addition to both knowledge and intention as fault elements of possession (see **Lata v State** AAU0037 of 2013: 26 May 2017 [2017] FJCA 56), the Court of Appeal in ***Abourizk (2019***) held that recklessness too is part of the fault element of possession under section 05 (a) and 5(b) of the Illicit Drugs Control Act 2004 and that when recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element (see paragraphs [94 & [97]). Justice Keith in ***Abourizk (2022)*** dealt with the fault element of possession of illicit

drugs without referring to the relevant provisions of the Crimes Act, 2009 and treated it as *'knowledge'* but did not rule out recklessness but said that His Lordship could see how in one sense recklessness might be relevant (see paragraph [27]).

[51] Since no presumption applies to the fault element of the offence of possession of illicit drugs under section 5 of the Illicit Drugs Control Act 2004, the burden of proof beyond reasonable doubt of the fault element throughout the trial rests with the prosecution. In contrast, in Singapore presumptions of both possession and knowledge are applicable and section 18(2) of Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ('MDA') ('presumption of knowledge') states that anyone who is *proved or presumed* to have possessed controlled drugs shall be presumed to have known the nature of that drug. Section 18(1) ("presumption of possession") states that anyone who is *proved* to have possessed anything containing controlled drugs is presumed to have possessed that drug. In **Zainal bin Hamad v Public Prosecutor** [2018] SGCA 62, the Singapore Court of Appeal agreed that where the Prosecution wishes to prove possession, it must prove not only that the accused possessed the package, but also that the accused knew that the package contained *something* – which may later be established to be the controlled drugs. However, the Prosecution need not prove that the accused knew that he possessed drugs, as long as it proves the accused was in possession of *something*, and that *thing* turns out to be the drugs in question (The converse is where something is planted without the accused's knowledge). Indeed, once the Prosecution proves that the accused had physical control over or possession of the package which contains the *thing* at issue, the court may infer that the accused had knowledge of the existence of that *thing*. The accused may then raise a reasonable doubt otherwise. The Court of Appeal also stated that the presumption of knowledge under section 18(2) applies either where possession is proven, or the presumption of possession under section 18(1) is not rebutted. To rebut the presumption of knowledge, the accused has to prove on a balance of probabilities as to what he thought or believed he was carrying.

[52] In ***Abourizk (2022)***] the Supreme Court dealt with the burden of proof of the fault element as follows.

> *'[21] '……. 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.*
>
> *[22] Bearing in mind, then, that the burden of proving that they had not been in possession of the drugs had shifted to the petitioners ……..what did the requirement of knowledge mean that the petitioners had to prove? That depends on whether the burden is a legal or evidential one…… **If the burden is a legal burden, it was for the petitioners to prove – on a balance of probabilities** – that they had not known that any of the bags or suitcases in the car contained drugs. On the other hand, **if the burden is only an evidential one, it was for the petitioners to produce sufficient evidence** on which a court could conclude that they might not have known that any of the bags or suitcases contained drugs. If they were able to do that, it would then be for the prosecution to prove beyond reasonable doubt that they had known that there were drugs in one or other of the bags or suitcases……*

[53] In ***McNamara*** (1998) 87 Cr. App. R. 246, the Court of Appeal acknowledged the difficulty in expressing the concept of "possession" and in extracting the *ratio* from the speeches in ***Warner,*** above. The following propositions, it was said, emerged from those speeches.

1) *A man does not have possession of something which has been put into his pocket or house without his knowledge.*
2) *A mere mistake as to the quality of a thing under the defendant's control is not enough to prevent him being in possession –for example, in possession of heroin believing it to be cannabis or aspiring: see Randolph [1972] Crim. L. R. 779, DC*
3) *If the Defendant believed that the thing was of a wholly different nature to that which in fact it was, then, to use the words of Lord Pearce (in Warner), "the result would be otherwise".*
4) *In the case of a package or box, the defendant's possession of it led to the strong inference that he was in possession of the contents. However, if the contents were different in kind from what he believed, he was not in possession of them. To rebut the inference, the defendant would have to raise a doubt as to whether, either he was a servant or bailee who had no right to open the package and no reason to suspect that its contents were illicit or were drugs, or he had no knowledge of, or had made a genuine mistake as to,*

the nature of the contents, even though he was the owner, and that he had received the package innocently and had had no opportunity to acquaint himself with its actual contents.

[54] In ***Lewis*** *(G)* (1988) 87 Cr. App. R. 270, CA, police officers discovered drugs during a search of a house in respect of which L was the sole tenant. L's case was that he rarely visited the house which was frequented by others. The drugs had apparently been found in a cassette case hidden under some clothing. The appellant submitted that the minimum that had to be proved was knowledge of the existence of the cassette case. The court rejected this, holding that the following is an adequate direction (conforming to Warner): a person is in possession of something when he has knowledge of its presence and some control over it; but he would not have possession unless he either knew, or the circumstances were such that he had the opportunity, whether he availed himself of it or not, to learn to discover in a general way what the items were.

[55] Nevertheless, I think that in the light of the relevant provisions of the Crimes Act, 2009 in Fiji, as held by the Court of Appeal in ***Abourizk (2019***) the fault element for possession of illicit drugs under the Illicit Drugs Control Act 2004 is wider and not confined only to 'knowledge' but includes recklessness which means that proof of intention, knowledge or recklessness will satisfy that fault element.

[56] Mr. Singh, counsel for Muriwaqa (the co-appellant of Abourizk) had in the Supreme Court (***Abourizk (2022)***] contended that if the burden was a legal one as the Court of Appeal thought, the question would then arise whether section 32 of the Illicit Drugs Control Act 2004 offends the presumption of innocence guaranteed by section 14(2)(a) of the Constitution of the Republic of Fiji. However, Mr. Singh did not appear for any of the appellants in the Court of Appeal in ***Abourizk (2019***) and no argument was addressed to this court along those lines. Justice Keith thought that in the light of the favourable direction which the trial judge had given, the appeal before it was not the appropriate vehicle to consider this argument in ***Abourizk (2022)***].

[57] The learned High Court judge in ***Abourizk (2023)*** has determined that section 32 of the Illicit Drugs Control Act, 2004 imposes only an evidential burden on the defense and to impose a legal burden of proof on a balance of probabilities on the accused [as

the Court of Appeal did in ***Abourizk (2019***)] would be inconsistent with the presumption of innocence in section 14 (2)(a) of the Constitution which states that every person charged with an offence has the right to be presumed innocent until proven guilty according to law. This argument was not advanced by either party in the Court of Appeal nor did the court address its mind to it in ***Abourizk (2019***).

[58] Upon a most logical reading and interpretation of the cumulative effect of section 32 of the Illicit Drugs Control Act 2004 (which specifically refer to the presumption of possession '*until the contrary is* ***proved****'* and in the case of an evidential burden there is no question of *'proof'*) and section 60(c) of the Crimes Act, I am still convinced that the burden of proof on an accused when the presumption under section 32 operates is a legal burden and in terms of section 61 of the Crimes Act, a legal burden of proof on the accused must be discharged on the balance of probabilities. Presumptions such as this have been held to give rise to a legal burden since the judgment of the Appellate Division in **Ex parte Minister of Justice: in re R v Jacobson and Levy** 1931 AD 466. However, I have to now examine whether imposing a legal burden of proof as defined in section 59 of the Crimes Act would be inconsistent with the right to presumption of innocence under Bill of Rights in Chapter 2 of the Constitution.

Legal burden and evidential burden

[59] The legal burden, also known as the persuasive burden or ultimate burden of proof, is the overall responsibility placed on a party to prove or disprove a disputed fact. Legal burden focuses on the ultimate issue or the entirety of the case. It determines who wins or loses the overall dispute. The party with the legal burden has the responsibility to convince the trier of fact by meeting the required standard of proof, such as 'beyond a reasonable doubt' in criminal cases or 'preponderance of the evidence'/'balance of probability' in civil cases. Section 57(3) of the Crimes Act states that 'legal burden', in relation to a matter, means the burden of proving the existence of the matter and as per section 58(1) a legal burden of proof on the prosecution must be discharged beyond reasonable doubt. However, section 61 states

that a legal burden of proof on the defendant must be discharged on the balance of probabilities.

[60] The evidential burden, also known as the evidentiary burden, provisional burden, burden of adducing evidence or burden of production, refers to the responsibility of a party to present sufficient evidence on a specific issue or element of a claim or defense. The evidential burden may shift between the parties as the case progresses, depending on the rules of procedure and the type of case. According to section 59 of the Crimes Act 'evidential burden', in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist. It is misleading to refer to this as an evidential burden of *proof* because it does not require proof of the matter asserted (vide **Jayasena v. The Queen** [1970] A.C. 618, at 624).

[61] In summary, the legal burden determines the overall outcome of the case and the party who must prove their case should do so by meeting the required standard of proof. The evidential burden, on the other hand, concerns the responsibility to present sufficient evidence on specific issues or elements to raise a reasonable inference or establish a *prima facie* case.

Relevant Constitutional provisions in Fiji

[62] According to section 2(2) of the Constitution subject to its provisions, any law inconsistent with the Constitution is invalid to the extent of the inconsistency. Section 3(1) requires any person interpreting or applying the Constitution to promote the spirit, purpose and objects of it as a whole, and the values that underlie a democratic society based on human dignity, equality and freedom and as per section 3(2), 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 its provisions over an interpretation that is inconsistent with it. The rights and freedoms under Chapter 2 – Bill of Rights may be limited *inter alia* by limitations which are necessary and are prescribed, permitted by law or provided under a law [vide section 6(5)(c) of the Constitution]. Section 7(1) states that in addition to complying with section 3, when

interpreting and applying Chapter 2, a court, tribunal or other authority (a) must promote the values that underlie a democratic society based on human dignity, equality and freedom; and (b) may, if relevant, consider international law, applicable to the protection of the rights and freedoms in Chapter 2. Section 7(3) states that a law that limits a right or freedom set out in Chapter 2 is not invalid solely because the law exceeds the limits imposed by Chapter 2 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. According to section 7(5), in considering the application of Chapter 2 to any particular law, a court must interpret Chapter 2 contextually, having regard to the content and consequences of the law, including its impact upon individuals or groups of individuals. This is the constitutional framework within which the presumption of innocence under section 14(2)(a) should be considered and interpreted. I am also mindful that Illicit Drugs Control Act, 2004 had been enacted prior to the promulgation of the Constitution of Fiji (2013) and preserved by section 173(1) of the Constitution which states

> *'173.—(1) Subject to subsection (2), all written laws in force immediately before the date of commencement of this Constitution (other than the laws referred to in Part C of this Chapter) shall continue in force as if they had been made under or pursuant to this Constitution, and* ***shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Constitution****.'*

Relevant International law

[63] Article 11(1) of the Universal Declaration of Human Rights (1948), Article 6.2 of the European Convention for the Protection of Human Rights (ECHR) and Fundamental Freedoms (1950) and Article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) (1966) provide that everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law. Article 14(1) of the ICCPR guarantees the right to a fair trial. Fiji is a party to ICCPR.

Is presumption of innocence absolute? Limitations on presumption of innocence.

[64] The High Court in ***Abourizk (2023)*** has held that

'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".'

[65] Section 6(5) of the Constitution of Fiji states that the rights and freedoms set out in Chapter 2 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***.

[66] The presumption of innocence holds that the defendant is considered innocent until proven guilty, and the burden of proof rests on the prosecution to establish guilt beyond a reasonable doubt. The presumption of innocence is derived from the centuries-old principle of English law, forcefully restated by Viscount Sankey in his celebrated speech in **Woolmington v Director of Public Prosecutions** (1935) AC 462 (HL) at 481, that it is always for the prosecution to prove the guilt of the accused person, and that the proof must be proof beyond a reasonable doubt. Further, the prosecution must disprove according to the same criminal standard any defenses (such as self-defense, automatism, intoxication, alibi, provocation, duress etc.) advanced by the defense (see for example **Mancini v. D.P.P** [1942] A.C. 1 at 12-13; **Johnson** [1961] 3 All E. R. 969, at 971) except the defense of insanity which in common law must be proved by the accused on a balance of probabilities (civil standard of proof). Although the onus of proof is cast upon the prosecution in respect of negating a defense, an evidential burden is cast upon the accused in relation to the raising of a specific matter by way of defense (see for example **Mancini v. D.P.P** [1942] A.C. 8; **D.P.P v Morgan** [1976] A.C. 182 at 214). Discharging an evidential burden in relation to a matter does not require proof of it by the party concerned.

Once the evidential burden is discharged, the mater is before the tribunal of fact, and it is then upon the prosecution to negative the defense beyond reasonable doubt.

[67] However, it is open to the legislature to reverse the onus of proof on the accused (*i.e*. reverse burden where the burden of proof is shifted to the accused), either generally or in respect of an element of liability or a defense of the crime charged or some other related matter. For example, it may be provided (in substance) that the prosecution must prove the physical elements of an offence beyond reasonable doubt, with the accused then being liable to conviction unless he or she can prove that he or she acted with reasonable cause, or excuse. Or it may be provided that the averment of a matter is *prima facie* proof that it existed, or that proof of fact A is *prima facie* evidence that fact B existed, or that a fact shall be deemed to exist unless the contrary be proven, and so forth. Some of these provisions will unambiguously reverse the burden of proof, while others are more ambivalent in their effect. They facilitate proof (generally by the prosecution) and are occasionally referred to as evidential sections, or statutory presumptions. The justification for them parallels that for the doctrine of strict liability in the context of the minor crimes – they are needed to make legislation workable, that is, the subject matter of the legislation in question is such that were such provisions not to be made, it would be unreasonably difficult to apply the legislation, and thus secure compliance with it. A provision that a fact shall be taken, or deemed, to exist unless there is "proof to the contrary" as in section 32 of the IDCA does cast an onus upon the person disputing the existence of this fact, to disprove its existence (with the applicable standard being the civil one). Reverse burden requires the defendant to prove or disprove a certain fact or defense, which would typically be the responsibility of the prosecution. However, the imposition of a reverse burden in criminal law can be seen as a departure from the fundamental principle of the presumption of innocence and is subject to constitutional and human rights considerations.

[68] Obviously, section 32 of the Illicit Drugs Control Act 2004 operates to limit the right to presumption of innocence but not a complete denial of it, for it imposes a burden on the appellant to rebut only the factual presumption on possession, being the physical element of the offence of possession of illicit drugs, and section 32 does not

per se create a presumption of guilt of the offence of possession of illicit drugs under section 5. The fault element still needs to be proved by the prosecution beyond reasonable doubt. Thus, section 32 imposes a 'reverse burden' on the accused to prove that he was not in possession of the illicit drugs on a balance of probability when the prosecution has proved beyond reasonable doubt that it was an illicit drug, it was on or in any premises, craft or vehicle which was under the control of the accused. The presumptions phrased in the way similar to section 32 *('until the contrary is proved*') have been held to give rise to a legal burden (see **Ex parte Minister of Justice: in re R v Jacobson and Levy** 1931 AD 466) and not an evidential burden. It has also been held that presumptions of facts *'unless the contrary is proved'* impose a legal burden upon accused persons (See **S v Guess** 1976 (4) SA 715 (A) at 719 B - C; **S v Radloff** 1978 (4) SA 66 (A) at 71H.). A legal burden would require an accused to demonstrate on a balance of probabilities that he or she was not guilty of possession in order to be acquitted of the offence of possession of illicit drugs under section 32. Even if the accused raises a reasonable doubt as to whether he or she was in possession of the illicit drug, but fails to show it on a balance of probabilities, he or she must nevertheless be convicted. The effect of imposing the legal burden on the accused may therefore result in a conviction for possession of illicit drugs under section 32 despite the existence of a reasonable doubt as to his or her guilt. An evidential burden on the other hand would require the accused, once the prosecution has proved beyond reasonable doubt that it was an illicit drug, it was on or in any premises, craft or vehicle which was under the control of the accused, to adduce evidence which raises a reasonable doubt as to whether he or she was in possession of the illicit drug in order to be acquitted of the offence of possession of the illicit drug.

[69] Thus, the reverse burden certainly contains a limitation on the right to be presumed innocent but it is prescribed by law namely section 32 of the Illicit Drugs Control Act 2004. The important question then to be determined is whether the limitation is ***necessary*** and if so to what extent**.** If it is necessary, section 32 limitation on presumption of evidence is not *per se* inconsistent with section 14(2)(a) of the Constitution and not invalid. Is it necessary to the extent of transferring the burden of proof on a balance of probability onto the accused? If the answer is 'no', and if

section 32 appears to be inconsistent with section 14(2)(a) of the Constitution to some extent, the court must to that extent accord a reasonable interpretation to section 32 that is consistent with the presumption of innocence. In answering the question whether the limitation is necessary in the matter of interpretation of section 32, the court must also promote the values of a democratic society based on human dignity, equality and freedom and in so far as relevant may consider international law applicable to the protection of the rights and freedoms. Whether the limitation in section 32 is ***necessary*** has to be considered in this broader context. I shall now deal with this question.

[70] Reverse burden is not always inconsistent with the presumption of innocence. However, the imposition of a reverse burden is generally justified only in limited circumstances where there are compelling reasons and safeguards in place. It is crucial to note that the imposition of a reverse burden in criminal law is subject to constitutional and human rights considerations, including the right to the presumption of innocence. Where a statute reverses the burden of proof, requiring the accused to prove an ultimate fact which is necessary to determine his guilt or innocence he is required to satisfy the burden on the balance of probabilities [vide **HKSAR v Gurung Krishna** [2010] 4 HKLRD 456 (21 July 2010)].

South Africa

[71] Section 25(3)(c) of the South African Constitution *inter alia* had stated that every accused person shall have the right to a fair trial, which shall include the right (c) to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial. Section 33(1) of the SA Constitution, in so far as it applies to section 25(3) has provided the rights entrenched in the Chapter may be limited by law of general application, provided that such limitation - (a) shall be permissible only to the extent that it is - (i) reasonable; and (ii) justifiable in an open and democratic society based on freedom and equality; and (b) shall not negate the essential content of the right in question, and ... shall ... also be necessary. Sections 98(5) of the Constitution provided that in the event of the Constitutional Court finding that any law or any provision thereof is inconsistent with the Constitution, it shall declare such

law or provision invalid to the extent of its inconsistency. Section 35(2) of the SA Constitution provided that*: 'No law which limits any of the rights entrenched in this Chapter, shall be constitutionally invalid solely by reason of the fact that the wording used prima facie exceeds the limits imposed in this Chapter, provided such a law is reasonably capable of a more restricted interpretation which does not exceed such limits, in which event such law shall be construed as having a meaning in accordance with the said more restricted interpretation.*'. Thus, these are somewhat similar to the relevant provisions in the Constitution in Fiji.

[72] In **S v Makwanyane and Another** 1995(3) SA 391 (CC);1995(6) BCLR 665 (CC) on behalf of the Constitutional Court of South Africa Chaskalson P (at paragraph 104) had stated that this enquiry involves the weighing up of competing values and ultimately an assessment based on **proportionality**. He said at paragraph 104 that

> *'In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.' (see also S v Williams 1995 (3) SA 632 (CC); 1995 (7) BCLR 861 (CC) at paragraphs 58 - 60).*

[73] In **S v Zuma and Others** 1995(2) SA 642(CC); 1995(4) BCLR 401(CC), the issue was the constitutionality of a legal provision contained in section 217(1)(b)(ii) of the Criminal Procedure Act 51 of 1977 which placed a burden on the accused to rebut a presumed fact, namely, that a confession had been made freely and voluntarily. The phrase *'unless the contrary is proved'* which was used in the provision meant, in effect, that if the accused failed to discharge the burden of proof, that is, on a balance of probabilities, the confession would be admitted notwithstanding the existence of a reasonable doubt that it had been made freely and voluntarily. The Constitutional Court of South Africa held in ***Zuma*** that the presumption of innocence was infringed by the provision which imposed an onus on the accused to disprove the voluntariness of the confession.

[74] Kentridge AJ ***Zuma and Others*** at paragraph 41 pointed out that the effect of the judgment was not to invalidate every legal presumption reversing the onus of proof as some presumptions

> *'may be justifiable as being rational in themselves, requiring an accused person to prove only facts to which he or she has easy access, and which it would be unreasonable to expect the prosecution to disprove ... Or there may be presumptions which are necessary if certain offences are to be effectively prosecuted, and the State is able to show that for good reason it cannot be expected to produce the evidence itself …'.*

[75] In **S v Bhulwana; S v Gwadiso** (CCT12/95, CCT11/95) [1995] ZACC 11; 1996 (1) SA 388; 1995 (12) BCLR 1579 (29 November 1995) the Constitutional Court of South Africa was concerned with a provision in section 21(1)(a)(i) of the Drugs and Drug Trafficking Act 140 of 1992 which required that an accused who was proved to be in unlawful possession of dagga in excess of 115 grams be presumed, *'until the contrary is proved'* to be dealing in such dagga (as opposed to the lesser offence of possession). The effect of the presumption was that if the accused failed to prove on a preponderance of probabilities that he or she was not dealing or trafficking in dagga, a conviction for dealing would result, even if the evidence raised a reasonable doubt as to the innocence of the accused. The Constitutional Court considered the section to be an infringement of the right of an accused person to be presumed innocent in section 25(3)(c) of the Constitution. The Court found that the section was not justifiable in terms of s 33(1) of the Constitution, holding that the State had failed to prove that the presumption substantially furthered the aim of combatting the trafficking of illegal drugs; nor could it be said that the presumption facilitates the prosecution and conviction of drug offenders who would otherwise not be convicted. O' Regan J said

> *'[18] In sum, therefore, the court places the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be.*

[76] It was argued in ***Bhulwana, Gwadiso*** that if the court found section 21(1)(a)(i) to be unconstitutional, the court should 'read down' the section and rule that it should be

interpreted as imposing not a legal burden but an evidential one. However, the Constitutional Court declined and stated that

> *'[29] To read section 21(1)(a)(i) as imposing an evidential burden upon the accused rather than a legal burden would require reading the words in section 21(1)(a)(i) 'until the contrary is proved' as meaning 'unless the evidence raises a reasonable doubt'. I do not think that these words are reasonably capable of such an interpretation, both in the light of the unambiguous language of the phrase 'until the contrary is proved' and the considerable and consistent judicial dicta interpreting that phrase. Accordingly, the submission that section 21(1)(a)(i) be read down to give rise to an evidential and not a legal burden cannot be accepted.'*

[77] In **S v Mbatha, S v Prinsloo** (CCT19/95, CCT35/95) [1996] ZACC 1; 1996 (3) BCLR 293; 1996 (2) SA 464 (9 February 1996), the Constitutional Court of South Africa considered the constitutionality of section 40(1) of the Arms and Ammunitions Act 75 of 1969 which contains a presumption to assist the State prove possession of unlawful possession of arms and ammunition. The presumption provided:

> *'Whenever in any prosecution for being in possession of any article contrary to the provisions of this Act, it is proved that such article has at any time been on or in any premises, including any building, dwelling, flat, room, office, shop, structure, vessel, aircraft or vehicle or any part thereof, any person who at that time was on or in or in charge of or present at or occupying such premises, shall be presumed to have been in possession of that article at that time, until the contrary is proved.'*

[78] The Constitutional Court in ***Mbatha, Prinsloo*** classified the presumption in s 40(1) as a 'reverse-onus' provision because it shifted the burden of proof of guilt away from the State to the accused to disprove the presumed fact on a balance of probabilities. In this case the fact presumed was 'possession' which constituted an essential element of the offence. The presumption required the accused to disprove 'possession' on a balance of probabilities. This meant that even if the accused established a reasonable doubt he or she could still be convicted for failing to disprove the presumed fact on a balance of probabilities. The Court held that this presumption infringed the right of an accused person to be presumed innocent in terms of s 25(3)(c) of the Constitution. The court considered next whether the presumption was a reasonable and justifiable limitation of the right of an accused to be presumed innocent. It noted the high levels of crime in South Africa were linked to the proliferation of illegal firearms and ammunition and also acknowledged the difficulties confronting the police in the

investigation of crime and the illegal distribution and possession of arms and ammunition. The Court found that the presumption was widely phrased and included within its reach many categories of potentially innocent people who may have had no connection with the arms or ammunition found, but against whom the presumption could be used to prove guilt despite the existence of a reasonable doubt. It held that the presumption as it stood could not be classified a reasonable and justifiable limitation on the right of an accused to be presumed innocent. Langa J said

> *'[21] The presumption is couched in wide terms and no attempt has been made to tune its provisions finely so as to make them consistent with the Constitution and to avoid the real risk of convicting innocent persons who happen to be at the wrong place at the wrong time. It may be invoked in a wide range of circumstances and against any number of categories of persons, as long as they have been in, on or at a particular place at the relevant time.'*
>
> *[24] ……..A legislative limitation motivated by strong societal need should not be disproportionate in its impact to the purpose for which that right is limited. If restrictions are warranted by such societal need, they should be properly focussed and appropriately balanced….'*

[79] In **S v Julies** (CCT7/96) [1996] ZACC 14; 1996 (7) BCLR 899; 1996 (4) SA 313 (11 June 1996) involved a challenge to section 21(1)(a)(iii) of the Drugs and Drug Trafficking Act 140 of 1992, which creates a presumption that a person found in possession of any quantity of an undesirable dependence producing substance was presumed to be dealing in that substance. The Constitutional Court of South Africa found that the presumption violated the accused's right to silence and the presumption of innocence. The Court held that the presumed fact of trafficking in drugs could in no reasonable way be said to flow from the proof of possession of a negligible quantity of that substance. In the absence of any such rational connection the Court found that, regardless of any policy considerations, the presumption could not be justified in terms of section 33(1) of the Constitution

[80] Similar reasoning was adopted by the Constitutional Court of South Africa **S v Ntsele** (CCT25/97) [1997] ZACC 14; 1997 (11) BCLR 1543 (14 October 1997) with regard to section 21(1)(b) of the Drugs and Drug Trafficking Act 140 of 1992 which presumed that anyone in charge of cultivated land which has dagga plants growing on

it is dealing in dagga until the contrary is proved and held that the provision violated the constitutional right to be presumed innocent under section 35(3)(h) of the new Constitution. Mokgoro J held that

> *'[4] The fundamental rights bound up with and protected by the presumption of innocence are so important, and the consequences of their infringement potentially so grave, that compelling justification would be required to save them from invalidation. None is apparent here. On the contrary, the importance of the values in issue and the extent and nature of the risk involved in their erosion outweigh any societal interest likely to be advanced by the presumption.'*

[81] In **S v Mello** (CCT5/98) [1998] ZACC 7; 1998 (3) SA 712; 1998 (7) BCLR 908 (28 May 1998) the Constitutional Court of South Africa was called upon to consider the constitutionality of a presumption created by section 20 of the Drugs and Drug Trafficking Act No. 140 of 1992. The section provided that if a person is being prosecuted for an offence under the said Act and it is proved that any drug was found in the immediate vicinity of the said accused, it shall be presumed, until the contrary is proved, that he or she was found in possession of such drug. The Court found that the effect of this presumption has the effect of relieving the prosecution of the burden of proving an essential element of the offence, impose a reverse burden on an accused person to disprove an essential element of the offence and to prove his or her innocence. If the accused person fails to do so, even where reasonable doubt as to guilt exists, conviction would follow. The Court concluded that the presumption offends against the very right of a fair trial which included the right of the accused person to be presumed innocent, is unjustifiable in an open and democratic society based on freedom and equality and is therefore unconstitutional. Accordingly, the Court held that section 20 could only be saved by the provisions of section 33(1) of the interim Constitution, if it constitutes a limitation which is reasonably necessary and justifiable in an open and democratic society based on freedom and equality. Mokgoro J held

> *'[10] ……Furthermore, no argument springs to mind in favour of risking false convictions by keeping alive a provision which hits at the core of the right to be presumed innocent until proven guilty; a right which protects the basic values of justice in an open and democratic society based on freedom and equality. I find section 20 to be unjustifiable. In the result it is unconstitutional.'*

[82] In ***Mbatha, Prinsloo,*** the State had argued that the inroads which section 40(1) of the of the Arms and Ammunitions Act 75 of 1969 makes on the presumption of innocence are reasonable, justifiable and necessary and that they do not negate the essential content of the right and characterized the objective of the presumption as being to assist in combating the escalating levels of crime as part of the government's duty to protect society generally. The contention was that the provision is intended to ensure effective policing and to facilitate the investigation and prosecution of crime as well as to ease the prosecution's task of securing convictions for contraventions. The State had provided to the Constitutional Court the problems which the government has to contend with in fulfilling its duty to protect society in some detail (see paragraph [17]). The Court in reply said that the objective of the presumption was truly laudable and its importance, in the climate of very high levels of violent crime, cannot be overstated and that it was difficult not to have sympathy for representations of this nature, coming as they did from officials of the State whose task it is to deal with what has become a truly serious problem and admitted that those were real and pressing social concerns and it was imperative that proper attention should be given to finding urgent and effective solutions. However, the Court stressed that

> *'[18] …….The issue before us, however, is not simply whether there is a pressing social need to combat the crimes of violence - there clearly is - but also whether the instrument to be used in meeting this need is itself fashioned in accordance with specifications permitted by the Constitution…..'*

[83] Langa J in ***Mbatha, Prinsloo*** elaborated further as follows.

> *'[19] The presumption of innocence is clearly of vital importance in the establishment and maintenance of an open and democratic society based on freedom and equality. If, in particular cases, what is effectively a presumption of guilt is to be substituted for the presumption of innocence, the justification for doing so must be established clearly and convincingly.*
>
> *[20] It was argued that without the presumption it would be almost impossible for the prosecution to prove both the mental and physical elements of possession. I do not agree. The circumstances of each case will determine whether or not the elements of possession have been established beyond reasonable doubt. The evidence need not necessarily be direct. It may be, and often is, circumstantial and will often be sufficient to secure a conviction without the assistance of the*

presumption. There will no doubt be cases in which it will be difficult to prove that a particular person against whom the presumption would have operated, was in fact in possession of the prohibited article. If that person was in fact guilty, the absence of the presumption might enable him or her to escape conviction. But this is inevitably a consequence of the presumption of innocence; this must be weighed against the danger that innocent people may be convicted if the presumption were to apply. In that process the rights of innocent persons must be given precedence. After all, the consequences of a wrong conviction are not trivial. Apart from the social disapprobation attached to it, heavy penalties are attached to contraventions of the Act. In the cases before us, the sentence prescribed by the Act for the illegal possession of a firearm is imprisonment for a period not exceeding 25 years with a minimum of five years. Illegal possession of ammunition attracts a sentence of imprisonment for a period not exceeding 25 years.'

[84] In **State v Manamela** [2000] 5 LRC 65 the majority of the South African Constitutional Court held that a reverse burden provision in respect of handling recently stolen goods was incompatible with a constitutional presumption of innocence. On the other hand, an evidential burden requiring the accused to explain his possession of the goods would not have amounted to a violation of the constitutional right of silence. The majority observed [at para 49]:

". . . the state has failed, in our view, to discharge the onus of establishing that the extent of the limitation is reasonable and justifiable and that the relation between the limitation and its purpose is proportional. It equally failed to establish that no less restrictive means were available to Parliament in order to achieve the purpose. The imposition of an evidential burden on the accused would equally serve to furnish the prosecution with details of the transaction at the time of acquisition or receipt. Accordingly, there is a less invasive means of achieving the legislative purpose which serves to a significant degree to reconcile the conflicting interests present in this case . . ."

Canada

[85] Section 11(d) of the Canadian Charter of Rights and Freedoms provides that an accused person has the right *'to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal'.* The Canadian Supreme Court has on numerous occasions held that section 11(d) will be breached where a presumption has the effect that an accused person may be convicted while a reasonable doubt exists as to his or her guilt. (See, for example, **R v Oakes** 26 DLR (4th) 200 (1986) at 222; **R v Vaillancourt** 47 DLR (4th) 399 (1988) at 417; **R v**

Whyte 51 DLR (4th) 481 (1989) at 493; **R v Keegstra** (1989) 39 CRR 5 at 13; **Downey v The Queen** 90 DLR (4th) 449 (1992) at 461; **R v Laba** 120 DLR (4th) 175 (1995) at 201). The view that has prevailed is that if by the provisions of the statutory presumptions, an accused is required to establish, that is to say prove or disprove, on a balance of probabilities either an element of the offence or an excuse, then it contravenes section 11(d) because such a provision would permit a conviction in spite of a reasonable doubt. On the other hand, a permissive or evidentiary presumption from which a trier of fact may (as opposed to must) draw an inference of guilt will not infringe section 11(d). Dickson CJC in **R v Whyte (1988) 51 DLR 4th 481 (at 493)** in the Canadian Supreme Court said

> *'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'.*

[86] Accordingly, once it is shown that a statutory presumption is in breach of section 11(d), the court must consider whether the presumption is nevertheless justifiable in terms of section 1 of the Charter, which provides that the rights are *'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.* The Canadian Supreme Court has held that, in particular cases, reverse onus provisions may be justifiable in terms of section 1 (See, for example, **Downey v The Queen**, supra; **R v Whyte** 51 DLR (4th) 481 (1988); **R v Chaulk** (1990) 1 CRR (2d) 1.).

Hong Kong

[87] Prior to June 2005, the generally accepted view was that when a person who was proved to have in his physical possession a container (or the keys to it) which transpired to contain a dangerous drug, he was presumed, unless and until he rebutted the presumption on a balance of probability, to possess the drug and knew what was in his possession was indeed dangerous drug. Later, this was thought to be too great a burden and was inconsistent with the Bill of Rights Ordinance as applied by the Basic Law.

[88] Section 47 of the Dangerous Drugs Ordinance, Cap. 134, creates certain presumptions in respect of a person who is proved to have had in his physical possession a container, or the keys thereto, which transpires to house a dangerous drug. It is first presumed, until the contrary is shown, that the person had the drug in his possession; and it is also presumed, until the contrary is shown, that the person shown to have been in possession of the dangerous drug knew that what was in his possession was indeed a dangerous drug.

[89] In **HKSAR v. Hung Chan Wa and Atsushi Asano** [2005] 3 HKLRD 291 (23 June 2005) it was accepted that the accused had physical possession of a container and knew that the container housed the substance which turned out to be a dangerous drug. The first presumption was therefore never an issue. But the second presumption was, for each accused said that he thought that the substance housed was something other than a dangerous drug. The Court of Appeal ruled that the legal burden imposed on an accused facing a charge of trafficking dangerous drug was incorrect. The provisions only create an evidential burden in that once the defendant raises sufficient evidence that suggests he did not know he possessed an item which transpired to be a dangerous drug or that the item was dangerous drug, the burden remained on the prosecution at all times to prove that he did so know. The Court of Final Appeal upheld the judgment of the Court of Appeal.

[90] In **HKSAR v Lam Kwomg Wai and Lam Ka Man** [2006] 3 HKLRD 808; (2006) 9 HKCFAR 574 (31 August 2006), the Court of Final Appeal (Hong Kong) was concerned with section 20(1) of the Firearms and Ammunition Ordinance, Cap. 238 ("the Ordinance") which provided that a person who is in possession of an imitation firearm commits an offence punishable with imprisonment; yet section 20(3) went on to provide that he does not commit an offence if he satisfies the court of one or more of the matters stated in the sub-section. Relying on section 20(3), the prosecution did not lead evidence to prove that the respondents were in possession of the imitation firearm for any of the purposes listed in section 20(3)(c). The principal issue in the appeals, as it was in the Court of Appeal, was whether section 20(3)(c), by placing an onus on the accused, is consistent with the presumption of innocence.

[91] Presumption of innocence is protected by Art.87(2) of the Basic Law and Art.11(1) of the Hong Kong Bill of Rights ("BOR") implementing Art.14(2) of the International Covenant on Civil and Political Rights ("ICCPR"), as applied by Art.39 of the Basic Law and with the right to a fair trial (which is protected by Art.87(2) of the Basic Law and Art.10 of the BOR (Art.14.1 of the ICCPR) as applied by Art.39 of the Basic Law. The Court of Appeal resolved this issue by holding that there was inconsistency with the presumption of innocence and the right to a fair trial, so that section 20(1) when read with section 20(3)(c) was invalid. In reaching this conclusion, the Court, however, concluded that it was not possible to read section 20 in such a way as to preserve its validity, in particular to read the section as creating an evidential, not a persuasive, burden.

[92] The Court of Final Appeal (Hong Kong) held that section 20(3)(c), should be read and given effect as imposing on the defendant an evidential burden only and although presumption of innocence and the right to a fair trial were expressed in absolute terms, the presumption was not an absolute right and was capable of derogation but the derogation must be justified. An encroachment on these rights by way of presumption or reverse onus of proof might be justified if it had a rational connection with the pursuit of a legitimate aim and if it was no more than necessary for the achievement of that legitimate aim. In the case of a reverse onus the justification must be compelling. The court further said that on a common law interpretation of section 20(3)(c), the onus imposed was persuasive, not evidential and section 20(3)(c) imposed on defendants a persuasive burden which went to an essential element which was a derogation from the presumption of innocence. The court agreed that section 20(3)(c) satisfied the **rationality test**: the persuasive onus was imposed in pursuit of a legitimate aim. The aim was the prevention, suppression and punishment of serious crime, being the use of imitation firearms for a purpose dangerous to the public peace or of committing an offence. However, the court held that persuasive onus did not satisfy the **proportionality test** and the more serious the offence, the more important it was that there should be no interference with the presumption. Therefore, the court adopted the more radical **remedial interpretation** which was meant to preserve a statute's validity but not one the statute was capable of bearing as a matter of ordinary common law interpretation. The remedial interpretation involves the well-known

techniques of severance, reading in, reading down and striking out (see **R v A** (No.2) [2002] 1 AC 45, **R v Lambert** [2002] 2 AC 545, **Ghaidan v Godin-Mendoza** [2004] 2 AC 557). It was only in the event that a remedial interpretation was not possible that a court should declare a contravention, entailing unconstitutionality and invalidity.

[93] Mr. Justice Bokhary PJ in the Court of Final Appeal ***Lam Kwomg Wai and Lam Ka Man*** said

> *'2. I agree with the Chief Justice and Sir Anthony Mason NPJ in this appeal and the one heard together with it. Striking down a law is a course of last resort. The courts will strive to give laws a constitutional reading to save them, if possible, from being declared unconstitutional. Each of these reverse burden provisions can and should be read to impose only an evidential burden. So read each leaves defendants with what the presumption of innocence exists to provide. By that I mean a measure of protection consistent with the idea that convicting the innocent is far more abhorrent than letting the guilty go free……'*

[94] Section 14(1) of the Prevention of Bribery Ordinance, Cap 201 ("the Ordinance") gives the court power to authorize the Commissioner of the Independent Commission Against Corruption ("ICAC") to serve a notice requiring the person served to furnish information relating to assets and liabilities relevant to an investigation or proceedings being conducted pursuant to the Ordinance. Section 14(4) makes it an offence punishable by a fine of $20,000 and imprisonment for one year for that person to neglect or fail to comply with such a notice without reasonable excuse. Section 24 provided that in any proceedings against a person for an offence under this Ordinance, the burden of proving a defence of lawful authority or reasonable excuse shall lie upon the accused. The questions which fell to be determined by Court of Final Appeal (Hong Kong) in **Hksar v Ng Po On And Another** 2008] 4 HKLRD 176; (2008) 11 HKCFAR 91 were: (i) whether the persuasive burden of establishing that a failure to comply was "without reasonable excuse" lies on the prosecution or the defence; (ii) if on the defence, whether that is consistent with the presumption of innocence which enjoys constitutional protection under Article 87(2) of the Basic Law and Article 11(1) of the Bill of Rights; and (iii) if on the prosecution, whether the defence has an evidential burden in relation to the issue of reasonable excuse which encompassed the situation where a ***remedial interpretation*** was required

whereby the persuasive burden resting on the defence is read down to an evidential burden.

[95] The Court held that section 14(4) and 24 read together expressly imposed on the defendant the persuasive burden of establishing the existence of a reasonable excuse on the balance of probability and the imposition of a reverse onus under section 14(4) satisfied the rationality test (namely the societal aim of suppression of corruption) but the persuasive burden did not satisfy the proportionality test in that it had not been shown that the imposition of a the persuasive burden was no more than necessary in the pursuit of the legitimate aim of the Ordinance and that the evidential burden did not suffice. Accordingly, on a remedial interpretation, section 24 read with section 14(4) was read down so that they imposed an evidential burden instead of a persuasive burden.

[96] In **HKSAR v Gurung Krishna** [2010] 4 HKLRD 456 (21 July 2010) is where D was convicted of unlawful sexual intercourse with a mentally incapacitated woman, contrary to s.125 of the Crimes Ordinance (Cap.200). Section 125(2) provides that a man is not guilty *"if he does not know and has no reason to suspect her to be a mentally incapacitated person"*. Section 150 provides that *"Where … the description of an offence is expressed to be subject to exceptions mentioned in the section, proof of the exception is to lie on the person relying on it".* At issue on D's appeal was whether s.125 (2) when read with s.150 infringed the presumption of innocence under Art.87(2) of the Basic Law, and Art.14(2) of the International Covenant on Civil and Political Rights, applied by Art.39 of the Basic Law.

[97] The Court of Appeal (Hong Kong) stated said that on a proper construction, section 125 of the Crimes Ordinance, Cap. 200 requires the prosecution to prove the act of sexual intercourse and the fact of mental incapacity of the woman but, when read with section 150, it imposes upon an accused person a persuasive burden to show that at the time of the intercourse he did not know or have reason to suspect the woman to be a mentally incapacitated person. Allowing the appeal and quashing the conviction the Court of Appeal held that:

> *(1) The presumption of innocence was not absolute but any derogation might be justified if it (a) had a legitimate aim; (b) was rationally connected with the pursuit if that aim; and (c) was no more than*

necessary for the achievement of that aim (HKSAR v Ng Po On (2008) 11 HKCFAR 91 followed). (See para.29.)

(2) On a true construction of s.125, the reverse onus imposed upon the accused person was a persuasive, and not a mere evidential, one. The question was whether this derogation was justified, (See para.29)

(3) As for (a) and (b), these were satisfied. The reverse onus was imposed because, in general, mentally incapacitated persons were less likely to be in a position to provide an account, or a reliable account, of material events. This was a legitimate societal aim and the derogation was rationally connected with that aim. (See para.32.)

*(4) **Thus the key issue was that of proportionality**, specifically whether the creation of a persuasive onus rather than an evidential burden upon the accused had been shown to be necessary to achieve the legitimate aim. In this respect, s.125 was s serious offence and a compelling case for requiring the accused to disprove a substantial element of the offence under s.150 had not been shown. While this type of case presented the prosecution with difficulties of proof because of the mental condition of the complainant, the more extreme the complainant's condition, the easier it would be to prove through other evidence that her condition must have been obvious to an observer. As for the difficulty of proving the circumstances in which the accused had intercourse with the complainant, if the woman was unable to give evidence, there would often be other evidence, and it must be remembered that difficulty of proof was a concomitant of the presumption of innocence and did not per se justify a reverse onus. There existed special measure by which prosecutors could present the evidence of a mentally incapacitated person, thereby facilitating, though not eradicating, the practical difficulties presented in such cases. Finally, other common law jurisdictions had dispensed with the persuasive burden. It followed that s.125 when read with s. 150 was unconstitutional. (See para.63.)*

(5) The Court would exercise its power of remedial interpretation under the Basic Law to read down s.125 (2) in conjunction with s.150, so that an evidential burden did not infringe the presumption of innocence (HKSAR v Lam Kwong Wai (2006) 9 HKCFAR 574 applied). (See paras. 73-74.)

[98] Hon Stock VP further said

'29. In the context of reverse onus provisions, the fundamental principles have been articulated in a number of the decisions of the Court of Final Appeal, most particularly in HKSAR v Lam Kwong Wai and HKSAR v Ng Po On:

(a) Although in any event a central rule of common law, the presumption of innocence enjoys constitutional protection by

reason of art.87 of the Basic Law and by art.14(2) of the International Covenant on Civil and Political Rights (ICCPR), applied by art.39 of the Basic Law.

(b) A corollary of the presumption is the burden upon the prosecution of proving beyond reasonable doubt the defendant's guilt of the offence charged, which means that the law 'does not (in the absence of statutory intervention) impose any persuasive burden on the accused, but places the burden throughout on the prosecution to prove the ingredients of the offence and to negative any defence raised by the accused beyond reasonable doubt.'

(c) Where a statute reverses the burden of proof, requiring the accused to prove an ultimate fact which is necessary to the determination of his guilt or innocence, he is required to satisfy that burden on the balance of probabilities.

(d) A reverse onus is prima facie objectionable and in any event inconsistent with the presumption of innocence, 'because it allows the defendant to be convicted on failing to discharge the reverse onus, even though the prosecution fails to prove all the elements of the offence beyond reasonable doubt':

> *A defendant may in other words be convicted even though there is a reasonable doubt as to his guilt of the offence charged or as to his entitlement to rely on an applicable defence, on the ground that he has not persuaded the tribunal of fact that the evidence he relies on in respect of the relevant ultimate fact is probably true. Indeed, a reverse burden requires the defendant to be convicted even if his version of the facts is considered equally likely to be right as to be wrong.*

(e) A burden which requires an accused to prove that it is more likely than not that his version of a fact necessary for the determination of guilt or innocence is true is categorised as a persuasive burden, which is to be contrasted with an evidential burden; the latter does not require the accused to establish anything as a matter of proof but:

> *... arises where the defendant wishes to put in issue some matter that is potentially exculpatory whilst the prosecution continues to bear the persuasive burden throughout. In such cases, there must be evidence supporting such exculpatory matter which is sufficiently substantial that it raises a reasonable doubt as to the defendant's guilt ... If ... the accused fails to adduce or point to any evidence on the relevant issue or if the evidence adduced is rejected or is not sufficiently substantial to raise a reasonable doubt, the potentially exculpatory matter places no obstacle in the way of the prosecution proving its case beyond reasonable doubt. An*

evidential burden, functioning in this manner, is wholly consistent with the presumption of innocence.

(f) The constitutional protection accorded to the presumption of innocence is not absolute. Derogation from it may be justified if the derogation:

(i) Has a legitimate aim;
(ii) Is rationally connected with the pursuit of that aim; and
(iii) Is no more than necessary for the achievement of that aim.

(g) The burden of justifying the derogation is on the state.

(h) The burden of justification is a substantial one and for a reverse onus to be acceptable 'there must be a compelling reason why it is fair and reasonable to deny the accused person the protection normally guaranteed to everyone by the presumption of innocence.' The more serious the punishment upon conviction the more compelling must be the reason.

(i) It is incumbent upon the court to give weight to the Legislature's view that the imposition of a reverse onus is an appropriate response to the problem addressed in the statute. That said:

> *The weight to be accorded to the legislative judgment by the Court will vary from case to case depending upon the nature of the problem, whether the executive and the Legislature are better equipped than the courts to understand its ramifications and the means of dealing with it. In matters of serious crime, the courts must recognise that the legislature has the responsibility for determining policy and framing the elements of the criminal offence.*

There may, however, be cases where the issue turns on matters of proof, onus and evidence in which realm the court may be in as good a position as the legislature to form a judgment:

> *It is for the Court to exercise its constitutional responsibility by determining the issue, after giving appropriate respect to the legislative judgment. At the end of the day, to repeat the words of Lord Nicholls of Birkenhead in R v Johnstone [2003] 1 WLR 1736, 1750F-G:*

The court will reach a different conclusion from the legislature only when it is apparent the legislature has attached insufficient importance to the fundamental right of an individual to be presumed innocent until proved guilty."

United Kingdom

[99] The case **Regina v Lambert** [2001] UKHL 37 involved a man convicted of possession of a controlled drug, cocaine, with intent to supply, contrary to section 5 of the Misuse of Drugs Act 1971 (MDA 1971) and sentenced to seven years imprisonment. Section 5 (3) provided that *'.. Subject to section 28 of this Act, it is an offence for a person to have a controlled drug in his possession, whether lawfully or not, with intent to supply it to another . . .'.* Section 28.-(2) said subject to subsection (3), in any proceedings for an offence to which this section applies it shall be a defence for the accused to prove that he neither knew of nor suspected nor had reason to suspect the existence of some fact alleged by the prosecution which it is necessary for the prosecution to prove if he is to be convicted of the offence charged.

[100] The certified questions remitted to the House of Lords included (1) whether it is an essential element of the offence of possession of a controlled drug under section 5 of the 1971 Act that the accused knew that he had a controlled drug in his possession; (2) 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 of burden of proof that the accused neither believed nor suspected nor had reason to suspect that the substance in question was a controlled drug. The House of Lords rejected the appeal but held that section 28 of the MDA 1971 should be read in light of the Convention rights, as requiring the accused only an evidential burden of proof.

[101] The effect of section 28 is that in a prosecution for possession of controlled drugs with intent to supply, although the prosecution must establish that prohibited drugs were in the possession of the defendant, and that he or she knew that the package contained something, the accused must prove on a balance of probabilities that he did not know that the package contained controlled drugs. The material parts of section 28 are:

> *"(2) Subject to subsection (3) below, in any proceedings for an offence to which this section applies it shall be a defence for the accused to prove that he neither knew of nor suspected nor had reason to suspect the existence of some fact alleged by the prosecution which it is necessary*

for the prosecution to prove if he is to be convicted of the offence charged.

(3) Where in any proceedings for an offence to which this section applies it is necessary, if the accused is to be convicted of the offence charged, for the prosecution to prove that some substance or product involved in the alleged offence was the controlled drug which the prosecution alleges it to have been, and it is proved that the substance or product in question was that controlled drug, the accused –

(a) shall not be acquitted of the offence charged by reason only of providing that he neither knew nor suspected nor had reason to suspect that the substance or product in question was the particular controlled drug alleged; but

(b) shall be acquitted thereof -

(i) if he proves that he neither believed nor suspected nor had reason to suspect that the substance or product in question was a controlled drug; or

(ii) if he proves that he believed the substance or product in question to be a controlled drug, or a controlled drug of a description, such that, if it had in fact been that controlled drug or a controlled drug of that description, he would not at the material time have been committing any offence to which this section applies."

[102] Lord Slynn held in ***Lambert***

'16. The first question asks whether it is an essential element of the offence of possession of a controlled drug under section 5 of the Misuse of Drugs Act 1971 that the accused knows that he has a controlled drug in his possession. Bearing fully in mind the importance of the principle that the onus is on the prosecution to prove the elements of an offence and that the provisions of an Act which transfer or limit that burden of proof should be carefully scrutinised, it seems to me that the Court of Appeal in R v McNamara [1988] 87 Cr APP R 246 rightly identified the elements of the offence which the prosecution must prove. I refer in particular to the judgement of Lord Lane CJ at page 252. This means in a case like the present that the prosecution must prove that the accused had a bag with something in it in his custody or control; and that the something in the bag was a controlled drug. It is not necessary for the prosecution to prove that the accused knew that the thing was a controlled drug let alone a particular controlled drug. The defendant may then seek to establish one of the defences provided in section 5(4) or section 28 of the 1971 Act.

17. The second question in effect asks whether, if the prosecution has proved the three elements to which I have referred, it is contrary to Article 6(2) of the Convention Rights for a judge to direct a jury that

"the defendant is guilty as charged unless he discharges a legal, rather than an evidential, burden of proof to the effect that he neither believed nor suspected nor had reason to suspect that the substance in question was a controlled drug". If read in isolation there is obviously much force in the contention that section 28(2) imposes the legal burden of proof on the accused, in which case serious arguments arise as to whether this is justified or so disproportionate that there is a violation of Article 6 (2) of the Convention rights (see Salabiaku v France [1988] 13 EHRR 37 at para 28). In balancing the interests of the individual in achieving justice against the needs of society to protect against abuse of drugs this seems to me a very difficult question but I incline to the view that this burden would not be justified under Article 6(2) of the Convention rights. 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. (emphasis added)

[103] 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 Convention rights. On the appeal to the House a majority suggested that, once the 1998 Act (1998 Human Rights Act) 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.

[104] In ***McNamara*** (supra), Lord Lane C.J. took the view (at p. 252) that the 1971 Act (Misuse of Drugs Act 1971) was intended, by a combination of sections 5 and 28, to give effect to Warner. Accordingly, his Lordship attempted to summarise the position, under the Act, as being, first, that possession is established against the defendant once the prosecution have proved that he had in his control a package that in fact contained the drug alleged, that he knew that he had the package in his control and that he knew it contained something; and, secondly, that, once possession is thus established, an evidential burden is cast upon the defendant to bring himself within section 28(2) or (3)(b).

New Zealand

[105] Under section 6(6) of the Misuse of Drugs Act 1975, those who are in possession of controlled drugs above specified quantities are deemed "until the contrary is proved" to possess the drugs for the purpose of supply or sale. Section 6 of the New Zealand Bill of Rights Act provides:

> *'6 Interpretation consistent with Bill of Rights to be preferred*
> *Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.*

[106] Section 5 of the New Zealand Bill of Rights Act provides:

> *5 Justified limitations*
> *Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this 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.*

[107] Section 25 of the New Zealand Bill of Rights Act enacts as follows

> *25 Minimum standards of criminal procedure –*
> *Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights: ... (c) The right to be presumed innocent until proved guilty according to law.*

[108] In **Paul Rodney Hansen v The Queen** - SC 58/2005 [2007] NZSC 7 Mr. Hansen argued that section 6(6) of the Misuse of Drugs Act 1975 should be interpreted as

requiring him to point to evidence of another purpose, leaving the onus of proof of intent on the prosecution. He relied on section 6 of the New Zealand Bill of Rights Act which requires an interpretation consistent with the right under s 25(c) of the New Zealand Bill of Rights Act 1990 to be presumed innocent until proved guilty, to be preferred to any other. All members of the Court accepted that the presumption contained in section 6(6) was inconsistent with the right to be presumed innocent under section 25(c) of the New Zealand Bill of Rights Act but it was not capable of an interpretation consistent with section 25(c). The Court unanimously held that section 6(6) of the Misuse of Drugs Act was not capable of being interpreted to refer to a burden to produce evidence (evidential burden). It held that it clearly transferred to Mr. Hansen the burden of persuading the jury (balance of probability) that he did not intend to supply the cannabis to others. The Court refused reading down section 6(6) as imposing only an evidential burden instead of a legal burden. The Court did not seem to accept that the words *'until the contrary is proved'* could be taken to mean *'unless sufficient evidence is given to the contrary'* because the word 'proved' was fatal to such a proposition as raising an issue as to a particular element of a crime could not be said to be 'proof' as held in **Sheldrake v Director of Public Prosecutions** [2005] 1 AC 264 at para [1]. The Chief Justice seems to think that such a 'strained and unnatural interpretation' may entail judicial 'legislation' rather than interpretation.

[109] Blanchard J in ***Hansen*** at paragraph [64] held that New Zealand courts have commonly adopted the test to decide what constitutes a justified limitation used by the Supreme Court of Canada in **R v Oakes** [1986] 1 SCR 103, which was summarised by that Court in the following way in **R v Chaulk** [1990] 3 SCR 1303 at pp 1335 – 1336.

> 1. *The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right or freedom; it must relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.*
>
> 2. *Assuming that a sufficiently important objective has been established, the means chosen to achieve the objective must pass a proportionality test; that is to say they must:*

(a) be "rationally connected" to the objective and not be arbitrary, unfair or based on irrational considerations;
(b) impair the right or freedom in question as "little as possible"; and
(c) be such that their effects on the limitation of rights and freedoms are proportional to the objective.

Australia

[110] Australian courts appear to have been largely uncritical when faced with statutory reversals in the burden of proof. However, the case of **R v Momcilovic** [2010] VSCA 50 represents a small step forward for human rights instruments in Australia[1]**.** Ms Momcilovic was convicted of trafficking under s 71AC of the Drugs, Poisons and Controlled Substances Act 1981 (Vic) ('the Drugs Act'). The drugs were found in Ms Momcilovic's apartment, which she shared with her partner. The prosecution relied on section 5 of the Drugs Act, under which possession is presumed where it is proved that a controlled substance was found on premises occupied by the accused. On appeal, Ms Momcilovic submitted that section 5 should be interpreted in a manner consistent with human rights pursuant to section 32(1) of the Victorian Charter and therefore the 'deeming provision' should be construed as imposing an evidentiary onus rather than a legal onus on the defendant. This, according to the defence, would achieve an interpretation of section 5 consistent with the presumption of innocence under s 25(1) of the Charter.

[111] The Victorian Court of Appeal unanimously upheld the validity of the Victorian Charter and stated that s 32(1) 'does not create a 'special' rule of interpretation, but rather forms part of the body of interpretive rules to be applied at the outset, in ascertaining the meaning of the provision in question'. In interpreting section 5 of the Drugs Act, the Court of Appeal found that it imposed a reversal of the onus of proof that was inconsistent with the presumption of innocence. Authorities from different jurisdictions were considered, and it was concluded that where there exists a risk that a defendant would be convicted despite raising a reasonable doubt about his or her guilt, there would be an infringement of the presumption of innocence.

[1] Ong, Kuan Chung --- "Statutory Reversals of Proof: Justifying Reversals and the Impact of Human Rights" [2013] UTasLawRw 14; (2013) 32(2) University of Tasmania Law Review 247

However, the possibility of reading down section 5 as merely imposing an evidentiary onus on the defendant was rejected because of the clear language of the provision.

[112] Section 7(2) of the Victorian Charter imposes a test of reasonable necessity and consideration of whether there are other less intrusive means of achieving the same purpose. In ***Momcilovic*** the primary justifications relied upon by the Crown in support of the legal reverse burden were the potentially severe consequences of trafficking offences for society and the difficulties of proving these offences. However, the Victorian Court of Appeal rejected these justifications. When pressed to justify the legal reverse burden, the Crown acknowledged that a switch from a legal onus to an evidentiary onus would have made no 'major or demonstrable difference to drug trafficking prosecutions'. This meant that there could be no justification for the legal reversal of proof on the basis of difficulties of proof because of the existence of a less intrusive means of achieving the same objective.

Respondent's position

[113] In the appeal before this court, the respondent represented by the DPP has not urged any matters similar to what the State had urged in several other jurisdictions discussed above as to why the presumption of possession in section 32 of the Illicit Drugs Control Act should be upheld casting a legal (and reverse) burden of proof on a balance of probability upon the accused. Nor has the respondent adverted to any objective justification before us for the legislative interference with the presumption of innocence as highlighted in other jurisdictions which, however, does not mean that there are no such objective justifications**.** Mr. Burney in his written submissions has submitted that having extensively researched the jurisprudence developed in other common law jurisdictions (and according to him 'there is no reason for Fiji to adopt a different approach'), the respondent is now of the considered view [perhaps as opposed to the contrary view taken in ***Abourizk (2019***) and at the leave to appeal stage in this appeal in 2019] that a statutory reverse onus provision that imposes a legal/persuasive burden on an accused is *prima facie* inconsistent with the entrenched presumption of innocence in section 14(2)(a) of the Constitution because it allows an accused to be convicted of failing to discharge the reverse onus, even though the prosecution fails to prove all elements of the offence beyond reasonable doubt.

Principle of proportionality

[114] However, according to Lord Steyn in ***Lambert*** the burden is on the State to show that the legislative means adopted were not greater than necessary on the basis of the principle of proportionality. Lord Steyn clarified that where there is objective justification for some inroad 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 satisfies the jury on a balance of probabilities to the contrary. The second is to impose only an evidential burden on the accused in which event 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 jury as to the matter beyond reasonable doubt in the ordinary way. Arguably, the legislature in Fiji had chosen the former by enacting section 32 implying that an encroachment into the presumption of innocence is justified on an objective basis.

[115] I am inclined to hold that indeed there is an objective of sufficient importance to curtail the presumption of innocence in cases of possession of illicit drugs. In other words there is an objective justification for legislative encroachment into the presumption of innocence with regard to the instances of possession of illicit drugs, by transferring the legal burden of proof of rebutting the factual presumption of possession on a balance of probability under section 32 of the Illicit Drugs Control Act to the accused. I can do no better than quoting from paragraph [17] in ***Mbatha, Prinsloo*** which *mutatis mutandis* could be safely adopted to offences under the Illicit Drugs Control Act, 2004 in Fiji.

> *'[17] The problems which the government has to contend with in fulfilling its duty to protect society were given to us in some detail. We were informed that the detection of people in possession of illegal arms and ammunition is often very difficult. Police have to depend on informers or pure chance to trace offenders. The use of informers who infiltrate gun-smuggling networks is a helpful but often time-consuming and dangerous process. Gunrunners make extensive use of couriers to transport arms; some of the couriers, especially women and children, are used without their knowledge. Even vehicles such as ambulances and official government cars are sometimes used, without the people in control of the vehicles*

knowing it. Sometimes aircraft and motor vehicles equipped with false panels and compartments for storage are used in the illegal transportation of arms. The problem of policing is compounded by geographical factors; the borders of South Africa are extensive and impossible to patrol effectively 24 hours a day, making it easier for cross-border dealers and smugglers of arms to ply their trade and evade detection. The severe shortage of trained personnel has adverse effects on the capacity of the police to conduct raids and searches in places like hostels and informal settlements, to look for places used for concealment of illegal arms and to trap motor vehicles used in illegal conveyance of arms. Ordinary members of the community often withhold information because they are too terrified and intimidated by armed gangsters and traffickers in narcotic drugs and illegal arms.'

[116] Lord Steyn in ***Lambert***, also found that there is an objective justification for legislature encroachment into the presumption of innocence.

'36. It is now necessary to consider the question of justification for the legislative interference with the presumption of innocence. I am satisfied that there is an objective justification for some interference with the burden of proof in prosecutions under section 5 of the 1971 Act. The basis for this justification is that sophisticated drug smugglers, dealers and couriers typically secrete 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.'

[117] I would be naive to think that the law enforcement authorities and the prosecutors in Fiji do not have similar concerns when it comes to offences relating to illicit drugs. The learned High Court judge confirms this in [***Abourizk*** (2023)]:

'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.'

[118] In addition, courts in Fiji applying the presumption of innocence has a duty to promote the spirit, purpose and objects of the Constitution as a whole, and the values that underline a democratic society based on human dignity, equality and freedom of all and having regard to the content and consequences of the Illicit Drugs Control Act namely to regulate and control the possession of illicit drugs, which obviously includes its impact upon individuals or groups of individuals particularly the right to health and right of children, the limitation of presumption of innocence in section 32 of the Illicit Drugs Control Act is, in my view, ***necessary*** and objectively justified in this broad context.

[119] This is only the first threshold and the matter does not end there. Having satisfied myself that there is a logical, rational and legitimate nexus between the reverse burden on the accused on presumption of possession and the objectives to be achieved, the next stage of the test is to consider whether transferring the legal burden of proof of rebutting the factual presumption of possession on a balance of probability (reverse burden) under section 32 of the Illicit Drugs Control Act to the accused would pass the proportionality test.

[120] As I have already concluded, I have little doubt that the encroachment of section 32 into the presumption of possession until proved otherwise by the accused on a balance of probability is rationally connected to the objective of regulating and control the possession of illicit drugs and not arbitrary, unfair or based on irrational considerations. However, I am doubtful whether this limitation impairs the right to be presumed innocent until proved guilty as *"little as possible"* or *'no more than necessary'* and I am also not sure that the effects of the curtailment on the presumption of innocence in this manner is proportionate to the objectives including the regulation and control of the possession of illicit drugs, becoming as it is, a scourge to the individuals and the society at large affecting the right to health and right of children under the Bill of Rights. Therefore, this court has to consider whether such a legal burden to be discharged on a balance of probability by an accused could be judicially upheld in the context of the Constitutional provisions in Fiji.

[121] Having also examined Canadian and South African jurisprudence, Lord Steyn in ***Lambert*** had concluded that the transfer of the legal burden in section 28 does not satisfy the criterion of proportionality. The Lord held that viewed in its place in the current legal system, section 28 of the 1971 Act is a disproportionate reaction to perceived difficulties facing the prosecution in drugs cases and it would be sufficient to impose an evidential burden on the accused. It follows that section 28 is incompatible with Convention rights.

[122] However, in South Africa, New Zealand and Australia reading down reverse burden provisions as imposing merely an evidential burden rather than a legal burden has been declined. Nevertheless, in Canada, Hong Kong and United Kingdom persuasive burden in similar provisions has been read down to an evidential burden.

[123] I remind myself of what the Constitutional Court in South Africa said in ***Mbatha, Prinsloo***:

> *'[10] No legal system can guarantee that no innocent person can ever be convicted. Indeed, the provision of corrective action by way of appeal and review procedures is an acknowledgement of the ever-present possibility of judicial fallibility. Yet it is one thing for the law to acknowledge the possibility of wrongly but honestly convicting the innocent and then provide appropriate measures to reduce the possibility of this happening as far as is practicable; it is another for the law itself to heighten the possibility of a miscarriage of justice by compelling the trial court to convict where it entertains real doubts as to culpability and then to prevent the reviewing court from altering the conviction even if it shares in the doubts.'*

<u>Conclusion</u>

[124] The enquiry into the constitutionality of any impugned section involves two stages. Firstly, whether the section is inconsistent with Bill of Rights contained in Chapter 2 of the Constitution; if it is, then secondly, whether the inconsistency is saved in terms of section 3(2) of the Constitution. Any law inconsistent with the Constitution is invalid to the extent of the inconsistency [vide section 2(2) of the Constitution]. Section 7(3) has no application here as Chapter 2 does not impose any limits on the presumption of innocence enshrined in section 14(2)(a) of the Constitution [unlike for example section 13(1)(f) & 14(2)(f)] and therefore, section 32 of the Illicit Drugs

Control Act cannot be given a more restricted interpretation that does not exceed those 'limits'. Section 7(3) applies when Chapter 2 limits a right available under it and another law exceeds *those* limits. Section 32 of the Illicit Drugs Control Act enacted in 2004 should be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution - 2013 (vide section 173(1) of the Constitution)

[125] Thus, as for the first threshold (rationality test), having considered the relevant Constitutional provisions namely sections 3(1), 7(1)(a) & (b) and 7(4) and 173(1) and the applications and interpretations of similar provisions in different jurisdictions discussed in detail in the preceding paragraphs, I am of the view that section 3(2) of the Illicit Drugs Control Act is not *per se* inconsistent with the presumption of innocence but it limits it as permitted by section 6(5) of the Constitution and the limitation of the presumption of innocence was imposed in pursuit of a legitimate and necessary aim. However, with regard to the second threshold (proportionality test), I hold that the reverse burden cast on an accused under section 32 of the Illicit Drugs Control Act to prove that he is not in possession of illicit drugs on a balance of probability is inconsistent with the presumption of innocence embedded in section 14(2)(a) of the Constitution of the Republic of Fiji and *prima facie* invalid to that extent. Secondly, as duty-bound by section 3(2) of the Constitution, I adopt an interpretation, which I consider to be reasonable, of section 32 of the Illicit Drugs Control Act consistent with the right to be presumed innocent until proved guilty according to law, entrenched in section 14(2)(a) of the Constitution (in doing so, I am also guided by section 2(2), 7(5) and 173(1) of the Constitution and the remedial rule of interpretation) by declaring that the reverse burden under section 32 represented by the phrase 'until the contrary is proved' is only an evidential burden as opposed to a burden of proof to be discharged on a balance of probability. In my view, the relevant constitutional provisions in Fiji and the remedial interpretation permit me to read down section 32 as merely imposing an evidential burden which is consistent with the presumption of innocence and constitutionally valid.

[126] Accordingly, I hold that the factual presumption relating to possession of illicit drugs in section 32 of the Illicit Drugs Control Act may be rebutted by an accused by

adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist as per section 59 of the Crimes Act.

<u>What is the evidential burden on the accused under section 32 of the Illicit Drugs Control Act?</u>

[127] However, I must hasten to add that as Lord Slynn at paragraph [17] said in ***Lambert*** it is not enough for an accused seeking to establish the evidential burden to merely mouth the words of the section or merely to allege the fact in question; the court decides whether there is a real issue on the matter. Lord Hope at paragraph [90] said that an evidential burden is not to be thought of as a burden which is illusory and what the accused must do is put evidence before court which, if believed, could be taken by a reasonable jury to support his defense the same way he has to do to invoke one of the defense such as revocation or duress.

[128] In **<u>Henvey and Another v Her Majesty's Advocate</u>**: HCJ 03 Feb 2005 [2005HCJAC10], the Lord Justice General on behalf of the Appeal Court, High Court of Justiciary in Scotland held as follows on evidential burden.

> *'[11] Our views in regard to the evidential burden and its significance can be summarised in the following paragraphs.*
>
> *1. It must be emphasised that for the discharge of the burden there has to be evidence. As Lord Slynn of Hadley observed in Lambert at paragraph 17: "It is not enough that the defendant in seeking to establish the evidential burden should merely mouth the words of the section"……*
>
> *2. The evidence would have to cover each of the elements in the relevant subsection of section 28. Thus, in the case of subsection (2), the evidence would have to be to the effect that the accused neither knew of nor suspected nor had reason to suspect the existence of the fact alleged by the prosecution which it was necessary for the prosecution to prove if he was to be convicted of the offence charged.*
>
> *3. As was pointed out by the Lord Justice General in Salmon at page 75, subsection (2) does not require that the accused must necessarily have given evidence. As he observed:*
>
> > *"Doubtless, that would often be the simplest mode of proof, but the necessary evidence might come, for example, from a 'mixed' statement or from witnesses speaking to what the accused was told was in the container or to the accused's apparent astonishment when the contents of the container were revealed and found to be a controlled drug".*

4. It is important to bear in mind that the question of whether the evidential burden has been discharged is a question whether there is sufficient evidence for the purposes of the relevant subsection, for which it requires to be assumed that the evidence relied on is believed. Hence, as we have noted, Lord Hope spoke of the need for the accused to put evidence before the court "which, if believed, could be taken by a reasonable jury to support his defence". That is a matter for the trial judge, who would require to direct the jury accordingly.

If that is the case, the Crown requires to meet that defence and to satisfy the jury beyond reasonable doubt that it should be rejected. If the jury believe evidence that the accused neither knew of nor suspected nor had reason to suspect the existence of the relevant fact, he must be acquitted. Even if they are not prepared to go so far as to believe that evidence, but are left in reasonable doubt about that matter, he must also be acquitted. Thus, as Lord Clyde stated in Lambert at paragraph 158 in regard to a section 5 case:

"If the jury are satisfied beyond reasonable doubt that the accused possessed the substance or product in question but are not satisfied beyond reasonable doubt that he knew that it was a controlled drug (or suspected or had reason to suspect that it was) then again they should acquit him. They can only convict if they are satisfied beyond reasonable doubt that the prosecution has proved possession of the controlled drug and, if the issue is raised, that the lines of defence set out in section 28 are without foundation"

[129] The strength of the evidence required to "satisfy" or "discharge" the evidential burden has been variously conceived. Clearly, so it has been noted, it need not amount to proof of the fact asserted. Some of the more common formulations of strength which will be encountered in the reports include those that the evidential burden is satisfied by evidence which is "fit to go to the jury",[2] or by evidence which "fairly raises the issue", [3] or by evidence which makes out a *"prima facie*" case as to the existence of the fact in question, [4] or by evidence which gives rise to a reasonable inference that the fact exists, [5] or which gives rise to a possible inference of its existence, [6] or which renders its existence a reasonable possibility, [7] or evidence which if believed and left uncontradicted and unexplained could be accepted by the tribunal of fact as proof, [8]

[2] Fell v. Lloyd (1911) 13 C.L.R. 230, at 241
[3] Holt v. Cameron (1979) 27 A.L.R. 311, at 314.
[4] Hinz [1972] Qd.R.272, at 277; Hill v. Baxter [1958] 1 Q.B. 277, at 284-5, 286; Henderson v. Henry E. Jenkins & Sons [1970] A.C.282, at 308.
[5] Bratty v. Attorney-General of Northern Ireland [1963] A.C. 386, at 413.
[6] Johnson v. The Queen (1976) 136 C.L.R. 619, at 641-2; Rolle v. The Queen [1965] 3 All E.R. 582, at 584.
[7] Jayasena v. The Queen [1970] A.C. 618, at 624.
[8] Ibid.

or by evidence which makes the issue a live one, [9] or a genuine one, [10] or (in a criminal trial) is such as to raise a "reasonable doubt" as to non-existence of the fact unfavourable to the accused, [11] or which is such that the alleged fact could reasonably be found by reference to it, [12] or that it is sufficient to raise the issue.[13]

[130] Therefore, evidential burden is the obligation to introduce enough evidence to raise a reasonable inference or support a *prima facie* case as to the existence of the purported fact. The evidence must be such as to make the existence of the fact a live or a genuine issue or it must be such that a person could reasonably conclude that the purported fact exists. The party with the evidential burden must offer evidence to establish the existence or non-existence of certain facts and to introduce sufficient evidence to establish a *prima facie* case or create a reasonable inference. Therefore, 'until the contrary is proved' in section 32 of the Illicit Drugs Control Act would mean 'unless there is evidence to the contrary which, if accepted, would raise a reasonable doubt'.

[131] On the fears centered on the ability of an accused in a drugs case to manipulate the system by providing a mixed statement containing a self-serving explanation that he did not know what was in the package (which is not uncommon in Fiji), Lord Steyn said as follows

> *'The perceived difficulty is that the whole statement may be introduced as evidence and he may not testify. In the leading case of Duncan (1981) 73 Cr App R 359, Lord Lane CJ observed (at 365):*
>
> > *". . . where appropriate, as it usually will be, the judge may, and should, point out that the incriminating parts are likely to be true (otherwise why say them?), whereas the excuses do not have the same weight. Nor is there any reason why, again where appropriate, the judge should not comment in relation to the exculpatory remarks upon the election of the accused not to give evidence."*
>
> *This guidance has twice been approved by the House: Sharp [1988] 1 WLR 7; Aziz [1996] AC 41.'*

[9] D.P.P v. Morgan [1976] A.C. 182, at 214
[10] Hinz [1972] Qd. R. 272, at 277; Carter [1959] V.R. 105, at 111.
[11] Webb (1977) 16 S.A.S.R. 309, at 313; Griffith (1980) 23 S. A. S. R. 264, at 269; Romano; (1984) 36 S.A.S.R. 283, at 286; Alexander [1981] V.R. 277.
[12] Samuels v. Stokes [1973) 130 C.L.R. 490, at 504.
[13] Seaman (1981) 4 A. Crim. R. 119.

[132] Lord Steyn in ***Lambert*** also said as follows of the task on the prosecution as a result of reading down the legal burden as an evidential burden that

> *'[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 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.'*

[133] In the same context, I pose the question if the prosecution proves beyond reasonable doubt that any illicit drug was on or in any premises, craft or vehicle under the control of the accused, should it not be possible for the fact finders to conclude inferentially and circumstantially that the accused was in fact in possession of such illicit drug even without the presumption in section 32.

[134] Given the above conclusion on the burden on an accused under section 32 of the Illicit Drugs Control Act and also given the fact that the learned trial judge had placed a higher burden on the appellant both in his directions to the assessors and to himself in the judgment, it is clear that the learned judge had erred in law with regard to the burden on an accused under section 32. However, no blame should be attached to the learned trial judge as his directions were entirely in line with the accepted legal thinking at that time and up to now or at least up to ***Abourizk*** (2023).

What is the effect of the misdirection?

[135] In terms of section 23 (1)(a) of the Court of Appeal Act the first question is whether this error of law has caused a miscarriage of justice requiring this court to set aside the conviction and allow the appeal. If so, the next question is whether a verdict of acquittal should be entered or in the interest of justice a new trial should be ordered. However, notwithstanding the fact that this ground of appeal is decided in favour of the appellant on the premise that the wrong direction on section 32 has resulted in a

miscarriage of justice, this court may in terms of the proviso to section 23(1), still dismiss the appeal, if no substantial miscarriage of justice has occurred. In other words, there having been a miscarriage of justice, section 23(1)(a) requires that the appeal be allowed unless it be determined that the proviso would apply.

Application of the proviso to section 23(1)

[136] The Court of Appeal in **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015) critically analysed the proviso to section 23(1) of the Court of Appeal Act and stated as follows on its application.

> *[55] The approach that should be followed in deciding whether to apply the proviso to section 23(1) of the Court of Appeal Act was explained by the Court of Appeal in **R v. Haddy** [1944] 1 KB 442. The decision is authority for the proposition that **if the Court of Appeal is satisfied that on the whole of the facts and with a correct direction the only reasonable and proper verdict would be one of guilty there is no substantial miscarriage of justice**. This decision was based on section 4(1) of the Criminal Appeal Act 1907 (UK) which was in the same terms as section 23(1) of the Court of Appeal Act.*
>
> *[57] This will be so notwithstanding that the finding of guilt may have been due in some extent to the faulty direction given by the judge. In other words the misdirection may give rise to the conclusion that there has been a miscarriage of justice (ground 4 in section 23(1)) by virtue of the faulty direction but when considering whether to apply the proviso the appeal may be dismissed if the Court considers that there was no substantial miscarriage of justice.'*

[137] A determination that appellant's guilt is established beyond reasonable doubt is a necessary, though not necessarily sufficient, condition of the application of the proviso. Referring to the apparent tension between the command to allow an appeal where the court is of the opinion that there was a miscarriage of justice, and the proviso that it may dismiss the appeal if it considers that no substantial miscarriage of justice has occurred, in **Hofer v The Queen** [2021] HCA 36; 95 ALJR 937, the High Court of Australia said that the resolution of it is (as per the decision in **Weiss v The Queen** (2005) 224 CLR 300 at [35], [44])

> *'[59] .....not to be undertaken by attempting to predict what a jury (whether the jury at trial or some hypothetical future jury) would or might do", but*

> *on the basis that the appellate court is itself satisfied of the appellant's guilt beyond reasonable doubt. As was explained by the plurality in Kalbasi v Western Australia, in such a case "the appellate court is not predicting the outcome of a hypothetical error-free trial, but is deciding whether, notwithstanding error, guilt was proved to the criminal standard on the admissible evidence at the trial that was had'.*

[138] ***Hofer*** at paragraph [60] admits that in some cases the error which has occurred at trial may be such as to prevent the appellate court from making that assessment and these cases include but are not limited to, cases which turn on issues of contested credibility, cases in which there has been a failure to leave a defence or partial defence for the jury's consideration and cases in which there has been a wrong direction on an element of liability in issue or on a defence or partial defence. In such cases regardless of the apparent strength of the prosecution case, the appellate court cannot be satisfied that guilt has been proved. ***Hofer*** said at paragraph [51] that even where the appellate court is satisfied of the appellant's guilt beyond reasonable doubt, there may have been a *"significant denial of procedural fairness at trial"* which makes it *"proper to allow the appeal and order a new trial".*

[139] Neither the summing-up nor the judgment contemplates a scenario where excluding the application of reverse burden on the appellant under section 32 of the Illicit Drugs Control Act to be discharged on a balance of probability, whether it is still possible to conclude beyond reasonable doubt that the appellant was guilty.

[140] In my view, this case is one where this court is unable to decide that notwithstanding the error in the direction on a fundamental matter such as the burden of proof on the appellant under section 32 of the Illicit Drug Control Act in the summing-up and the judgment, the appellant's guilt was proved to the criminal standard on the admissible evidence at the trial. In my view, there is a significant denial of procedural fairness affecting a fair trial due to this error of law at the trial and therefore it is proper to allow the appeal, set aside the conviction and in the interest of justice to order a new trial in terms of section 23(2)(a) of the Court of Appeal Act.

[141] In the decision to order a new trial, I have also considered the decision in **Laojindamanee v State** [2016] FJCA 137; AAU0044.2013 (30 September 2016) where the Court of Appeal laid down some guidance relevant to ordering a retrial.

> '[*103] The power to order a retrial is granted by section 23 (2) of the Court of Appeal Act. A retrial should only be ordered if the interests of justice so require……the interests of justice are not confined to the interests of either the prosecution or the accused in any particular case. They also include the interests of the public that people who are guilty of serious crimes should be brought to justice. Other relevant considerations are the strength of evidence against an accused, the likelihood of a conviction being obtained on a new trial and any identifiable prejudice to an accused whilst awaiting a retrial. A retrial should not be ordered to enable the prosecution to make a new case or to fill in any gaps in evidence (Azamatula v State unreported Cr App No AAU0060 of 2006S: 14 November 2008).'*

Ground 8

[142] The appellant submits that the learned trial judge had not directed the assessors and himself on the inconsistencies, commissions and contradictions in the prosecution witnesses.

[143] He particularly complains about DC Pita's evidence as to the form in which he found dried leaves in the appellant's house; whether scattered in the drawer or in two clear plastic bags. No other such inconsistencies, omissions and contradictions have been highlighted.

[144] The learned trial judge had dealt with as to how the assessors should deal with inconsistencies and omissions at paragraphs 106, 107, 110 and 111 in the summing-up and drawn the assessors' attention to DC Pita's evidence aforesaid at paragraphs 38-41. The learned trial judge had given his mind to this aspect of DC Pita's evidence at paragraph 15 of the judgment and concluded that the said inconsistency in the evidence of DC Pita had not advisedly affected the reliability and credibility of the evidence presented by the prosecution in respect of the two plastic bags containing the dried leaves. Moreover, the fact remains that dried leaves had been found in the appellant's house and he had signed on the search list containing them as well.

[145] In **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) the Court of Appeal dealt with how to deal with inconsistencies, omissions, contradictions and discrepancies *in extenso* and stated

> *'[15] It is well settled that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be discredited or disregarded. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution's witnesses. As the mental abilities of a human being cannot be expected to be attuned to absorb all the details of incidents, minor discrepancies are bound to occur in the statements of witnesses.'*

[146] In my view, the inconsistency highlighted by the appellant in DC Pita's evidence do not go to the root of the finding of dried leaves in the appellant's house and shake the basic version of the witness and cannot be annexed with undue importance.

Ground 09

[147] The appellant's contention is that the learned trial judge had not properly directed the assessors that they should consider the entirety or totality of evidence to decide his guilt or otherwise.

[148] However, having given sufficient general directions on various aspects of evidence in a number of paragraphs across the summing-up, the learned trial judge had summarised at paragraph 116 as follows and given similar directions on all counts.

> *116. Upon consideration of whole of the evidence adduced during the course of the hearing, if you are satisfied that the prosecution has proven beyond reasonable doubt that the accused has committed the first count as charged, you can find the accused guilty for the first count.*
>
> *117. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the accused has committed the first count as charged, you must find the accused not guilty for the first count*

Ground 10

[149] The appellant argues that the learned trial judge had not directed the assessors to consider whether the appellant's evidence was capable of creating a reasonable doubt and not necessarily whether they believed his evidence.

[150] The learned trial judge had given all conventional directions with regard to the burden of proof at paragraphs 7-9 of the summing-up which clearly convey the message that if there is a reasonable doubt about the appellant's guilt it should be resolved in favour of the appellant.

> *7. I now draw your attention to the issue of burden and standard of proof. The accused is presumed to be innocent until he is proven guilty. The presumption of innocence is in force until you form your own opinion that the accused is guilty for the offence.*
>
> *8. The burden of proof of the charge against the accused person is on the prosecution. It is because the accused is presumed to be innocent until he is proven guilty. In other words there is no burden on the accused person to prove his innocence, as his innocence is presumed by law.*
>
> *9. The standard of proof in criminal trial is "proof beyond reasonable doubt". It means that you must be satisfied in your mind that you are sure of the accused's guilt. If there is a riddle in your mind as to the guilt of the accused after deliberating facts based on the evidence presented, that means the prosecution has failed to satisfy you the guilt of the accused beyond reasonable doubt. If you found any reasonable doubt as to the commission of the offence as charged or any other offence by the accused, such doubt should always be given in favour of the accused person.*

[151] There is no incantation to be recited with regard to an accused's evidence. The time-tested directions as the learned trial judge had given is sufficient even when an accused gives evidence. In any event, the judgment shows that the appellant's evidence had not managed to leave the trial judge in any reasonable doubt as to his guilt.

Re-directions not sought

[152] Further, the trial judge had requested the counsel for any re-directions at the end of his summing up and counsel for the appellants asked for no such directions either on law or facts. The appellate courts have from time and again commented upon the failure in not raising appropriate directions with the trial judge resulting in the appellate court not looking at the complaints against the summing-up based on such misdirection or non-directions favorably. Thus, the appellate courts would be slow to

entertain such grounds of appeal. The Supreme Court said in **Raj v. State** CAV0003 of 2014:20 August 2014 [2014] FJSC 12 that raising of matters of appropriate directions with the trial judge is a useful function and by doing so counsel would not only act in their client's interest but also they would help in achieving a fair trial and the appellate courts will not look favourably on cases where counsel have held their seats, hoping for an appeal point, when issues in directions should have been raised with the judge. The Supreme Court once again reiterated this position in **Tuwai v State** CAV0013 of 2015: 26 August 2016 [2016] FJSC 35 and in **Alfaaz v State** CAV0009 of 2018: 30 August 2018 [2018] FJSC 17.

[153] Moreover, it is now well-established in Fiji that the decision on guilt or innocence is ultimately a matter for the presiding judge whereas the role of the assessors is to render opinions to assist the judge but they are not final deciders of fact, law or the verdict (vide **Prasad v The Queen** [1981] 1 A. E. R 319, **Noa Maya v. State** [2015 FJSC 30 CAV 009 of 2015 (23 October 2015)] and **Volau v State** [2017] FJCA 51 AAU0011 of 2013 (26 May 2017). Therefore, complaints of misdirections and non-directions or omissions should be looked at keeping that position in mind. Even if there are deficiencies in the summing-up, if the trial judge has addressed himself on the very same issues in the judgment, those non-directions, misdirections or omissions would not *per se* vitiate a verdict unless they have led to a miscarriage of justice.

Sentence appeal

[154] In view of my decision to quash the conviction and order a new trial on ground 7 read with ground 3, I do not think it necessary to deal with the sentence appeal in detail. It would be an exercise in futility.

[155] Therefore, I conclude that the appellant's appeal against conviction should be allowed, the conviction ought to be set aside and a new trial be ordered. In view of this order, I would make no order with regard to the appeal against sentence.

Mataitoga, JA

[156] I support reasons and conclusions.

Morgan, JA

[157] I agree with the draft judgment and have no further comments.

The Orders of the Court are:

1. *Appeal against conviction is allowed.*
2. *Appellant's conviction is quashed.*
3. *A new trial is ordered against the appellant.*
4. *The appellant is to be produced before the High Court on or before 10 August 2023 and until then he shall be kept in remand custody.*

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

COURT OF APPEAL FIJI

.....
Hon. Mr. Justice I. Mataitoga
JUSTICE OF APPEAL

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