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

CRIMINAL APPEAL NO.AAU 0023 of 2019
[High Court of Lautoka Criminal Case No. HAC 129 of 2014]

BETWEEN	:	**PENIASI CEDRECA SUKANAKONIFEREDI**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Mr. M. Young for Appellant**
	:	**Mr. L. J. Burney for the Respondent**
Date of Hearing	:	**15 February 2021**
Date of Ruling	:	**16 February 2021**

RULING

[1] The appellant had been charged in the High Court of Lautoka on a single count of Unlawful Possession of Illicit Drugs *i.e. methamphetamine* contrary to section 5(a) of the Illegal Drugs Control Act, one count of Unlawful Possession of Control Chemical *i.e. pseudoephedrine* contrary to section 6(b) of the Illegal Drugs Control Act and one count of Unlawful Possession of Control Equipment *i.e. a single punch tablet press machine*, contrary to section 6(b) of the Illegal Drugs Control Act on 22 March 2014 at Nadi in the Western Division. The information reads as follows.

Count 1

Unlawful possession of Illicit Drugs: *Contrary to section 5 (a) of the Illicit Drugs control Act 2004.*

Particulars of Offence

PENIASI SUKANAKONIFEREDI *on the 22nd day of March 2014 at Nadi in the Western Division, without lawful authority, was found in possession of illicit drugs, namely methamphetamine, weighing 4.653 kilograms.*

Count 2

Unlawful Possession of Control Chemical: *Contrary to section 6 (b) of the Illicit Drugs Control Act 2004.*

Particulars of Offence

PENIASI SUKANAKONIFEREDI *on the 22nd day of March 2014 at Nadi in the Western Division, without lawful authority, was found in possession of a controlled chemical namely, pseudoephedrine, weighing 1.989 kilograms and being reckless as to whether that chemical is to be used in or for the commission of an offence.*

Count 3

Unlawful Possession of Control Equipment*: Contrary to section 6 (b) of the Illicit Drugs Control Act 2004*

Particulars of Offence

PENIASI SUKANAKONIFEREDI *on the 22nd day of March 2014 at Nadi in the Western Division, without lawful authority, was found in possession of controlled equipment namely, a single punch tablet press machine, and was reckless as to whether that equipment is to be used in or for the commission of an offence.*

[2] After the summing-up on 19 February 2019 the assessors unanimously found the appellant guilty of all counts. The learned High Court judge had agreed with the assessors and convicted the appellant on all counts in the judgment delivered on 20 February 2019. The appellant was sentenced on 22 February 2019 to 17 years of imprisonment on count 01 and 15 years of imprisonment each on the second and third counts (all sentences to run concurrently) subject to a non-prole period of 12 years.

[3] Pacific Law Chambers had tendered a timely notice of appeal on 21 March 2019 against conviction and sentence. The appellant's written submissions had been tendered on 27 October 2020. The State had tendered its written submissions on 19 November 2020.

[4] The trial judge had summarised the case as follows in the sentencing order.

> *'2] Pursuant to another enquiry, irrelevant to these proceedings, the Police had cause to inspect the premises at Nadi Airport of a company registered in Fiji under the name of Energy Supplements Fiji Limited ("Energy"). Therein they discovered a "warehouse" of pills both loose and packaged under odd names such as "Fast and Furious", "Pink Devils" and "Purple XXX". There were powders, creams and chemicals. There was also a pharmaceutical machine which was obviously used for punching out pills from a prepared sheet product.*
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> *3.] All of the items were seized and the accused arrested.*
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> *4.] Police forensic chemists analysed the seizures and the contents revealed the nature and weight of the drugs set out in the charges.*
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> *5.] The evidence of the accused's custody and control of the items in the premises was overwhelming. He was a Director of Energy, the only person in the country running the business, had the sole key in existence to the premises and was the sole signatory to the company bank account in Fiji.*
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> *6.] There was evidence before the Court that a co-Director, resident abroad was directing operations by email instructions to the accused but this did not absolve the accused from being found in custody and control. The accused said in evidence that he would receive the orders from abroad, pack the order and send it to the customer by post.'*

[5] In terms of section 21(1) (b) and (c) of the Court of Appeal Act, the appellants could appeal against conviction and sentence only with leave of court. The test for leave to appeal is **'reasonable prospect of success'** (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019) in order to distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 and **Naisua v State** [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.

[6] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** CAV0010 of 2013: 20 November

2013 [2013] FJSC 14; **House v The King** [1936] HCA 40; (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011). The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of ***Kim Nam Bae's*** case. **For a ground of appeal timely preferred against sentence to be considered arguable there must be a reasonable prospect of its success in appeal**. The aforesaid guidelines are as follows.

> *(i) Acted upon a wrong principle;*
> *(ii) Allowed extraneous or irrelevant matters to guide or affect him.*
> *(iii) Mistook the facts;*
> *(iv) Failed to take into account some relevant consideration.*

[7] Grounds of appeal urged on behalf of the appellant are given below. 'Additional grounds of appeal' in the appellant's written submissions would not be considered as they had not been duly presented to this court as additional grounds of appeal.

> ***'Conviction - Errors of law***
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> ***Ground 1***
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> *(i) The Learned Trial Judge erred in law when he gave directions that could have caused the Assessors confusion and miscarriage of justice when at Paragraph 4 of the Summing Up he directed that the onus lies on the Prosecution and then at Paragraph 19 states that it is up to the Accused (Appellant) to prove that he was not in control of the items.*
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> *(ii) The Learned Trial Judge erred in law when he failed to direct the Assessors on the reverse burden for the Appellant (Accused) to prove on the Balance of Probabilities that he neither believed nor suspected nor had reason to suspect that the substances found in the warehouse were illicit drugs (Paragraph 19).*
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> *(iii) The Learned Trial Judge erred in law when he failed to adequately direct the Assessors on the mental element of intention in relation to possession of an illicit drug, a controlled chemical or controlled equipment.*
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> *(iv) Further to the above ground, the Learned Trial Judge erred in law when in the Summing Up he failed to direct the Assessors the mens rea for the 3 different offences, especially when it is clearly stated in the information that was filed on 12/03/19 that the mental element for Counts 2 and 3 is recklessness.*

(v) The Learned Trial Judge erred in law when he directed the Assessors at Page 35 of the Summing Up that "it doesn't matter whether he knew that they contained illicit drugs or whether he knew that pseudo ephedrine is a controlled chemical or whether he knew that the machines was controlled equipment. This is especially in light of the fact that the mens rea in Courts 2 and 3 is recklessness.

(vi) The Learned Trial Judge erred in law when he failed to deal with each count separately in that each count should have had specific directions on the elements of the offence. The inadequate direction on the separate consideration of charges led to a miscarriage of justice.

Conviction – Error of Fact and Law

(vii) That the Learned Trial Judge erred in fact and law in relation to Counts 1 and 2 in that there was inadequate direction on the actual drugs in that His Lordship failed to explain to the Assessors what the findings of the Analysts were and the quantities found.

Sentence

(i) The Learned Trial Judge erred in law and fact when he failed to take into account the long delay (5 years) and the effects on the Accused during the sentencing.

(ii) The Learned Trial Judge erred in law when at Paragraph 14 he refers to remorse as a factor taken into account for sentencing purposes.

(iii) The Learned Trial Judge erred in law when he imposed a sentence that was excessive given the circumstances of this particular case.

Ground of appeal (i) and (ii)

[8] The appellant argues that the trial judge had erred in law in not directing the assessors on the burden of proof and reverse burden of proof. He refers to paragraphs 5, 13 and 19 of the summing-up.

[9] The Court of Appeal in **Abourizk v State** [2019] FJCA 98; AAU0054.2016 (7 June 2019) dealt with the burden of proof and standard of proof on an accused facing a charge for possession under section 5 of the Illicit Drugs Control Act 2004 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 Act 2004 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 Act 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).

'[74] To that extent the trial judge had erred in law in treating the burden on the appellants as an evidential burden under section 59(1) of the Crimes Act when the presumption under section 32 of the Illicit Drugs Control Act 2004 becomes applicable. However, this error has prejudiced the prosecution and not the appellants. However, there was an evidential burden on the appellant to show, if that be the case, that they had lawful authority to possess the quantity of Cocaine concerned, as the prosecution cannot be expected to prove the negative and that fact was exclusively within the knowledge of the appellants. The appellant did not discharge this burden and in fact, they could not have done so without first admitting that they knowingly had in their possession the prohibited drug. Given their defense of lack of knowledge of the presence of Cocaine in the bag and suitcase in the boot of the car, the element of 'without authority' in section 5(a) of the Illicit Drugs Control Act 2004 should be taken as proven when the physical presence of the bag and suitcase containing Cocaine in the boot was admitted. The ground of appeal based on an error on the burden of proof is, therefore, rejected.

[10] The facts had revealed that the appellant was the only person remaining as a director of 'Energy' in Fiji that had leased premises at which the police had recovered methamphetamine, pseudoephedrine and a pill punch machine, who was running the business, had the sole key to the premises and was the sole signatory to the company bank account. He had run his defense at the trial on the premise that he lacked any knowledge that the pills contained illicit drugs and never seen the tablet punching machine in use. He had claimed that his task was to look after the pills and, upon receipt of orders from oversees, to post orders to customers as instructed by one George Reid who had hired him as a labourer and then appointed him as a director and left Fiji in 2010. Under cross-examination, the appellant had admitted that he was aware of all the items that were in the office. Thus, it appears that the appellant had not disputed his physical control of the items described in the information or at least the evidence had shown that the prosecution affirmatively established that methamphetamine, pseudoephedrine and the pill punch machine were in the appellant's possession.

[11] Section 32 of the Illicit Drugs Control Act 2004 seemed to have fortified the prosecution case as far as the element of possession was concerned. Section 32 states:

> *'Factual presumption relating to possession of illicit drugs*
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> *Where in any prosecution under this Act it is proved that any illicit drug, controlled chemical or controlled equipment was on or in any premises, craft, vehicle or animal under the control of the accused, it shall be presumed, until the contrary is proved, that the accused was in possession of such illicit drug, controlled chemical or controlled equipment.'*

[12] Therefore, the appellant's criminal liability appeared to depend on whether he had entertained the fault elements corresponding to the physical acts mentioned in the three counts.

[13] The trial judge had given a proper general direction on burden of proof at paragraph 5 of the summing-up. Nevertheless, the trial judge at paragraph 13, 19 and 35 directed the assessors as follows which have given rise to the current bone of contention.

> *'13.] There is no evidence before you that Peniasi had any lawful authority to have what he did in that workshop and the Law says that it is for the accused to prove to you that he had that authority to possess the drugs.*
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> *19.] What's more, if somebody is in possession, he is presumed to know that the methamphetamine was there. An accused cannot say I didn't know it was methamphetamine or I didn't know it was a controlled chemical and I didn't know it was controlled equipment. It is up to him to prove to you that he wasn't in control of all the items. Has he done that?'*
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> *35.] Remember it doesn't matter whether he knew that they contained illicit drugs or whether he knew that pseudo ephedrine is a controlled chemical or whether he knew that the machine was controlled equipment.*

[14] Firstly, given the appellant's defense and the prosecution evidence, the direction at paragraph 13 seems irrelevant and the trial judge had not directed the assessors that in any event burden of proof, if any, must be discharged on a balance of probabilities by the appellant. Secondly, the directions at paragraph 19 and 35 have taken the appellant's defense of lack of knowledge completely away from the consideration of assessors and seem to amount to misdirection on the proof of the fault elements.

[15] In **Abourizk v State** (supra) the defense was lack of knowledge of the presence of Cocaine in the bag and suitcase in the boot of the car but the physical presence of the bag and suitcase in the boot was admitted. In the light of the said defense the Court of Appeal said of the fault element as follows.

> *[91] Therefore, since section 05 of the Illicit Drugs Control Act 2004 (i.e. the law creating the offence) does not specify a fault element for the physical element of possession section 23(2) would become applicable and recklessness becomes the fault element for the physical element of possession. This is the same with all other acts described under section 05(a) and 5(b) of the Illicit Drugs Control Act 2004, though not applicable in this case*
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> *[94] When recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element [vide section 21(4)]. Therefore, in cases under section 05 (a) and 5(b) of the Illicit Drugs Control Act 2004 the fault element would be established if the prosecution proves intention, knowledge or recklessness as defined in sections 19, 20 or 21 respectively. The presence of any one or more of the three fault elements namely intention, knowledge or recklessness would be sufficient to prove the fault element of the offences under section 05 (a) and 5(b) of the Illicit Drugs Control Act 2004.*
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> *[97] As already held above, it is my considered view that in addition to intention and knowledge, recklessness too is part of the fault element of possession under section 05 (a) of the Illicit Drugs Control Act 2004 in Fiji. This is the same with all other offences under section 05 (a) and 5(b) of the Illicit Drugs Control Act 2004. Therefore, the concept of fault elements under section 05 (a) and 5(b) of the Illicit Drugs Control Act 2004 assumes a wider scope than the fault elements identified in common law.*

[16] The trial judge had not directed the assessors to decide whether the prosecution had discharged the burden of proving the above fault element/s corresponding to the physical element of the first count and not addressed them on recklessness as the fault element for the second and third counts under section 6(b) of the Illicit Drugs Control Act 2004.

[17] The trial judge had not even directed his own mind to the issue of proof of the fault elements by the prosecution but at paragraph 5 of the judgment he had stated without referring to any particular provision that as per the presumptions in the Illicit Drugs Control Act 2004 the appellant was not only deemed to be in possession but also deemed to know the nature of the products. In other words, the trial judge had presumed that the appellant should be deemed to have known that the pills contained

illicit drugs (count 01), the substance was a controlled chemical (count 02) and the machine was controlled equipment (count 03). However, under section 6(b) of the Illicit Drugs Control Act 2004 the fault element is recklessness and when recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element [vide section 21(4) of the Crimes Act.2009]. Further, section 32 of the Illicit Drugs Control Act 2004 does not justify the trial judge's presumptions.

[18] These are matters of law that need not have leave to appeal under section 35(1) of the Court of Appeal Act, 2009 to be urged before the full court. It would also be pertinent for the full court to clarify the scope of the fault element/s under section 6(a) and 6(b) of the Illicit Drugs Control Act 2004 for future guidance.

03rd and 04th grounds of appeal

[19] The appellant complains that the trial judge had failed to give adequate legal directions on the fault elements of the offences alleged against the appellant and not addressed them separately on the fault elements on each of the offences.

[20] On a perusal of the summing-up it appears that there is substance in the appellant's complaint. Even the judgment suffers from this infirmity. Since the discussion under the first and second grounds of appeal include the matters of inadequate or non-direction on fault elements in the summing-up and they need no repetition.

[21] The 03rd and 04th rounds of appeal could go before the full court without leave as questions of law.

05th ground of appeal

[22] The gist of the complaint under this appeal ground has already been addressed under the first and second grounds of appeal. The full court could consider it as a matter of law.

06th ground of appeal

[23] The appellant correctly argues that the trial judge should have addressed the assessors separately on each of the counts. Along with first to fifth grounds of appeal the full court could consider this ground of appeal too.

07th ground of appeal

[24] The appellant argues that in relation to the first and second grounds of appeal the trial judge should have addressed the assessors on the nature of the prohibited drug and the findings of the Analyst.

[25] I do not see that there had been any challenge to the drug found being methamphetamine or its analysis and identification as such by the Analyst.

[26] I see no merits in this ground of appeal at this stage.

Grounds of appeal against sentence

[27] The Court of Appeal set new guidelines for tariff in sentences for all hard/major drugs (such as Cocaine, Heroin, and Methamphetamine etc.) to be applied across all acts identified under section 5(a) and 5(b) of the Illicit Drugs Control Act 2004 in **Abourizk v State** (supra). According to the said guidelines, for category 05 offences *i.e.* more than 01kg the sentencing range is 20 years to life imprisonment.

[28] The appellant had been sentenced in February 2019 and ***Abourizk*** guidelines were delivered in June 2019. There were no sentencing guidelines set by the Court of Appeal or the Supreme Court in respect of hard/major drugs such as Cocaine, Heroin, and Methamphetamine etc. before ***Abourizk.***

[29] The trial judge had stated in the sentencing order as follows

> *'11.] In the case of **Vakula** (HAC 247 of 2016S) Temo J. followed the New Zealand Court of Appeal decision in **Fatu** [2006] 2NZLR72. The NZ court set categories of offending for the sale and supply of methamphetamine. Although they related to supply and sale, Temo J. agreed that for all dealing under section 5 of our Act, be it possession, sale, dealing, manufacturing etc.,*

*the **Fatu** bands should be adopted in Fiji, pending a contrary decision from the Court of Appeal or Supreme Court.*

*12.] The highest category of offending in **Fatu** is category 4 which would sentence dealing with "very large commercial quantities (500 grammes or more) "to a term of imprisonment of between ten years and life imprisonment.*

13.] The quantity of methamphetamine being possessed in this case is seven times the threshold for the most serious category found by the NZ Court of Appeal and must therefore attract a very heavy sentence indeed.

[30] The appellant argues that delay of 05 years between charge and trial should have been taken into account in the matter of sentence in that he was charged in March 2014 and the trial commenced in February 2019. The appellant however is unable to point out what had caused the delay and therefore whether there had been any post-charge systemic delay. He does not complaint of any pre-charge delay.

[31] The judicial decisions cited by the appellant (**Nalawa v State** [2010] FJSC 2; CAV0002 of 2009 (13 August 2010) and **State v Joape Drauna & Ors** [2018] FJCA 13; AAU0046 of 2012 (08 March 2018)] do not seem to set down as a guiding principle in sentencing that pre-charge or post-charge delay should attract a discount as a mitigating factor. They seem to have dealt with the question of a fair trial *vis-à-vis* delay.

[32] It is possible to consider clear remorse as a mitigating factor in the matter of sentence [vide **State v Jamal U Din** [2019] FJCA 200; AAU 41 of 2012 (03 October 2019)]. However, the appellant's 'apology' had been conveyed to court by his counsel only at the sentencing stage and I think the trial judge had correctly not regarded it as a genuine remorse and not given any discount.

[33] The trial judge had stated that the appellant was the father of 03 children but not given any discount on account of that factor. In **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014) the Supreme Court stated that the accused's responsibility for his 5 year old son and 53 year old mother was in reality of little mitigatory value and quantum of the sentence can rarely be a ground for the intervention of the Supreme Court. The Court of Appeal in **Raj v State** [2014] FJCA 18; AAU0038.2010 (5 March 2014) said that legitimate aspects of mitigation will

include a clear record, proven remorse, mental disorder but not family circumstances because the perpetrator has by his conviction for the crime done everything within his power to destroy the fabric of the family unit. As a father of 03 children the appellant should never have indulged or been involved in the distribution of methamphetamine which has the potential to destroy children, make them drug addicts and ruin families.

[34] Methamphetamine is one of the most serious drug problems that the country faces at present. Perhaps, it could be more dangerous and destructive than any other drugs in the local market. It is a destructive drug for users as it is highly addictive with a myriad of adverse psychological consequences (vide **Kumar** [2017] FJHC 1217 (12 December 2018).

[35] It is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered [**Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006)]. In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range [**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015)].

[36] Considering all the circumstances I do not think that there is any sentencing error having a reasonable prospect of success in the appeal.

Order

1. Leave to appeal against conviction is allowed.
2. Leave to appeal against sentence is refused.

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL