IN THE COURT OF APPEAL, FIJI
Appellate Jurisdiction

CRIMINAL APPEAL NO. AAU 0072 OF 2023
High Court No. HAC 126 of 2015

BETWEEN : **JOSESE MURIWAQA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Mataitoga, RJA**

Counsel : **Mr G. O'Driscoll for Appellant**
Mr M. Rafiq with Ms R. Uce for Respondent

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

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

RULING

1. The appellant was charged with the 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.

4. At the time of the Leave Appeal hearing new counsel appeared for the appellant, who adopted the grounds of appeal against conviction and sentence filed by **John Rabuku Lawyers** in the Court Registry on 29 August 2023.

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).]

Leave To Appeal Hearing

7. Mr O'Driscoll at the Leave to Appeal Hearing advised the Court their submission and grounds of appeal 'piggy-back' on those submitted and argued by counsel for the co-accused Joesph Obourizk. I noted that on the grounds filed in court for this appellant, the grounds are not the same. I will address the grounds of appeal filed in the Court Registry dated 29 August 2023.

Grounds of Appeal

8. This appellant through his previous counsel from ***Rabuku Lawyers*** submitted 7 grounds of appeal. One ground was developed by Mr O'Driscoll on the hop so to speak, because it was not formally submitted in the initial Notice of Appeal and it refers to section 4 of the Crimes Act 2009 and how it should not be used to assist in the definition of possession in the Illicit Drugs Control Act

9. **Grounds 1 – 4**: Consolidate The first FOUR Grounds of appeal of this appellant when consolidated, allege that the trial judges made an error of law and fact with regard to the appellant being joint possession of the illicit drugs. It claims that the finding of the trial judge and in particular reference to his acceptance of ASP Neiko's evidence, is defective in three respects reference below was in error:

(i) Appellant did not have full control to the exclusion of all others

(ii) No evidence that appellant came into contact with the drugs found in the boot of the car

(iii) No knowledge that the suitcases in the boot of the car has drugs in them

(iv) ASP Neiko's evidence on possession should not have been accepted by the trail judge because he had admitted that some of his earlier statements were inconsistent to his court testimony

10. The above issues are raised to try and mitigate section 32 of the Illicit Drugs Control Act, which states:

> *"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 <u>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,</u> controlled chemical or controlled equipment."*

11. The trial Judge's analysis was that the prosecution conducted the trial on the basis that the substance found in the bag and the suitcase (the bag and the suitcase will herein after be referred to as containers for the purpose of convenience) contained 49.9 kilograms of illicit drugs, namely cocaine, and that the Accused were in joint possession of the illicit drugs to the exclusion of any other person except each other. The trial judge further analysed

> *"198. There are no admissions in this case. However, there is no dispute that the two containers containing 49.9 kilograms of the substance, later found to be cocaine, were found in HM 046 driven by the 2nd Accused Muriwaqa. There is also no dispute that the 1st Accused Abourizk had been travelling with Muriwaqa in HM 046 for a considerable distance and time with the knowledge that those containers were in their vehicle. Therefore, the two containers were physically in the possession and custody of the two Accused. The crucial issue that this Court is called upon to decide is whether the Accused persons, in its legal sense, were in joint possession of the illicit drugs found in the containers to the exclusion of any other person except each other.*
>
> *199. To establish this charge, the Prosecution must make me sure that the Accused had the containers with something in it in their custody or control; and that the Accused knew that the containers were in their custody or control and that the something in the containers was illicit drug, namely cocaine. Once these elements are satisfied it is not necessary for the prosecution to prove that the Accused knew that the substance was illicit drug let alone a particular illicit drug until sufficient narrative is available in evidence raising the issue of lack*

of knowledge and control on the part of the Accused. If sufficient evidence to that effect is available, the Prosecution must prove beyond reasonable doubt that each Accused in fact knew that the bags contained illicit drugs."

12. The defence on the other hand attack on the prosecution case noted above was twofold: create a reasonable doubt about the possession of the illicit drugs by running the innocent dupe defence that claim Simon was the owner of the illicit drugs and also claim of fabrication of evidence by the police.

13. On joint possession the trial judge held 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"*

14. The trial judge's explanation of the reasons he accepted part of ASP Neiko's evidence:

> '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.*

15. It is clear from the above analysis that the conclusions reached by the trial judge was based on his analysis of the evidence and applicable law. The conclusion is available to him to reach and it is not unreasonable.

16. These 4 grounds are meritless. Leave to appeal is refused.

<u>Ground 5</u>: <u>Did the trial Judge erred in law and fact in finding that Simon did not exists</u>?

17. On the issue of the "**<u>innocent dupe defence</u>**" with regard to Simon, the trial judge stated the following after analyzing the evidence on both ASP Neiko and Joseph Abourizk:

"232. The second important aspect of SP Neiko's evidence relates to his claim that he undertook a hot pursuit for HM 046 from Navutu roundabout right up to where it finally stopped in the gravel road at Vuda Marina. This part of Neiko's evidence is important to my assessment of Abourizk's evidence that a man by the name of Simon was dropped off at the First Landing before HM 046 reached its final destination.

233. Neiko's evidence is that he sighted HM 046 for the first time at Navuto roundabout and his Pajero maintained five car distance right up to the gravel road where it finally stopped. He was sure that at no time HM 046 turned into First Landing. On the other hand, Abourizk's evidence is that they went into First Landing to drop Simon off at the car park. Who is telling the truth? Bearing in mind that the overall burden of proof squarely rests on the Prosecution right throughout, I would embark upon an exercise to determine where the truth lies. If I find the version of events of the Defence case to be true or may be true, both Accused are entitled to be acquitted because it leaves a reasonable doubt in the Prosecution case.

234. There is no dispute that HM 046's starting point with the drugs had been Ba town and the destination, the rail track running across the gravel road at Vuda Marina. As to the time of the meeting of the two vehicles, there is no big difference in the two versions. According to Abourizk, they had reached Ba town somewhere after lunch and returned to First Landing approximately 3-3.30 p.m. According to Neiko, he first sighted HM 046 at around 3-3.30 p.m. It is also not disputed that Neiko must have sighted HM 046 somewhere between First Landing and the gravel road. Therefore, the divergence is mainly focused on the exact location at which HM 046 was first sighted by Neiko. The resolution of this dispute is important because if Neiko had first sighted HM 046 somewhere between First landing and the gravel road, it is possible that he had no chance to see HM 046 going into First Landing.

235. According to Neiko, he was standing at Navutu Roundabout, when he first sighted HM 046 heading towards Nadi at around 3.30 p.m. After sighting HM 046, he had to wait there for three minutes, until his driver brought the Pajero to initiate the pursuit. It was suggested that within that three minutes, HM 046 would have gone out of sight. Neiko agreed that it would have gone about two kilometres. However, they were still able to catch up HM 046 because of the traffic along the Queens High Way. He further argued that if they had missed HM 046 in that stretch, they would have headed right up to Nadi without turning into Viseisei road. That argument is sound. According to Neiko, the distance between Navutu Roundabout and Viseisei junction is approximately 10 kilometres and it is not impossible for the Pajero to catch up the Fielder, especially during traffic hours, before it turned into Viseisei road even if it had gone out of sight. (It is noteworthy that it was a Monday and 3-30 p.m. is school traffic time).

236. *Abourizk had agreed at the first trial that Neiko had told Court in his evidence that HM-046 never made a stop at first landing. He had also agreed that if Neiko was following them, he (Neiko) would have seen them but he could not say if Neiko was following them or not.*

……………

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."*

18. 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."*

19. For this ground of appeal there is no reasonable prospects of it succeeding on appeal. Leave is refused.

Ground 6: Interface between Section 4 of the Crimes Act and the Illicit Drugs Control Act

20. Did the trial Judge erred in law in relying of section 4 of the Crimes Act in determining the issue of 'possession' under the Illicit Drugs Control Act? This is an important area of criminal procedure that would benefit greatly from a more definitive determination from the court of appeal.

21. This ground is one of law. No leave is required.

Ground 7: Mohammed [2014] FJCA 216 been overruled by the Supreme Court

22. In the absence of any submissions to support this ground as required under Rule 36 (1) Court of Appeal Rules. This ground have not been precisely articulated with backing submissions. This was not done in this case. Leave is refused.

Appeal Against Sentence

23. **Ground 1** - Was the sentence harsh and excessive? It should be noted that this ground was not pursued by this appellant's co-accused at the Leave Hearing. Counsel for the appellant advise the court that they 'Piggy-Back' on the co-accused submissions, which I take to mean follow the position of the Co-Accused in **Obourizk** (AAU No: 071 of 2023). This ground was not pursued and is dismissed.

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

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

> *"[73] Therefore, the correct legal position is that the offender must be sentenced in accordance with the sentencing regime applicable at the date of sentence. 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."

26. 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."*

27. This ground of appeal against sentence has no merit. Leave refused.

ORDERS

Against Conviction

1. Leave to appeal with regard to grounds 1 to 5 and 7 is refused
2. Leave allowed for Ground 6 – on issues of law only

Against Sentence

3. Leave is refused on all grounds submitted.

Isikeli U Mataitoga

Resident Justice of Appeal