

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

CRIMINAL APPEAL NO. AAU 122 OF 2015
(High Court HAC 1 of 2015)

BETWEEN : **THE STATE**

Appellant

AND : **MOHAMMED SHAHEED KHAN**

Respondent

Coram : **Calanchini P**

Counsel : **Mr L Burney for the Appellant**
Mr Iqbal Khan for the Respondent

Date of Hearing : **10 July 2019**

Date of Ruling : **16 August 2019**

RULING

- [1] Following a trial in the High Court at Lautoka the respondent was acquitted on the charge of unlawful importation of 29.9 kilograms of heroin contrary to section 4(1) of the Illicit Drugs Control Act 2004. The respondent's co-accused (Ethan Kai) was convicted in the

same trial on one count of engaging in dealing with the respondent for the import of 29.9 kilogram of heroin contrary to section 5(b) of the Illicit Drugs Control Act 2004.

[2] This is the appellant State's application for leave to appeal against acquittal. The notice of appeal was filed within time and an enlargement of time was granted for late service of the notice on the respondent who had left the jurisdiction or alternatively on the legal practitioner acting for the respondent who had initially refused to accept service. To the extent that the grounds of appeal involve questions of law alone, leave is not required. However leave is required when the grounds of appeal involve questions of fact alone or questions of mixed law and fact under section 21(2)(b) of the Court of Appeal Act 1949 (the Act). Section 35(i) of the Act gives to a single judge of the Court power to grant leave. At present the test for granting leave to appeal against acquittal is whether the appeal is arguable before the Court of Appeal: **Naisua -v- The State** [2013] FJSC 14; CAV 10 of 2013, 30 November 2013.

[3] The grounds of appeal upon which the State relies are set out in the "*Amended Grounds of Appeal*" notice filed on 7 April 2017.

1. *That the Learned Trial Judge erred in law and in fact in acquitting the respondent of importing 29.9 kilograms of heroin without lawful authority contrary to section 4(1) of the Illicit Drugs Control Act 2004 when it was not reasonably open to him to do so having regard in particular to the fact that the Learned Trial Judge convicted the respondent's co-accused, Ethan Kai, of engaging in dealings with the respondent for the import of the same 29.9 kilograms of heroin.*
2. *That the Learned Trial Judge erred at paragraph 33 of his Judgment in misconstruing the Admitted Facts as an admission by the prosecution that the content of the respondents cautioned interview was true whereas the admission went only to the admissibility of the caution interview. The weight to be attached to the content of the cautioned interview was a matter for the Learned Trial Judge and by treating the exculpatory matters in the cautioned interviews as uncontested the Learned Trial Judge attached undue weight to the exculpatory matters thereby giving rise to a miscarriage of justice.*

3. *The Learned Trial Judge erred in law and in fact at paragraph 38 of his Judgment by applying the wrong burden and standard of proof to the critical issue of the respondent's knowledge of the presence of illicit drugs in the consignment. Having found at paragraph 25 of the Judgment, that the respondent was the consignee of the container and the cargo therein, the burden shifted to the respondent by virtue of section 32 of the Illicit Drugs Control Act, 2004 and section 60 of the Crimes Act to prove, on the balance of probabilities, that he had no knowledge of the illicit drugs. It was not reasonably open to the Learned Trial Judge to make such a finding in favour of the respondent on the totality of the evidence and this error has therefore resulted in a miscarriage of justice."*

[4] Prior to the commencement of the hearing Counsel for the respondent applied to be excused on account of his being involved in a criminal trial that was about to commence in the High Court. Counsel indicated to the Court that the respondent relied on the written submissions filed on 26 June 2019. Leave was reluctantly granted.

[5] Ground one raises the issue of inconsistent verdicts. The respondent was acquitted on the charge of importing an illicit drug whereas his co-accused was convicted on the count of engaging in dealings with the respondent for the import of the same drugs. It is arguable that the acquittal of the respondent is logically inconsistent with the conviction of his co-accused. On the basis that it is arguable that the acquittal verdict was unreasonable, then if leave is required, leave is granted. Otherwise, the ground is not vexatious or frivolous.

[6] It is also arguable as a miscarriage of justice that the trial judge has misconstrued the admission by the State that the caution interview be admitted into evidence. The question of weight is also ultimately a matter for the Judge which, it is submitted, the learned Judge did not consider in his judgment.

[7] The third ground relates to the burden of proof in relation to the issue of knowledge of the presence of illicit drugs in the consignment. The ground is based on the finding of the trial Judge set out in paragraph 25 of the judgment. The ground is arguable as a miscarriage of justice.

[8] For the above reasons leave to appeal against acquittal is granted.

Order:

Leave to appeal against acquittal is granted.



W. Calanchini

Hon Mr Justice W D Calanchini
PRESIDENT, COURT OF APPEAL