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

CRIMINAL APPEAL NO.AAU 0084 of 2020
[High Court at Suva Criminal Case No. HAC 211 of 2018L]

BETWEEN : **ILAISA CALEVU**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Mr. M. Fesaitu for Appellant**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **05 October 2022**

Date of Ruling : **14 October 2022**

RULING

[1] The appellant had been charged with another in the High Court at Suva on the first count of unlawful cultivation of illicit drugs (15 June 2016 at Navosa in the Western Division) and charged alone on the second count of unlawful cultivation of illicit drugs (between 01 November 2016 and 07 March 2017 at Navosa in the Western Division) and the fourth count of unlawful cultivation of illicit drugs (between the 01 November 2017 and 13 March 2018 at Navosa in the Western Division) contrary to section 5(a) of the Illegal Drugs Control Act of 2004. He was also charged under the third count with resisting arrest contrary to section 277 (b) of the Crimes Act 2009 on 06 March 2017 at Navosa in the Western Division and under the fifth count of criminal intimidation contrary to section 375 (1) (a) (iv) of the Crimes Act 2009 on 13 March 2018 at Navosa in the Western Division.

[2] The assessors were unanimous that the appellant (but not his co-accused) guilty of count 01. Their opinion on count 02 and 04 was that the appellant was not guilty. However, they found him guilty of counts 03 and 05. The learned trial judge agreed with the assessors and convicted the appellant accordingly. On 26 June 2020 he was sentenced to 07 years, 06 months and 03 years of imprisonment on counts 01, 03 and 05 respectively to be served concurrently with a non-parole period of 05 years.

[3] The appellant had through the Legal Aid Commission lodged a timely appeal against conviction on two grounds of appeal against conviction as follows:

> *'**Conviction:***
>
> *Ground 1*
>
> *THAT the verdict subjected to count 1 is inconsistent to that of the Appellant's co-accused who was acquitted given their cases are similar in nature.*
>
> *Ground 2*
>
> *THAT the Appellant's case was not summed up fairly and objectively resulting in a miscarriage of justice.'*

[4] In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. The test in a timely appeal for leave to appeal against conviction is **' 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) 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 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[5] The brief summary of facts according to the sentencing order is as follows:

> *'2. The brief facts were as follows. In June 2016, the police received information that you were cultivating cannabis sativa plants, that is, marijuana, high up in the hills of Navosa. On 13 June 2016, a police raiding party went up to your marijuana farm. In fact, you led them to your farm. They saw your marijuana plants, uprooted the same, and brought them back to Navosa Police Station. The drugs were analyzed by the government analyst on 16 June 2016, and it was confirmed the plants were cannabis sativa, weighing 6.2 kilograms. Please refer to Prosecution Exhibit No. 11.*
>
> *3. You were caution interviewed by police, and you admitted the allegations in count no. 1. You also admitted the allegations in count no. 3 and 5 when caution interviewed by police. Please refer to Prosecution Exhibits 6 and 8. You had been tried and convicted on the above offences.'*

[6] The appellant had been caution interviewed at Navosa Police Station on 15 June 2016 whereas his co-accused had been caution interviewed at the same police station on 26 July 2016. During the interview both accused had allegedly admitted to allegation in count no. 01.

[7] Thus, the evidence against the appellant on count 01 consisted of his cautioned interview statement which he had challenged on the basis that he had not given it voluntarily but as a result of police assault. In addition the prosecution had led evidence of the police officers regarding uprooting marijuana from the farm that the appellant and his co-accused were cultivating.

[8] The appellant had also been caution interviewed at Navosa Police Station on 11 March 2017. He had allegedly admitted counts no. 02 and 03 to police during the interview. On counts no. 04 and 05, the appellant had been caution interviewed by police at Navosa Police Station on 16 March 2018. During the interview, he had allegedly admitted counts no. 04 and 05. However, as stated earlier the appellant was acquitted of counts 02 and 04.

Ground 1

[9] The law on inconsistent verdicts is that a conviction will only be set aside if the different verdicts brought by the jury are such that no reasonable jury, applying themselves properly to the facts, could have arrived at those verdicts. It is the appellant who must satisfy the court that the verdicts are unreasonable or *"an affront to logic and commonsense which is unacceptable and strongly suggests a compromise of the performance of the jury's duty"*. The test that is applied in dealing with questions of inconsistent verdicts, *"is one of logic and reasonableness."* An accused who asserts that two verdicts are inconsistent with each other, *"must satisfy the court that the two verdicts cannot stand together"* [*vide* **Balemaira v State** [2013] FJSC 17; CAV0008.2013 (6 December 2013)].

[10] The appellant argues that since the assessors and the trial judge had acquitted his co-accused on count 01, the verdict of conviction on the same count against him cannot stand.

[11] The trial judge had explained his agreement with the assessors on their opinion of guilty against the appellant on count 01 at paragraph 8 and 9 of the judgment. The judge was convinced even after the trial proper of the voluntariness of the appellant's caution statement. In addition, the trial judge was satisfied that the chain of custody of the illicit drugs was unbroken so far as count 01was concerned.

[12] However, the assessors and the trial judge had not accepted the co-accused's caution statement and acquitted him of count 01 (see paragraph 4 of the judgment). According to the judgment at paragraph 15, the allegation of assault on the co-accused had cast a reasonable doubt on the prosecution case on count 01.

[13] It is clear that the appellant had been caution interviewed on 15 June 2016 whereas his co-accused had been interviewed on 26 July 2016 though both had been conducted at the same police station. Although, the trial judge had accepted the voluntariness of the caution statement of the co-accused at the *voir dire* inquiry, the co-accused had called Dr. A Chand to establish the alleged police assault on him at the trial which had

caused the outcome of the trial proper going in his favour. The fact that the co-accused had been subjected to police assault prior to his caution interview on 26 July 2016 does not necessarily mean that the appellant too had been assaulted prior to his caution interview on 15 June 2016.

[14] Therefore, applying the law on inconsistent verdicts as discussed above, I am of the view that the verdicts of guilty on the appellant and not guilty on the co-accused on count 01 could be upheld. The appellant has not satisfied this court that two the verdicts are unreasonable, illogical or inconsistent and cannot stand together.

02nd ground of appeal

[15] The appellant's complaint is related in some way to the first ground of appeal. I cannot agree that the appellant's case had not been adequately summed-up to the assessors. The trial judge had addressed the assessors on his case, particularly on the allegation of police assault at paragraphs 24, 25 and 31 of the summing-up. The judge had done so in the judgment too at paragraph 7, 8, 9 and 10. In fact, the trial judge agreed with the assessors on the acquittal of the appellant on count 02 and 04 (see paragraphs 11, 12 and 14).

[16] What is crucial in the end is the trial judge's reasoning leading to the ultimate decision in the case and not his address to the assessors. In **Fraser v State** [2021] FJCA 185; AAU128.2014 (5 May 2021) it was held that in Fiji, the assessors are not the sole judge of facts. The judge is the sole judge of fact in respect of guilt, and the assessors are there only to offer their opinions, based on their views of the facts and it is the judge who ultimately decides whether the accused is guilty or not [vide **Rokonabete v State** [2006] FJCA 85; AAU0048.2005S (22 March 2006), **Noa Maya v. The State** [2015] FJSC 30; CAV 009 of 2015 (23 October 2015] and **Rokopeta v State** [2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26 August 2016)].

Order of the Court:

1. Leave to appeal against conviction is refused.

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Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL