

**IN THE SUPREME COURT OF FIJI**

**APPELLATE JURISDICTION**

**Criminal Appeal No. CAV 0013 OF 2019**

**BETWEEN: JOSEPH ABOURIZK and**

**JOSESE MURIWAQA**

**Petitioners**

**AND: THE STATE**

**Respondent**

**Coram: Hon. Chief Justice Kamal Kumar, President of the Supreme Court  
Hon. Justice Priyantha Nawana, Judge of the Supreme Court  
Hon. Justice Viraj Dayaratne, Judge of the Supreme Court**

**Counsel: Mr. A. K Singh and Ms S. D Prasad for the Petitioners  
Mr. L. J. Burney for the Respondent**

**Date of Review: 9 November 2022**

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**REVIEW OF JUDGEMENT**

**(Review of Judgment pursuant to section 98 (7)  
of the Constitution of the Republic of Fiji)**

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## **Introduction**

1. Petitioners were charged with the offence of unlawful possession of illicit drugs contrary to s5(a) of Illicit Drugs Act 2004.
2. After conclusion of the trial, the assessors unanimously declared an opinion of not guilty.
3. The Trial Judge disagreed with the assessors opinion, and found the Petitioners guilty as charged.
4. On 22 April 2016, the Trial Judge sentenced the Petitioners to 14 years imprisonment with non-parole period of 12 years.
5. The Petitioners appealed the conviction and sentence with the Respondent appealing the sentence to Court of Appeal.
6. Whilst the Court of Appeal dismissed the Petitioner's appeal, it allowed the Respondent's appeal by increasing the imprisonment term to **25 years** with non-parole period of 20 years.
7. The Petitioners appealed the Court of Appeal decision to this Court which appeal was heard on 22 April 2022, by the panel consisting of Marsoof J, Aluwihare J and Keith J (**hereinafter referred to as "the 1<sup>st</sup> Panel**).
8. The 1<sup>st</sup> Panel delivered Judgment on 28 April 2022, and pronounced following orders;
  - (i) *The petitioners' application for leave to appeal to the Supreme Court is granted.*
  - (ii) *The petitioners' appeal against their convictions is allowed, and their convictions are hereby quashed.*

- (iii) *The Director of Public Prosecutions must notify the Court by 12 May 2022 whether he proposes to apply for an order for a new trial.*
- (iv) *Such an application must be lodged by 19 May 2022.*
- (v) *In the meantime, the petitioners are remanded in custody.*

**(“the Judgment”)**

9. On 6 May 2022 the Respondent filed Application for Re-Trial by Notice of Motion dated 6 May 2022 (**“the Re-Trial Application”**).
10. The Re-Trial Application was called on 24 May 2022, when parties were directed to file Submissions and the Re-Trial Application was adjourned to 16 August 2022, for hearing.
11. The Re-Trial Application was heard on 16 August 2022, by Gates J, Dep J and Lokur J (**hereinafter referred as to “the 2<sup>nd</sup> Panel**). The lead Judgment was written by Lokur J.
12. The 2<sup>nd</sup> Panel delivered their Judgment on 25 August 2022, when they made following orders:
  - 1) *A limited retrial is ordered in exercise of power conferred by section 14 of the Supreme Court Act read with section 23(2) (a) of the Court of Appeal Act.*
  - 2) *The limited retrial will be held by a High Court Judge other than the learned Judge who heard and decided the case in the first instance.*
  - 3) *The High Court Judge will take into consideration **only the trial record without hearing fresh evidence**. The new High Court Judge will not refer to the summing up by his predecessor, the view of the assessors and the judgment of his predecessor. The High Court Judge will take a decision and pass judgment uninfluenced by the views expressed by the Court of Appeal and the Supreme Court and as if he were hearing the matter de novo.*

- 4) *The High Court Judge will hear and decide the case before him expeditiously, and meanwhile the Petitioners are remanded in custody till the 1<sup>st</sup> mention of their case at the Lautoka High Court on 16<sup>th</sup> September 2022.*
- 5) *There is no order as to costs.*

***("the Re-Trial Judgment")***

His Lordship Justice Dep while agreeing with the lead Judge that re-trial be ordered, did not agree to the Order for limited re-trial on copy record. His Lordship Justice Gates agreed with Lokur J for an order for re-trial and limited re-trial on copy record.

13. This Court in the exercise of its discretion under s98(7) of the Constitution decided to review orders 1 and 3 of the Re-Trial Judgment.
14. On 13 October 2022, this matter was called to enable the parties to make submissions if they intended to do so.
15. Whilst, the Counsel for the Petitioners sought time to file submissions, Counsel for the Respondent made very brief submission.
16. On 17 October 2022, the Petitioners filed their submissions.

**Review – Limited Re-Trial**

17. Section 98 (7) of the Constitution provides as follows:-

*"The Supreme Court may review any Judgment, pronouncement or order made by it."*

18. This Court fully endorses and adopts the following comment made by the Supreme Court in ***Dromudole v State*** CAV 13 of 2013 (7 October 2013):-

***The nature of the review.*** *The third hurdle which Dromudole must overcome is that the current application is an application for a review. Such an application will*

*always present an applicant with difficulties. It has been said that a decision of a final appellate court is one of great sanctity. It should not be disturbed save in exceptional circumstances. That is not to say that an application for a review of a previous judgment of the Supreme Court can never be granted, but it does mean that only compelling reasons will justify taking that course. (Paragraph 13)*

19. The Counsel for the Respondent submitted that the order for limited re-trial is wrong in law and he was not aware of any case where limited re-trial had been ordered by the appellate court.
20. The Petitioners in their submissions submit that order for re-trial be set aside and in the alternative limited re-trial be held on the copy records.
21. Section 14 of the Supreme Court Act 1998 provides:-;

*“For the purposes of the Constitution and this Act, the Supreme Court has, in relation to matters that come before it, **all the power and authority of the Court of Appeal** and that power and authority may be exercised, with such modifications as are necessary according to the circumstances of the case”*

22. Section 23(2) (a) of the Court of Appeal Act 1949 provides:-

*“if they allow an appeal against conviction, either quash the conviction and direct a judgment and verdict of acquittal to be entered, or **if the interest of justice so require, order a new trial**”*

**(emphasis added)**

Under s23(2)(a), the appellate Court after allowing an appeal against conviction can:-

- i) Quash the conviction and enter a verdict of acquittal; or
  - ii) Order a new trial if interests of justice so require.
23. This Court is of the view that the question posed at paragraph 12 of the Re-Trial Judgment be answered here. This will obviously clear any doubts in respect to

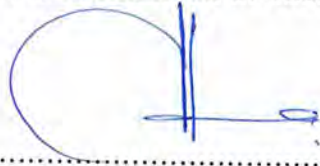
s23(2)(a) of the Court of Appeal Act 1949. This Court holds that if appeal against conviction is allowed, then **quashing of the conviction is pre-requisite** to

- i. Entering a verdict of acquittal or
  - ii. Ordering a new trial if interest of justice so requires
24. This Court is also of the view that the appeal should not fall within the ambit of exceptional circumstances for an order for Re-Trial as stated at paragraph 25(a) of the Re-Trial Judgment. His Lordship Justice Lokur in his judgment has very succinctly stated the guideline and principles in relation to determining the issue as to whether a re-trial should be ordered or not with reference to the cases cited by him. The appellate courts should follow the guiding principles when dealing with this issue.
25. This Court is of the view that the Order for the re-trial was rightly made pursuant to section 23(2) (a) of the Court of Appeal Act 1949 and Section 14 of the Supreme Court Act 1998.
26. It must be noted, that the Respondent filed Re-Trial Application pursuant to Order No. (3) of the Judgment by the 1<sup>st</sup> Panel and no application for review has been made by the Petitioners in respect of that Order.
27. The lead Judge in the last sentence of paragraph 34 of the Re-Trial Judgment stated:-
- “Therefore, following the dictum laid down by the House of Lords, there is no reason for this Panel to order a complete retrial in this case”*
28. The lead Judge did not say from which House of Lords decision the dictum for the limited re-trial is taken. The House of Lords judgments referred to by the lead Judge dealt with the issue of whether a re-trial should be ordered or not and the principles governing this issue. There is nothing in those judgments that mention limited re-trial.

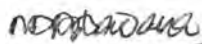
29. To order a re-trial limited to copy records without the Re-Trial Judge having the benefit to hear the witnesses, analyse the evidence himself or herself and assess the demeanor of witness as would certainly diminish public confidence in the administration of Justice.
30. This Court is of the view that once a Re-Trial is ordered it should be left to the Re-Trial Judge to determine the manner in which the Re-Trial is to be conducted. To restrict the Re-Trial Judge as to how to conduct the Trial is against public interest.
31. Where a party moves to introduce any evidence that was not called at the 1<sup>st</sup> trial or not allowed then it is up to the Re-Trial Judge to determine that question as he/she will determine the manner of trial.
32. It is noted that the 1<sup>st</sup> Panel dealt in detail about ASP Neiko's (Prosecution Witness) evidence. In particular, the Trial Judge's finding on the credibility of ASP Neiko's evidence. This is evident from Keith J's (**1<sup>st</sup> Panel**) reasoning at paragraph 49 of 1<sup>st</sup> Panel Judgment where his Lordship Justice Keith states:-

*"[49] The other reason the judge gave for accepting ASP's evidence on this topic was that he regarded ASP Neiko's evidence on the topic as credible. I am at a loss to understand why. I know that it is a common direction to give fact-finders, whether assessors or juries, that just because you disbelieve a witness on one topic does not mean that you have to disbelieve them on every topic. But the parts of ASP Neiko's evidence on which the judge has to be treated as not having been sure about were not peripheral topics. They went to the heart of the case. Having concluded that he could not be sure about those parts of ASP Neiko's evidence, I do not think that it was reasonably open for him to say that this part of ASP Neiko's evidence was credible – at any rate, without explaining why. And to the extent that he did explain why – Mr Thangaraj's failure to put Abourizk's case to ASP Neiko – that reason was flawed"*

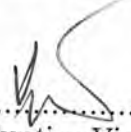
- 33. Ordering a re-trial on the record is same as the appellate Court determining the Trial Judge's finding and deciding whether his/her decision should be set aside or affirmed. If this is the case, then there is no need for the appellate Court to order a retrial before another Judge.
  
- 34. In view of the foregoing reasons, this Court is of the view that the order of the 2<sup>nd</sup> Panel should be varied by substituting the Orders in the Re-Trial Judgment with following orders:-
  - (1) A re-trial is ordered in the exercise of powers conferred by section 14 of the Supreme Court Act 1998 and s23(2) (a) of the Court of Appeal Act 1949;
  - (2) The re-trial will be held by a High Court Judge other than the learned Judge who heard and decided the case in the first instance;
  - (3) The High Court Judge will hear and decide the case before him expeditiously, and meanwhile the Petitioners are remanded in custody;
  - (4) There is no order as to costs.



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Hon. Chief Justice Kamal Kumar  
**President, Supreme Court**



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Hon. Justice Priyantha Nawana  
**Judge, Supreme Court**



.....  
Hon. Justice Viraj Dayaratne  
**Judge Supreme Court**

**Solicitors**

A.K. Singh Law for the Petitioners  
Office of the Director of Public Prosecutions for the Respondent