IN THE COURT OF APPEAL, FIJI
Appellate Jurisdiction

CRIMINAL APPEAL NO. AAU 0071 OF 2023
High Court No. HAC 126 of 2015

BETWEEN : **JOSEPH ABOURIZK**

Appellant

AND : **THE STATE**

Respondent

Coram : **Mataitoga, RJA**

Counsel : **Mr M. Thangaraj (SC) with Ms K. Lal for Appellant**

Ms R. Uce for Respondent

Date of Hearing : **1 March, 2024**

Date of Ruling : **19 March, 2024**

RULING

1. The appellant was charged with following offence in the Lautoka High Court. The Information filed by the DPP outlined the charge as follows:

Statement of Offence

UNLAWFUL POSSESSION OF ILLICIT DRUGS: Contrary to Section 5 (a) of the Illicit Drug Control Act 2004

Particulars of the Offence

JOSEPH NAYEF ABOURIZK and JOSESE MURIWAQA on the 13 day of July 2015 at Lautoka in the Western Division, without lawful authority were found in possession of illicit drugs, namely, cocaine weighing 49.9 kilograms

2. Following the trial in the High Court before five assessors, they found by a unanimous opinion the appellant was not guilty. The trial judge overturned the assessor's verdict and convicted both the appellant and the co-accused on 22 April 2015. The appellant was sentenced to 14 years imprisonment with a non-parole period of 12 years.

3. The appellant filed a timely appeal against conviction and sentence.

Brief Background

4. In 2016 the appellant together with another was convicted

The Relevant Law

5. In making its assessment of the grounds of appeal submitted by the appellant, the relevant provision of the Court of Appeal Act is section 21 (1)(a) (b) and (c), which states:

> *"21 (1) 'a person convicted on a trial hele before the High Court, may appeal under this part to the Court of Appeal –*
>
> > *(a) Against conviction on any ground of appeal which involves a question of law alone;*

> (b) *With the leave of the Court of Appeal or upon the certificate of judge who tried him that it is a fit case for appeal on any ground of appeal which involves a question of fact alone or question of mixed law and fact and law or any other ground which appears to the Court to be a sufficient ground of appeal; and*
>
> (c) *With the leave of the Court of Appeal against the sentence passed on his conviction unless the sentence is one fixed by law."*

6. For leave to be granted the court must be satisfied that the grounds submitted by the appellant has **'reasonable prospect of success'** [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019).]

7. Before the appellant's counsel started his submission, the court reminded him that the real issue for consideration is 'possession' of the drugs. In the context of this trial, the narrow issues of joint possession are the main issue.

8. In this Leave Hearing I assess the grounds of appeal submitted by the appellant against conviction and sentence based on the High Court Judgement in **Abourizk & Muriwaqa v State** [2023] FJHC 402 by Justice Aluthge delivered on 16 June 2023. This case has a history in the courts since it came on the scene in 2015.

Grounds of Appeal

9. At the leave hearing, counsel for the appellant submitted 15 grounds of appeal against conviction. One was withdrawn and 14 was considered. The court carefully reviewed the 14 of grounds appeal submitted against conviction and will deal with them to assess its whether they have reasonable prospect of success. I have consolidated some of the grounds of appeal as it covers same issues of law at this stage of the leave to appeal process.

Permanent Stay Application

10. Before I deal with the substantive grounds of appeal that was filed on 23 August 2023, I will briefly consider the permanent stay application. At the leave to appeal hearing counsel for the appellant mentioned this matter without any substantive submission to support their claim that the trial judge erred in not granting stay. The issue is that whether a Permanent Stay application can be made in the circumstances of this case or it should be filed as a separate application raising issues of fairness and procedural delay should be part of separate matter before the High Court.

11. The power to grant a stay of criminal prosecution will only be ordered in exceptional or extreme circumstances. The power is to be exercised with the utmost caution and will rarely be justified. A permanent stay, in effect, operates as a continuing immunity from prosecution. The power is a qualification on the prima facie right of a person to insist upon the exercise of jurisdiction by the courts where appropriate; a fundamental aspect of the rule of law. **Jago v. District Court of NSW** (1989) 168 CLR 23, 28, 31, 33 (Mason CJ), 76 (Gaudron J). A permanent stay may only be granted in an "extreme case" where there is "a fundamental defect that goes to the root of the trial of such a nature that nothing a trial judge can do in the conduct of the trial can relieve against it's unfair consequences" (**Dupas v R** (2010) 241 CLR 237).

12. Court has power to ensure its processes are not used to produce unfairness. The question is not whether the prosecution should have been brought, but whether the court, whose function it is to dispense justice with impartiality and fairness both to the parties and to the community which is serves, should permit it's processes to be employed in a manner which gives rise to unfairness: **Jago, 28 (Mason CJ)** Although the categories of abuse of process remain open, abuses of process usually fall into one of three categories: (1) the court's powers are invoked for an illegitimate purpose; (2) the use of the court's procedures is unjustifiably oppressive to one of the parties; or (3) the use of the court's procedures would bring the administration of justice into disrepute: **Rogers v The Queen** (1994) 181 CLR 251, 286 (McHugh J) There are two aspects to an abuse of process: 1. That of vexation, oppression and unfairness to the other party; and 2. The fact that the administration of justice may be brought into disrepute.

13. I am of the view and in light of the above legal principles regarding Permanent Stay Proceeding, it cannot be raised as part of this criminal proceeding because by its very nature it is a civil claim. It may be brought as a separate matter in constitutional redress action under section 44(3) of the Constitution, in the High Court. This was made clear to the appellant in the ruling dated 30 May 2023 in **State v Abourizk** [2023] FJHC 470 (HAM No: 121/2023).

14. Despite the clear ruling given by the High Court, this matter was again submitted as a ground of appeal in this Leave to Appeal Hearing. Since this concerns the same counsel that is appearing in this leave hearing, I consider this conduct unbecoming of an officer of the court to ignore a clear ruling of the court and try to submit the same matter to a further consideration this time in the Court of Appeal when it was clearly out of order.

Grounds 1, 2 and 3 – Unreasonable Verdicts

15. The grounds discussed here are:
    (1) The state failed to prove control to the exclusion of all others
    (2) State failed to prove knowledge beyond reasonable doubt
    (3) State failed to prove control beyond a reasonable doubt

16. These three grounds challenged the trial judge decision and considered as relevant and reliable in assessing the issue of possession of the drugs. It did that by attacking the evidence of ASP Neiko as unreliable and lacking credibility. He was the main witness for the prosecution in relation to the issues of appellant and his partner in crime being in possession of the drugs at the material time. There was substantial submission submitted by the counsel for the appellant covering the discovery of the drugs and in trying to undermine the evidence of ASP Neiko.

17. The trial judge in dealing with the issues of joint possession and knowledge, at the trial, firstly outline the law to be applied at paragraphs 14 to 22 and this was not challenged by counsel for the appellant. Secondly the trial judge carefully set out the evidence of ASP Neiko the main prosecution witness, which is set out in paragraphs 91 to 119 of

the judgement. The analysis of the evidence and the law is set out in <u>paragraphs 197 to 205</u> of the judgement.

18. In submissions made at the hearing counsel of the appellant understandably attach the credibility of the ASP Neiko and other police officers. At the end of it all, the trial judge explained why he accepted part of the evidence of ASP Neiko at paragraph 242 to 245, which states:

> *"242. I accept that Neiko had first sighted HM 046 on the Queens High Way and from there he had followed it to its final destination which is the gravel road at Vuda Marina. As a result of which, I accept that SP Neiko would be in a position to rebut Abourizk's claim that he had dropped Simon off at First Landing. I accept Neiko's evidence that he effectively monitored the movement of HM 046 from Queen's High Way to its destination at Vuda Mariana and that it never turned into First Landing. I also accept the undisputed Neiko's evidence that the bag and the suitcase containing 34 blocks of cocaine were found in HM 046 in which the Accused were travelling together*
>
> *243. I shall now give my reasons on what basis I accepted some part of Neiko's evidence and rejected the other parts. When the Judge sat with the assessors, we used to go give the assessors the direction that in assessing the evidence, they were at liberty to accept the whole of the witness's evidence or part of it and reject the other part or reject the whole. The judge sitting alone should be guided by the same direction in evaluating evidence.*
>
> *244. In Chandra v State [2015] FJSC 32; CAV21.2015 (10 December 2015) Dep.J observed as follows:*
>
>> *In the past, the courts applied the maxim 'Falses in Uno Falses in Omnibus' - meaning "He who speaks falsely in one point will speak falsely upon all" - to a witness who gives false evidence. The present trend is instead of rejecting the totality of evidence, to act on that part of evidence which is true and reliable. This approach is known as divisibility of credibility. The learned judge should have impressed upon the assessors that due to serious inconsistencies and infirmities in David's testimony he is an unreliable witness and not worthy of credit and it is unsafe to act on his evidence. However, the assessors should be informed that they are free to act on his evidence provided he had given a satisfactory explanation or can act on parts of evidence corroborated by independent evidence. The trial judge had failed to give adequate directions regarding this matter.*
>
> *245. The parts I have accepted are plausible in the circumstances of this case and are consistent with other evidence led in the trial. I concede that there are some infirmities in the investigation process and some basic guidelines in the Force Standing Orders have not been followed. However, that does not prevent me from ascertaining the truth in this case. The fact that Neiko gave evidence*

without his notes eight years after the incident and his frail memory over the years had to be given some recognition. The Defence was in an advantageous position in the process of cross-examination because they were equipped with Neiko's previous statement and evidence in two proceedings recorded approximately eight years ago."

19. On the issues of **joint possession,** the trial judge stated as follows:

> *"202. Both Accused deny that they were in control of the illicit drugs and that they had any knowledge that the two containers contained illicit drugs. There are two Accused and I must find the facts in respect of each Accused separately.*
>
> *203. The Prosecution case is that both Accused are presumed to be in joint possession of the illicit drugs by virtue of their joint control of HM046 at the material time. The 2nd Accused Muriwaqa admits that he was the driver of HM 046 at the material time. He had taken this car for rent from Rabola (PW -8) for two days to pick his friend from Nadi. There is no doubt the friend he referred to is the 2nd Accused, Abourizk. Muriwaqa has paid FJD 160.00 for two days and was driving this vehicle at the material time. Therefore, he was in control of HM 046 at the material time. In view of Section 32 presumption of the IDCA, it shall be presumed, until the contrary is proved' that he was in possession of the illicit drugs.*
>
> *204. I have already concluded that the nature of the burden on the Defence under Section 32 is evidential. Therefore, the Accused can raise the defence of lack of knowledge and control by an assertion in his police statement or by adducing evidence or by pointing to the evidence of other witnesses that is consistent with his defence.*
>
> *205. In this case, the 2nd Accused elected to exercise his right to remain silent. As I said, giving evidence is not strictly required to raise the issue of lack of knowledge and control. He can raise his defence by pointing to the evidence adduced either by the Prosecution or the Defence that is consistent with his defence. The 1st Accused produced evidence raising the issue of lack of knowledge and control. Muriwaqa's Counsel Mr. Rabuku in the process of cross-examination and by pointing to the evidence of the 2nd Accused raised his defence adequately.*
>
> *206. However, raising the issue per se is not sufficient to discharge his (evidential) burden. The evidence pointed to should be sufficient so as to be capable of supporting his defence. In other words, the evidence pointed to should be credible and believable so as to create a reasonable doubt in the Prosecution case.*
>
> *207. It is therefore necessary to draw logical inferences from the proved facts to determine whether the Accused have discharged their (evidential) burden. Once they have discharged their evidential burden, it is for the Prosecution to*

prove that the Accused were in fact in control and that they had knowledge of the illicit drugs beyond reasonable doubt.

208. The 1st Accused was a passenger of HM 046 at the material time. Is he a mere passenger or someone who had control over the vehicle? The Prosecution argues that Abourizk is also in control of this vehicle. It invites the Court to draw necessary inferences from the facts proved in this regard. Muriwaqa rented this car to pick Abourizk from Nadi. Abourizk associated himself with Muriwaqa, whom he described as his trusted friend and business partner in Fiji. It is on his instructions that Muriwaqa had driven this vehicle to Ba town where these containers were loaded into that car. He was travelling in this car with Muriwaqa for a considerable period of time and distance. The car had been driven to its final destination on Aborizk's instructions. He knew that the containers existed in the car and were therefore in their custody. I am satisfied that the 1st Accused was in control of HM 046 with Muriwaqa at the material time.

209. It is therefore necessary to draw logical inferences from the proved facts to determine whether each Accused has discharged the evidential burden in the manner described above as to the issue of lack of knowledge. It is undisputed that both Accused with the knowledge that the containers were in their vehicle, had driven HM 046 from Ba town to an isolated and impassable gravel road in Vunda where it finally came to an abrupt stop. The main plank in the Prosecution case is the inherent implausibility that both Accused, who were alone in HM 046, could possibly be unaware that there was a huge consignment of illicit drugs inside their vehicle.

210. In addition to that, in support of its argument that both Accused had knowledge and control of illicit drugs, the Prosecution invites the Court to draw necessary inference from the following strands of evidence:

> *(i) Both Accused transported the bags containing the illicit drugs over a significant distance;*
>
> *(ii) Both Accused were observed to be present at the rear of HM 046 as bags were repacked*
>
> *(iii) The keys to the locks on the two bags containing the illicit drugs were found inside HM 046*
>
> *(iv) A large sum of cash was found in the hotel room occupied by the 1st Accused which they say was wholly incompatible with the 1st Accused being in Fiji solely for the purpose of tourism.*

211. The Defence attack on the Prosecution case is twofold; Firstly, the Defence endeavours to create a reasonable doubt about the possession of the illicit drugs vis-a vis the Accused on the basis that the Accused may have been duped into transporting the bags containing illicit drugs by making them believe that the bags contained legitimate items, by a person named Simon who allowed the Accused to drive away with those bags (innocent dupe defence). The second

attack, launched basically by the 2nd Accused, was based on police fabrication. One may find the two theories inconsistent to each other. I would assume that the attack based on alleged police corruption /stealing launched by the 1st Accused is aimed at discrediting the version of police witnesses

212. There is no dispute that both Accused transported the bags containing the illicit drugs over a significant distance. The dispute is basically over the other strands. Let me begin by analysing the evidence on strands (ii) and (iii) mentioned above.

213. Prosecution substantially relies on SP Neiko's evidence to prove its case. Neiko's evidence is extremely important for the Prosecution for two reasons. Firstly, he is the only eye witness called by the Prosecution to testify to the 'repacking saga', and locating the keys to the locks on the two bags underneath the passenger seat, which evidence if believed, would have directly linked the Accused to the illicit drugs. Secondly, his evidence is important to discredit the innocent dupe defence raised by the Accused that the bags were left in the car by the man"

20. I have set out in full the relevant paragraphs in the trial judge's judgement to show that he was not influenced by what other judges have said in the earlier version of this case as it made its way all the way to the Supreme Court. Yet most the attack by counsel for the appellant at the hearing was relying of comments made by other judges elsewhere.

21. In light of the above analysis, it was not made clear in the appellant's submission where the trial judge has erred in applying the relevant law to the evidence before him. It was clearly open to him to make the determination he made.

22. The legal test applied by appellate court when issues of unreasonable verdicts are urged by appellants was discussed in **Gounder v State [2023] FJCA 277** as follows:

*"To put it another way the question for an appellate court is whether upon the whole of the evidence it was open to the assessors to be satisfied of guilt beyond reasonable doubt, which is to say whether the assessors must as distinct from might, have entertained a reasonable doubt about the appellant's guilt. "Must have had a doubt" is another way of saying that it was "not reasonably open" to the jury to be satisfied beyond reasonable doubt of the commission of the offence [see **Kumar v State** AAU 102 of 2015 (29 April 2021), **Naduva v State** AAU 0125 of 2015 (27 May 2021)]. The decisions in **Balak v State** [2021]; AAU 132.2015 (03 June 2021), **Pell v The Queen** [2020] HCA 12], **Libke v R** [2007] HCA 30; (2007) 230 CLR 559, **M v The Queen** [1994] HCA 63; (1994) 181 CLR 487, 493) were relied upon by the court in formulating the above test.*

*[9] Keith, J adverted to this in **Lesi v State** [2018] FJSC 23; CAV0016.2018 (1 November 2018) as follows:*

'[72] Moreover, not being lawyers, they do not have a real appreciation of the limited role of an appellate court. For example, some of their grounds of appeal, when properly analysed, amount to a contention that the trial judge did not take sufficient account of, or give sufficient weight to, a particular aspect of the evidence. An argument along those lines has its limitations. <u>The weight to be attached to some feature of the evidence, and the extent to which it assists the court in determining whether a defendant's guilt has been proved, are matters for the trial judge, and any adverse view about it taken by the trial judge can only be made a ground of appeal if the view which the judge took was one which could not reasonably have been taken.</u>'

23. In applying the legal test referred to above the analysis I have referred to in paragraphs 11- 14 above, it cannot be said that the trial judge erred in the manner alleged by the appellants.

24. These grounds of appeal lack merit and unlikely to succeed on appeal. Leave is refused.

25. **<u>Grounds 4,5,6 7 and 8</u>** – these grounds of appeal allege the following:

    (4) the trial changed the prosecution case and a miscarriage of justice resulted

    (5) Trial judge erred in accepting the evidence of Neiko in any regard

    (6) Trial judge erred in accepting the evidence of Neiko that Simon was not dropped off at First Landing

    (7) Trial judge erred in finding that the evidence of Neiko which claimed that Simon was dropped off at First Landing was relevant to the existence of Simon

    (8) The trial judge erred in finding that Simon did not exists

26. Almost all of what I have stated with regard to the evidence ASP Neiko, the analysis of the relevant law and its application to evidence are set in the various paragraphs already cited above. There is nothing submitted in the hearing from the appellant that showed that Justice Aluthge erred in his assessment of fact and law. What is being suggested by the appellant is that Neiko's evidence in previous proceeding in the COA and the Supreme Court was discredited, therefore it should be discredited in the second high

court trial. The trial judge is not bound by any earlier assessment of the evidence but the one heard before him at the second trial in the High Court.

27. On the issue of the "innocent dupe defence'. Neiko's evidence was critical in discrediting it. In reviewing the trial judge's findings on the issues raised by the grounds reference above, I reminded myself of the observation of the Court of Appeal in **Sahib v State** [1992] FJCA 24, where the court stated

> *"Having considered the evidence against this appellant as a whole, we cannot say the verdict was unreasonable. There was clearly evidence on which the verdict could be based. Neither can we, after reviewing the various discrepancies between the evidence of the prosecution eyewitnesses, the medical evidence, the written statements of the appellant and his and his brother's evidence, consider that there was a miscarriage of justice.*
>
> *It has been stated many times that the trial Court has the considerable advantage of having seen and heard the witnesses. It was in a better position to assess credibility and weight and we should not lightly interfere. There was undoubtedly evidence before the Court that, if accepted, would support such verdicts.*
>
> *We are not able to usurp the functions of the lower Court and substitute our own opinion."*

28. For these grounds of appeal there are reasonable prospects of it succeeding on appeal. Leave is refused.

29. **Grounds 9** and **10** – makes two interrelated allegations:

    (9) Trial judge erred in relying on the definition of possession in section 4 Crimes Act 2009

    (10) Trial judger erred in finding that **Mohammed v State** [2014] FJCA 216 had been overruled by Supreme Court

30. In light of the discussion on the issues of possession and the relevant law, these grounds of appeal raise issues of law, which the full court should review and make final determinations. **Leave is granted**

31. **Grounds 11, 12, 13 and 14** – These grounds alleged is based on the finding and judicial comments made in a different proceeding, not the current one under review. Counsel for the appellant was not able to articulate with any clarity what exactly is being alleged the trial judge erred in his finding. It seems to me reasonable in these circumstances for the power under section 35(2) of the Court of Appeal Act to be considered to find these grounds frivolous. In the hearing before me there was no detail submission provided to support what is the alleged error by the trial judge. The submission comes across as a 'scatter-gun approach' to cover as much ground as possible without any real submissions to support the ground submitted.

32. I therefore find these grounds frivolous under section 35(2) of the Court of Appeal Act and they are dismissed.

<u>Sentence Appeal</u>

33. **Ground 1** – the sentence was harsh and excessive.

34. The appellant counsel did pursue this ground of appeal at the hearing nor was it withdrawn. It may be due to the fact that it will open the opportunity to increase the sentence, given the state's position that the sentence may increase it if renewed in the Court of Appeal. Leave is refused on this ground.

35. **Ground 2** – Trial Judge **erred** in law in applying Guideline Judgement in sentencing retrospectively.

36. The law in Fiji is clear, the Court of Appeal stated the position in **<u>Chand v State</u>** [2019] FJCA 192 (AAU NO: 033/2015)

> *"[73] Therefore, the correct legal position is that the offender must <u>be sentenced in accordance with the sentencing regime applicable at the date of sentence</u>. The court must therefore have regard to the statutory purposes of sentencing, and to current sentencing practice which includes the tariff set for a particular offence. The sentence that could be passed is limited to the maximum sentence available at the time of the commission of the offence, unless the maximum had been reduced, when the lower maximum would be applicable."*

37. A similar statement was made by the Court in **Narayan v State** [2018] FJCA 200 (AAU No: 107/2016) as follows:

> *"[39] The commonly accepted principle is that one cannot be punished for something which was not a criminal offence when he did it. Would the new tariff seek to punish the Appellant for something that was not criminal at the time of its commission? In my judgment the answer to both is 'No'."*
>
> *'[40] ...... that the tariff of a sentence does not amount to a substantive law. Tariff is the normal range of sentences imposed by court on any given offence and it is considered to be part of the common law and not substantive law. It may also be said that tariff of a sentence helps to maintain uniformity of sentencing across given offences. .... Any change effected to an existing tariff for a given offence therefore could be retrospective in its operation. Therefore, the new tariff that was set out in Gordon Aitcheson (supra) could be retrospectively applied to the instant case. The punishment for the substantive offence of rape in terms of Section 207 (1) (2) of the Crimes Act 2009 is life imprisonment which remains the same before and after Gordon Aitcheson.'*

38. The appeal against sentence is meritless. Leave is refused.

ORDERS

1. Leave is granted for grounds 9 and 10.
2. Leave is refused on grounds 1 to 8 and 11 to 14.
3. Leave is refused on both grounds of the sentence appeal.

COURT OF APPEAL FIJI

Isikeli U Mataitoga

Resident Justice of Appeal