

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

CRIMINAL APPEAL NO. AAU 123 OF 2015
(High Court HAC 1 of 2015)

BETWEEN : **ETHAN KAI** *Appellant*

AND : **THE STATE** *Respondent*

Coram : **Calanchini P**

Counsel : **Mr A K Singh for the Appellant**
Mr L Burney 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 appellant was convicted on one count of engaging in dealing with his co-accused Mohammed Shaheed Khan for the import of 29.9 kilograms of heroin contrary to section 5(b) of the Illicit Drugs Control Act 2004. The appellant's co-accused was acquitted in the same trial on one count of unlawful

importation of 29.9 kilograms of heroin contrary to section 4(1) of the Illicit Drugs Control Act 2004. The appellant was sentenced to 15 years imprisonment with a non-parole term of 14 years.

- [2] This is the appellant's timely (conceded by the State) application for leave to appeal against conviction pursuant to section 21(1)(b) of the Court of Appeal Act 1949 (the Act). Section 35(1) of the Act gives to a single judge of the Court power to grant leave. The test for granting leave to appeal against conviction is whether the appeal is arguable before the Court of Appeal: **Naisua -v- The State** [2013] FJSC 14; CAV 10 of 2013, 20 November 2013.
- [3] The appellant had also initially sought leave to appeal against sentence. However on 10 July 2019 the appellant applied to abandon the appeal against sentence. That application is to be listed before the Full Court with the appeal against conviction if leave is granted or otherwise on a date to be fixed.
- [4] The principal ground upon which the appellant relies is the inconsistent verdict that arises as a result of the acquittal of the co-accused Khan. It is arguable that the two verdicts are logically inconsistent and that as a result the verdict in this case is unreasonable.
- [5] Although the appellant had filed 16 grounds of appeal against conviction, they were subsequently condensed into 8 grounds. However in written submissions filed on 5 September 2016 and in oral submissions before the Court Counsel confirmed that the appellant relies only on grounds 1, 2, 4, 5 and 6. The remainder are not being pursued.
- [6] Apart from the issue of inconsistent verdicts, the grounds of appeal are related to claims of misdirection or omissions in directions to the assessors in the summing up. At the end of the evidence and after the summing up the four assessors returned unanimous opinions of guilty against the appellant. The same assessors were split 2 and 2 in relation to the co-accused Khan who was subsequently acquitted by the trial Judge. The trial Judge delivered a thorough and comprehensive judgment in respect of which the appellant has

alleged no error. Leave to appeal is refused on all grounds other than the issue of inconsistent verdicts.

Order:

1. Leave to appeal against conviction is granted on the sole ground of inconsistent verdicts.
2. Application to abandon the appeal against sentence is to be listed for hearing with the appeal against conviction.



W. Calanchini

Hon Mr Justice W D Calanchini
PRESIDENT, COURT OF APPEAL