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

CRIMINAL APPEAL NO. AAU 66 of 2021
[In the High Court at Suva Criminal Case No. HAC 063 of 2019]

BETWEEN	:	**JOSHUA AZIZ RAHMAN**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Mr. D. Sharma for the Appellant**
	:	**Dr. A. Jack for the Respondent**
Date of Hearing	:	**09 August 2023**
Date of Ruling	:	**12 February 2024**

RULING

[1] The appellant had been charged and convicted in the High Court at Suva for possession of 39.5 kilograms of cocaine contrary to section 5(1) of the Illicit Drugs Control Act. The charge is as follows:

'***Statement of Offence***

Unlawful possession of illicit drugs*: Contrary to Section 5(a) of the Illicit Drugs Control Act 2004 and Section 46 of the Crimes Act 2009.*

Particulars of Offence

JOSHUA AZIZ RAHMAN *with another between 23 January 2019 and on 14 February 2019 at Caubati in the Central Division, without lawful authority, was found in possession of illicit drugs namely cocaine weighing 39.5 kilograms.*

[2] After trial, the learned High Court judge had convicted the appellant and sentenced him on 12 October 2021 to a head sentence of 23 years of imprisonment. The effective sentence became 20 years' with a non-parole period of 14 years after discounting the remand period.

[3] The appellant's appeal against conviction and sentence is timely.

[4] In terms of section 21(1) (a) and (b) of the Court of Appeal Act, the appellant could appeal against conviction and sentence only with leave of court. For a timely appeal, the test for leave to appeal against conviction and sentence 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) that will 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] Further guidelines to be followed when a sentence is challenged in appeal are whether the sentencing judge (i) acted upon a wrong principle; (ii) allowed extraneous or irrelevant matters to guide or affect him (iii) mistook the facts and (iv) failed to take into account some relevant considerations [vide **Naisua v State** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **House v The King** [1936] HCA 40; (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015].

[6] The grounds of appeal raised by the appellant are as follows:

> ***'Conviction:***
>
> 1. ***That*** *the Learned Trial Judge erred in fact and in law in not granting the Appellant bail on 28th March 2019 in breach of Sections 17 to 19 of the Bail*

Act 2002 since the substantive Hearing did not commence until 22nd March 2021.

2. ***That*** *the Learned Trial Judge erred in fact and in law in not dismissing the Charge since while on remand, the Appellant was incarcerated in solitary confinement for approximately 126 days at the Naboro Maximum Prison.*

3. ***That*** *the Learned Trial Judge erred in fact and in law in not dismissing the Charge since despite the Respondent being aware of the name of the other accused, the Respondent failed to name him in the Charge in breach of Section 64(1) of the Criminal Procedure Act 2009.*

4. ***That*** *the Learned Trial Judge erred in fact and in law in not dismissing the Charge since being a joint Charge, the Respondent did not prosecute and lead evidence against the co-accused.*

5. ***That*** *the Learned Trial Judge erred in fact and in law in not dismissing the Charge since the co-accused was not found guilty as required by the Judgment in* ***Viliame Rogose Tiritiri v The State*** *[Supreme Court of Fiji, Criminal Appeal No CAV 0028 of 2015; 23rd June 2016].*

6. ***That*** *the Learned Trial Judge erred in fact and in law when he held at paragraph [108] of the Judgment that no Judicial Warrant was required pursuant to Section 12 of the Illicit Drugs Act 2004 since he found the surveillance was for foreign currencies and not for drugs.*

7. ***That*** *the Learned Trial Judge erred in fact and in law when he refused at paragraphs [109] and [165] of the Judgment to disregard the photographs which was Prosecution Exhibit 3 since he held the photographs related to a surveillance on foreign currencies and this was an uncharged act.*

8. ***That*** *the Learned Trial Judge erred in fact and in law when at paragraph [112] of the Judgment he accepted Corporal Nair's evidence that the Appellant was not informed of the nature of any charge that may be brought against him since at paragraph [41] the Learned Trial Judge noted that Corporal Cakausese had stated in his Statement that the Appellant was arrested in Nadi for dealing with drugs.*

9. ***That*** *the Learned Trial Judge erred in law when at paragraph [116] of the Judgment he held that a Search Warrant may be executed at night time even though the Magistrate or Justice of Peace who authorised the Warrant did not sanction the search at night time.*

10. ***That*** *the Learned Trial Judge erred in fact and in law when at paragraph [118] of the Judgment he held that the Search of the Appellant's room at night time on 12th February 2019 was lawful since this was an uncharged act.*

11. ***That*** *the Learned Trial Judge erred in fact and in law when at paragraph [118] of the Judgment he held that the arrest of the Appellant was lawful since the Appellant was subsequently cautioned interviewed on 13th to 15th February 2019 for meeting with Mr. Sam Amine; Mr. Mangolini and Mr. Vaisevuraki (paragraphs [35] and [48] of the Judgment) and this was an uncharged act.*

12. ***That*** *the Learned Trial Judge erred in fact and in law when at paragraph [119] of the Judgment he held that there was no direct link between the search and seizure including the strip search of the Appellant on 12th February 2019 and the charge of possession of cocaine since in his Closing Submissions on 01st April 2021, the Prosecutor, Dr. Jack, submitted that investigations commenced when the Australian Federal Police alerted the Fiji Police Force that known drug dealers had travelled from Australia to Fiji in February 2019.*

13. ***That*** *the Learned Trial Judge erred in fact and in law when he held at paragraph [126] of the Judgment that the Appellant had been released and re-arrested on 15th February 2019 when the State refused to produce at the trial the CID Headquarters Diary and CCTV footage which would have recorded if the Appellant had been released at approximately 7:45pm on 15th February 2019.*

14. ***That*** *the Learned Trial Judge erred in fact and in law when he held that the Appellant had not been unlawfully detained in breach of Section 13(1)(f) of the Constitution of the Republic of Fiji (Promulgation) Act 2013 since the Appellant was detained for more than 48 hours from approximately 11:00pm on 12th February 2019 to approximately 7:45pm on 15th February 2019.*

15. ***That*** *the Learned Trial Judge erred in fact and in law when he held at paragraph [127] of the Judgment that on 15th February 2019 the Appellant had been arrested on a different allegation since on both 12th and 15th February 2019, the Appellant was arrested for drugs related offences.*

16. ***That*** *the Learned Trial Judge erred in fact and in law when he held at paragraph [139] of the Judgment that when the discovery of the drugs were made inside the master bedroom, the Appellant was the only person who had free access to the house, since the Learned Trial Judge failed to take into consideration that the Caretakers Mr. Alfred Rounds and Ms. Alanietan Masitabua said in their evidence that in the absence of Mr. Tallat Rahman, they had control of the house.*

17. ***That*** *the Learned Trial Judge erred in fact and in law when he held at paragraph [141] of the Judgment that he was satisfied so as to feel sure that the house in which the drugs were found was under a joint control of the Appellant and his father since he did not consider the Appellant's case separately from his co-accused and thereby prejudiced the Appellant's right to a fair trial.*

18. ***That*** *the Learned Trial Judge erred in law when he held at paragraph [19] that the presumption that the Appellant had to rebut on a balance of probabilities was that he neither believed or suspected nor had reason to suspect that the substance found on the premises was an illicit drug when the test in this case only required the Appellant to prove on a balance of probabilities that he was not in possession of the drugs, [it was an agreed fact that the drugs found in the property was 39.5 kg of cocaine].*

19. ***That*** *the Learned Trial Judge erred in fact and in law in not analysing or applying the relevant test to the reasons that the Appellant had advanced to show on a balance of probabilities that he was not in possession of drugs.*

20. ***That*** *the Learned Trial Judge erred in fact and in law when he held at paragraph [145] of the Judgment that the Appellant was evasive or contradictory on other material issues during his caution interview and in his evidence in Court.*

21. ***That*** *the Learned Trial Judge erred in fact and in law when he took into account an irrelevant consideration at paragraph [151] of the Judgment that he found the evidence of the Appellant that he did not know the identity of the three men he met on 9 February 2019 at Gloria Jeans and Nandos not plausible since the three men were neither jointly charged with the Appellant nor were the three men charged with any separate offence[s].*

22. ***That*** *the Learned Trial Judge erred in fact and in law when he held at paragraph [152] of the Judgment that the Appellant was also evasive or contradictory about the handwritten notes since this was an uncharged act.*

23. ***That*** *the Learned Trial Judge erred in fact and in law when he held at paragraphs [156] and [157] of the Judgment that he did not believe the Appellant's evidence that the handwriting may be his father's or that he did not know what the notes meant since the Appellant provided explanations and the State did not provide alternative evidence which contradicted the Appellant's evidence.*

24. ***That*** *the Learned Trial Judge erred in fact and in law when he imputed at paragraphs [158] to [160] of the Judgment that the Appellant was guilty since he knew a lot about his father's business; that he had access this father's funds; and that his father was financially supporting him since this was an uncharged act.*

25. ***That*** *the Learned Trial Judge erred in fact and in law when he used and relied on the evidence of Sergeant's Espinosa's unlawful and inadmissible evidence at paragraphs [161] to [164] of the Judgment since Sergeant Espinosa did not tender any exhibits to verify his evidence.*

26. ***That*** *the Learned Trial Judge erred in fact and in law when he failed to uphold the Appellant's objections to the evidence of Sergeant Espinosa and such should not have been allowed on the following grounds:*

i. *The Learned Judge allowed Sergeant Espinosa to give hearsay evidence.*

ii. *The State in its interlocutory application to adduce Sergeant Espinosa's evidence through skype attached a full statement of Detective Sergeant Espinosa which statement contained numerous opinions and allegations of uncharged acts.*

iii. *The purpose of filing the said statement of Sergeant Espinosa at the Skype Application was to allow the Learned Judge to read extraneous material which the State knew or ought to have known would colour the mind of the Learned Judge and influence the Learned Judge's decision.*

iv. *The Learned Judge allowed Detective Sergeant Espinosa to give evidence without upholding the Appellant's request for the said witness to produce the Reports, photographs, CCTV footage and statements he was relying upon to give evidence and his opinions.*

v. *The Learned Judge accepted Sergeant Espinosa's hearsay evidence about the nicknames White and Karate and failed to uphold the Appellant's objections to the said evidence as it was based purely on Sergeant Espinosa's opinions.*

vi. *The Learned Judge still accepted Sergeant Espinosa's evidence as being reasonably credible when Sergeant Espinosa failed and refused to produce copies of any Reports, statements, photographs or CCTV footage to support and verify the evidence he was giving through Skype.*

vii. *In order to get a fair trial, the Appellant was entitled under the Constitution not to have unlawful evidence adduced against him.*

27. ***That*** *the Learned Trial Judge erred in fact and in law when he accepted Sergeant's Espinosa's evidence outlined at paragraphs [161] to [164] of the Judgment as being reasonably reliable when the burden of proof was beyond a reasonable doubt.*

28. ***That*** *the Learned Trial Judge erred in fact and in law when he held at paragraph [166] of the Judgment that the evasiveness and contradictions in the evidence of the Appellant led him not to believe his account that he didn't know or believe or had reason to suspect that the house he was staying had an illicit drug.*

29. ***That*** *the Learned Judge erred in fact and in law when he failed to analyse or give any proper reasoning why he felt that the Appellant was being evasive in his caution interview when the facts before the Court were that the Appellant had provided answers in his caution interview to the best of his ability and the State did not robustly cross examine the Appellant on his answers in the caution interview and neither did the State adduce any evidence to refute the Appellant's evidence on issues such as the handwritten notes or his meeting with three unknown individuals*

30. ***That*** *the Learned Trial Judge erred in fact and in law when he found at paragraph [167] of the Judgment that the prosecution had rebutted the Appellant's evidence that he didn't know or believe or had reason to suspect that the house he was staying had an illicit drug since he did not analyse the evidence.*

31. ***That*** *the Learned Trial Judge erred in fact and in law when at paragraph [167] of the Judgment, he relied on the evidence that the Appellant's father had pleaded guilty in New Zealand to rebut the Appellant's involvement in drugs that he didn't know or believe or had reason to suspect that the house under his and his father's control at the relevant time had an illicit drug since he did not consider the Appellant's case separately from that of his father's and thereby prejudiced the Appellant's right to a fair trial.*

32. ***That*** *the Learned Trial Judge erred in fact and in law when he found the Appellant guilty on the basis that the Appellant's father had pleaded guilty to drugs offences in New Zealand.*

33. ***That*** *the Learned Trial Judge erred in fact and in law since he drew the inference that the Appellant was guilty from unestablished facts; and the Learned Trial Judge did not give the Appellant the benefit of a doubt.*

Sentence:

Ignoring Relevant Factors

34. ***That*** *the Learned Trial Judge erred in fact and in law in imposing a sentence that was manifestly harsh and oppressive in the circumstances and failed to consider the following relevant factors i.e.,*

i. The drugs were not imported into Fiji by the Appellant;

ii. That no unexplained wealth or monies were found on the Appellant;

iii. That no drugs were found with the Appellant in his personal possession;

iv. The Appellant was not the tenant of the property in which the drugs were found;

v. The drugs were concealed by the Appellant's father in the father's master bedroom;

vi. That there was no evidence before the Court that the Appellant had been inside his father's master bedroom.

vii. That there was no evidence at all before the Court that the Appellant had in any way handled the drugs.

viii. *There was no evidence before the Court that the Appellant had the financial resources to import such drugs into Fiji;*

ix. *That at worst the Appellant was a minor player in the offending in that based on circumstantial evidence he may at best have had knowledge that his father had stored drugs in the house.*

Irrelevant Factors

35. ***That*** *the Learned Trial Judge erred in fact and in law in considering irrelevant and unproved factors /and/or uncharged acts i.e.*

    i. ***Paragraph [6]:*** *meeting with individuals who had nothing to do with the confiscated drugs.*

    ii. ***Paragraph [9]****: That the Appellant had access to all the rooms when the only unchallenged evidence before the Court was that the Appellant had not gone into his father's bedroom.*

    iii. ***Paragraph [10]****: Court said that the level of criminality of the Appellant was the same as that of his father.*

    iv. ***Paragraph [11]****: that the Appellant had a close association with his father at a time when he was involved with illicit drug transactions in New Zealand.*

    v. ***Paragraph [11]****: that the Appellant had association with foreign nationals linked with international drug offences a few days before the drugs were discovered in the house.*

    vi. ***Paragraph [14]****: the drugs were concealed inside a cavity underneath a bed which indicated a high degree of planning was involved to avoid detection.*

    vii. ***Paragraph [15]****: Youth and good character are the tools used by offenders to exercise the sympathy of the Court.*

    viii. ***Paragraph [17]****: Rehabilitation is of little value when an offender takes no responsibility for his crime and is not genuinely remorseful.*

Wrong Principles of Law

36. ***That*** *the Learned Trial Judge erred in fact and in law in following the principles set out in the case of* ***Abourizk v State [2019] FJCA 08*** *when in that case the Judgment of Justice Prematilaka JA does not discuss the sentencing guidelines that are to be applied when the drugs found in a property exceed 1kg but the role of the person being convicted for possession is at best a minor role in that he may only have had some knowledge or suspicion that the principal offender was in possession of the said drugs.*

37. ***That*** *the Learned Trial Judge erred in fact and in law in applying the sentencing guidelines in* ***Abourizk*** *v* ***State [2019] FJCA 08*** *to the Appellant and in doing so breached section 14(1) (n) of the Constitution.*

38. ***That*** *the Learned Trial Judge erred in fact and in law in applying the sentencing guidelines in* ***Abourizk*** *v* ***State [2019] FJCA 08*** *to the Appellant when the facts of the two cases were entirely distinct and different.*

39. ***That*** *the Learned Trial Judge erred in fact and in law in applying the sentencing guidelines in* ***Abourizk*** *v* ***State [2019] FJCA 08*** *to the Appellant and in doing so breached section 5 of the Illicit Drugs Control Act 2004.*

40. ***That*** *the Learned Trial Judge erred in law in applying the sentencing guidelines in* ***Abourizk*** *v* ***State [2019] FJCA 08*** *to the Appellant and in doing so breached section 11 of the Constitution which states that every person has the right to freedom from disproportionately severe treatment or punishment and ignored relevant factors pertaining to the Appellant.*

[7] The respondent's written submissions has summarized the factual background to the case as follows:

1. *The Australian Federal Police alerted the Fiji Police Force that two persons of interest, Guiseppe Mangolini and Samuel Armine, were believed to be en route to Fiji.*

2. *On their early morning arrival on 9 February 2019 they failed to declare cash. Police placed the pair under covert surveillance and tracked them as they drove from Nadi to Suva. Along the way they stopped and picked up a third man, Samuel Vaisevuraki. In Suva Police observed them meeting with a local man subsequently identified as Joshua Rahman, the appellant.*

3. *Police arrested Guiseppe Mangolini, Samuel Armine and Samuel Vaisevuraki and interviewed them about the cash. They made no admissions and were released. Police also intended to interview the appellant on the same matter but he was not at his home when they went looking for him.*

4. *At 2230 on 12 February 2019 Police located the appellant at a hotel in Nadi. Under warrant they searched his hotel room, arrested him and took him to Namaka Police station for the night. The next morning at 0940 hours Police transported him back to Suva arriving at 1245 hours. D/Cpl Dutt interviewed the appellant about his meeting with Messrs Mangolini, Armine and Vaisevuraki. The interview began at 1756 hours. The interview was suspended for the appellant to consult his lawyer and for overnight rest. Police also obtained a warrant to search for drugs at the appellant's home in Caubati Road. Police executed the search warrant at about 2000 hours on 14 February 2019. With the aid of drug detector dogs they found 39 packages of what was later confirmed to be cocaine weighing 39.5 kg. One package was found opened and resealed in a*

bedside draw in the master bedroom, and the remaining 38 packages were found in a cavity under the bed base in the same room.

5. *The next day, 15 February 2019, D/Cpl Dutt recommenced his interview with the appellant on his meeting with Messrs Mangolini, Armine and Vaisevuraki. With insufficient evidence to take the matter further, D/Cpl Dutt concluded the interview, closed the file no offence disclosed, and handed the appellant to Inspector Taoka who released him from custody at about 1945.*

6. *Inspector Donu rearrested the appellant a short time later at 1955 later for possession of illicit drugs and returned him to custody. At 2043 hours the appellant was afforded his first hour process rights and consulted a Legal Aid Commission lawyer. D/Cpl Dutt suspended the interview overnight and so the appellant could take advice for his own private counsel. The interview resumed the next day at 1227 hours, and continued with overnight and other breaks until its final conclusion at 1410 hours on 17 February 2019. The appellant was charged and produced in the Magistrate's Court on 18 February 2019.*

Ground 1

[8] The appellant contends that serious prejudice was caused by the learned trial judge refusing to allow the appellant to be granted bail to prepare for his trial. The respondent submits that when the judge made his ruling on 28 March 2019 the appellant had been on remand for just 38 days and section 13(4) of the Bail Act 2002 was irrelevant. Any in any event whether he was granted bail or not on 28 March 2019 had no bearing on the safety of his conviction.

[9] The appellant does not seem to have appealed against the refusal of bail pending appeal or made a subsequent application to the trial judge for bail pending trial. The appellant has not demonstrated how his continuous remand pending trial which is unusual in criminal cases, materially affected the prospect of a fair trial.

Ground 2

[10] The appellant argues that the trial judge should have dismissed the charge since he was incarcerated whilst on remand in solitary confinement for approximately 126 days. The respondent asserts that it has no knowledge about the circumstances in

which the appellant was held on remand but submits that that is a matter for the Commissioner of Prisons and not for the trial judge.

[11] Here again, the appellant has not demonstrated as to how his remand in solitary confinement pending trial resulted in an unfair trial. If the appellant's complaint is true it could have been challenged in the proper forum by way of an action for constitutional redress.

Grounds 3, 4 and 5

[12] The summary of the appellant's arguments is (i) the respondent failed to name the appellant's co-accused (*i.e.* the appellant's father who was and is serving a sentence in New Zealand on a different matter) in the information in breach of section 64(1) of the Criminal Procedure Act 2009 (ii) the trial judge failed to dismiss the charge since the respondent did not prosecute and lead evidence against the co-accused and (iii) the trial judge should have dismissed the charge since the co-accused was not found guilty as required by the ***Viliame Rogose Tiritiri v The State*** [Supreme Court of Fiji, Criminal Appeal No CAV 0028 of 2015; 23rd June 2016].

[13] The respondent submits that that there is nothing in law which requires two offenders to be charged or tried together for the offence, although there may be administrative advantages in doing so, where the co-offender is either not known or cannot otherwise be brought before the court, separate trials are both necessary and lawful. It further argues that the information was clear and provided sufficient details to inform the appellant of the charge and ***Tiritri*** is only an authority for the proposition that where two offenders are tried together it would be inconsistent for a judge to find one guilty and the other not guilty for the same act which is not relevant to the appellant's case.

[14] I do not see a legal imperative, as argued by the appellant, for the appellant's father to have been made a co-accused and jointly prosecuted in this case or for the trial judge to have dismissed the charge based on ***Tiritri***.

Grounds 6 and 7

[15] The appellant challenges the trial judge's findings that no judicial warrant was required pursuant to section 12 of the Illicit Drugs Act 2004 since he found the surveillance was for foreign currencies and not for drugs and his refusal to disregard the photographs (Exhibit 3) on the basis that the photographs related to a surveillance on foreign currencies and it was an uncharged act.

[16] The respondent has submitted that the surveillance was in relation to undeclared cash at the border, not to an offence under the Illicit Drugs Control Act 2004 ('Act') and therefore a warrant under section 12 of the Act was therefore neither possible nor required and in any event all what the photographs did was to support the parol evidence the police officers gave in court on oath that the appellant met with the three men under surveillance from Nadi, a fact which the appellant admitted.

[17] The appellant has not demonstrated how the admission of exhibit 3, even if wrongly admitted, could have changed the outcome of the case.

Grounds 8-12

[18] The appellant asserts that the trial judge was wrong to find the appellant's arrest in Nadi on 12 February 2019 lawful. Corporal Cakausese had explained that he mentioned in his out of court statement that the appellant was arrested for dealing with drugs because the police suspected that the currencies found on him may have originated from drugs. Corporal Nair arrested the appellant on 12 February 2019 from the Mecure Hotel in Nadi but the appellant was only told that he was wanted for questioning by the CID. The appellant at that stage was not informed of the nature of any charge that may be brought against him. Corporal Dutt interviewed the appellant under caution relating to the currency case on 13 February 2019 (which the appellant describes as a red herring to justify the arrest & detention) and concluded it on 15 February 2019 during which Corporal Dutt had informed the appellant of the reason for his detention but not the nature of the charge that may be brought against him.

[19] ASP Taoka released the appellant from police custody on 15 February 2019 as he was not charged with any offence relating to currency after his caution interview. However, Inspector Donu arrested him again outside the CID Headquarters soon thereafter (10 minutes). Inspector Bari formally charged the appellant on 17 February 2019 at the CID Headquarters and it appears from the charge statement (PE12) that this time the appellant was charged with for possession of drugs as by that time his house had been searched and drugs had been found at his house on 14 February. Corporal Dutt commenced the second interview of the appellant under caution on 15 February and concluded on 17 February 2019.

[20] Thus, it appears from the sequence of events that he was arrested twice in connection with suspicion of involvement in two different offences; firstly in connection with currency on 12 February and the secondly with possession of drugs on 15 February. It appears that at least there was clear justification for the arrest and detention of the appellant on 15 February for possession of drugs.

[21] The appellant also challenges the trial judge's finding of the validity of the search warrant and the search itself (as it was executed in the night without specific authorization) of his room at night time on 12 February 2019. The trial judge had dealt with these matters at paragraphs 114 -118 by considering section 98 and 99 of the Criminal Procedure Act of 2009 in that the judge had stated that the search warrant issued after it was sworn before a justice of peace as authorized by section 98 of the Criminal Procedure Act, described the place and the items to be searched and there was no mandatory requirement for a police officer to obtain an express authority from a magistrate or justice of peace (JP) to execute a search warrant during nighttime though a magistrate or JP may give an express authority, yet in the absence of the sanction of a magistrate or justice of peace, a search warrant may still be executed at nighttime by a police officer. Accordingly, the trial judge had concluded that he was satisfied that the arrest and detention of the appellant and the search of his hotel room on 12 February 2019 was lawful.

[22] The respondent submits that the trial judge's analysis, reasoning and conclusion including what is stated at paragraphs 110-113 that the arrest was lawful, correct and

that his arrest and interview in connection with his meeting with Messrs Mangolini, Armine and Vaisevuraki had no direct bearing on the cocaine found at his house for which he was subsequently convicted, and that the trial judge was right to so conclude. The appellant has not demonstrated as to how even if the search of the appellant's room, his arrest and detention on 12 February is arguably tainted or irregular in some respects have resulted in a substantial miscarriage of justice in so far as his arrest, detention and subsequent conviction for possession of illicit drugs is concerned.

Grounds 13-15

[23] The appellant submits that he was unlawfully detained in breach of section 13(1)(f) of the Constitution for more than 48 hours from about 11:00pm on 12 February to about 7:45pm on 15 February 2019 and challenges the trial judge's finding that on 15 February the appellant had been arrested on a different allegation to that he was arrested on 12 February because according to him he was arrested for drugs related offences on both occasions. The appellant has argued at the trial that because his detention exceeded beyond 48 hours since 12 February arrest, the results of the search (the cocaine) on 14 February should be excluded.

[24] The judge has addressed this issue in his judgment at paragraphs 120-129. Police had arrested the appellant in Nadi on 12 February 2019 at around 22.30 and brought to Suva the next day. D/Cpl Dutt interviewed him about his meeting with Messrs Mangolini and Vaisevuraki and the undeclared currency in Suva but he made no incriminating admissions. D/Cpl Dutt suspended the interview to execute the search warrant at the appellant's home (which seems to have been executed after 8.00 pm but before 11.30 pm) in the course of which Police located the cocaine. D/Cpl Dutt concluded that there was insufficient evidence to take the currency matter further, closed the file on the basis 'no offence disclosed', and Inspector Taoka released the appellant at 19.45 hours on 15 February 2019. Inspector Donu arrested the appellant again a short time later at 19.55 on 15 February 2019 this time for possession of the illicit drugs found during the search of the appellant's house the previous evening. The interview was completed at 14.10 hours on 17 February 2019. The appellant did

not admit possessing the cocaine but made no complaint about extended detention. He was charged and produced in court at the next opportunity on 18 February 2019.

[25] The respondent submits that therefore, the learned trial judge was correct to find that the appellant had not been detained for more than 48 hours in respect of the charge for possessing cocaine and that the learned trial judge was also correct to conclude that the cocaine was found within 48 hours of his arrest in Nadi. The trial judge had also stated that there is no law prohibiting the police from re-arresting a suspect on a different allegation immediately after being released from custody.

Grounds 16 and 17

[26] These grounds relate to the trial judge's finding that the appellant was in control of the house attracting the presumption of possession in terms of section 32 of the illicit Drugs Control Act 2004. The appellant argues that the caretakers Mr. Alfred Rounds and Ms. Alanietan Masitabua in the absence of Mr. Tallat Rahman (his father) had control of and access to the house including the master bedroom where drugs were found and that when the appellant visited Fiji as a tourist, he had his own bedroom in the house. The appellant challenges the trial judges' finding that the house was under a joint control of the appellant and his father but submits that the trial judge did not consider the appellant's case separately from his father (co-accused) and thereby prejudiced the appellant's right to a fair trial. He further argues that even if the house was under joint control, it didn't mean that the drugs were under joint control or were part of a joint enterprise between the appellant and his father, Tallat Rahman.

[27] The respondent has itemised the evidence to support the learned trial judge's finding that the appellant was, on 14 February 2019, in control of the house, and that therefore he was presumed pursuant to section 32 of the Illicit Drugs Control Act 2004, to be in possession of the cocaine found there.

Grounds 18 and 19

[28] The appellant's contention is that the learned trial judge was wrong in law to state that in order to rebut the presumption under section 32 of the Illicit Drugs Control Act 2004 he

had to show that he neither believed or suspected nor had reason to suspect that the substance found on the premises was an illicit drug, when the test in this case only required him to prove on a balance of probabilities that he was not in possession of the drugs.

[29] The trial judge seems to have referred to the fault element of possession by the impugned words challenged by the appellant. The element of control appears to be on the physical element of possession. Be that as it may, since the delivery of the judgment against the appellant in this case in the High Court, the Court of Appeal in **Kumar v State** [2023] FJCA 125; AAU132.2018 (27 July 2023) held that the reverse burden under section 32 represented by the phrase *'until the contrary is proved'* is only an evidential burden as opposed to a burden of proof to be discharged on a balance of probability. Accordingly, the court further held that the factual presumption relating to possession of illicit drugs in section 32 of the Illicit Drugs Control Act may be rebutted by an accused by adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist as per section 59 of the Crimes Act 2009.

[30] In the light of ***Kumar***, when one considers paragraphs 18 and 19 of the judgment on the trial judge's analysis of section 32 of the Illicit Drugs Control Act, he seems to have misdirected himself on the burden on the appellant by stating that *'....the onus is on him to show on the balance of probabilities....'*. However, as the Court observed in ***Kumar*** no blame should be attached to the learned trial judge as his directions were entirely in line with the accepted legal thinking at that time. Nevertheless, based **Hofer v The Queen** [2021] HCA 36; 95 ALJR 937 and **Weiss v The Queen** (2005) 224 CLR 300 at [35], [44]) the Court ordered a new trial as even where the appellate court, notwithstanding error, is satisfied of the appellant's guilt on admissible evidence beyond reasonable doubt, there may have been a *'significant denial of procedural fairness at trial'* which makes it *'proper to allow the appeal and order a new trial'*.

[31] Therefore, I am inclined to allow leave to appeal on these two grounds of appeal. However, it is for the full court to decide whether to apply the proviso to section 23(1) of the Court of Appeal Act (*i.e.* no substantial miscarriage of justice has occurred

despite the misdirection) and still dismiss the appeal (if the Court of Appeal is satisfied that on the whole of the facts and with a correct direction the only reasonable and proper verdict would be one of guilty) **or** order a new trial as in ***Kumar*** **or** acquit the appellant if it is not satisfied of the appellant's guilt beyond reasonable doubt on the admissible evidence at the trial.

Grounds 20, 22 & 23

[32] The appellant argues that the trial judge was wrong to have disbelieved his evidence on the basis that he was evasive and contradictory on other material issues during his caution interview and in his evidence, about the handwritten notes relating to the uncharged act wherein the appellant provided an explanation and the prosecution had not contradicted him.

[33] The respondent submits that there was ample reason for the trial judge to doubt the credibility of the appellant's assertions that he neither knew, nor believed nor had reason to suspect that the cocaine was in his house and that an appeal court which has not had the benefit of seeing first-hand the witnesses give their evidence, should not lightly interfere with the judge's conclusions (vide **State v Ram; Sami v State** [1998] FJCA 56; AAU0005u.95s (12 February 1998).

[34] A trial judge has a considerable advantage of having seen and heard the witnesses who was in a better position to assess credibility and weight and the appellate court should not lightly interfere when there was undoubtedly evidence before the trial court that, when accepted, supported the verdict [see **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992)]. Keith, J adverted to this in **Lesi v State** [2018] FJSC 23; CAV0016.2018 (1 November 2018) as follows:

> *'[72] .....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. 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.

Ground 21

[35] The appellant complains that the trial judge took into account an irrelevant consideration in discrediting him in that the judge found the evidence of the appellant that he did not know the identity of the three men he met on 9 February 2019 at Gloria Jeans and Nandos not plausible because the three men were neither jointly charged with the appellant nor were they charged with any separate offence.

[36] The appellant has not demonstrated why the trial judge could not have legitimately considered this aspect of the appellant's evidence on the three men who figured prominently from the inception in the events leading to the arrest of the appellant on possession of drugs though they were not eventually charged, in his exercise to assesse the credibility of the appellant as a witness.

Ground 24

[37] The appellant asserts that the trial judge was wrong to find the appellant guilty because of his involvement in and level of knowledge about his father's other business enterprises arguing that the evidence confirmed that the appellant was not involved or had knowledge about his father's business affairs.

[38] The respondent submits that it was not the basis on which the learned trial judge found the appellant guilty but the State led evidence that he had significant levels of knowledge of and involvement in a number of business enterprises with his father and invited the court to draw the irresistible inference that he had a similar level of knowledge of and involvement in the business enterprise involving the cocaine found at the home the appellant shared with his father, and that the appellant's assertion that he did not know or had no reason to suspect the drugs were in his house was incredible.

Grounds 25 & 26

[39] The appellant criticizes the trial judge for having used and relied on the evidence of Sergeant Espinosa's (from New Zealand) 'unlawful' and 'inadmissible' evidence based on the investigations carried out in New Zealand in relation to methamphetamine which investigations resulted in the charging and conviction of the appellant's father, Tallat for the NZ offences.

[40] It appears from the judgment that Sergeant Espinosa's evidence on some details relating to his father's arrest and eventual plea of guilty to importing methamphetamine to New Zealand had been found in Notes PE18, PE19 and PE20 admitted by the appellant to have been found in the house occupied by the appellant and his father Tallat Rahman in Fiji where illicit drugs were found by the police. The appellant has not shown how Sergeant Espinosa's evidence can be called 'unlawful', 'inadmissible' and hearsay either. As per the judge, the prosecution relied upon the notes (Exhibits 18, 19 and 20) to link the appellant to drug offences in New Zealand involving his father and the relevance offered by the prosecution for that evidence was that it rebutted the appellant's evidence that he didn't know or believe or had reason to suspect that the house he was staying had an illicit drug of some sort.

Ground 27

[41] The appellant finds fault with the trial judge for having accepted Sergeant Espinosa's evidence as being reasonably reliable 'when the burden of proof was beyond a reasonable doubt'.

[42] According to the respondent, D/Sgt Espinosa, a New Zealand Police Officer gave evidence that he was in charge of Operation Nova, an investigation into the importation into New Zealand of methamphetamine, by amongst others, Tallat Rahman, the appellant's father. He had given evidence about three matters arising in his investigation specifically his analysis of phones seized by Fiji Police from Guiseppe Mangolini, Same Armine and Samuel Vaisevuraki, interactions between the appellant and his father Tallat Rahman in Auckland in December 2018, and information recorded on packages seized

in the course of search warrants executed on two properties in New Zealand. The respondent further submits that D/Sgt Espinosa gave evidence about aspects of the investigation he led, and what was recorded on his file and that it was up to the learned trial judge whether he believed him and if he did how much weight to give to his evidence. The judge was entitled to assess D/Sgt Espinosa's credibility, and to decide whether, and to what extent, he believed him, just as judges do in respect of every witness in a trial. Having watched D/Sgt Espinosa give his evidence, and be tested on it under rigorous cross examination, the judge had accepted D/Sgt Espinosa's evidence about the investigation he led as reliable.

[43] The standard of proof 'beyond reasonable doubt' is in relation to the guilt of the accused and not with regard to a particular witness. Individual witnesses are tested by their reliability (*i.e.* accuracy) and credibility (*i.e.* truthfulness).

Ground 30

[44] The appellant argues against the trial judge's finding that that the prosecution had rebutted his evidence that he didn't know or believe or had no reason to suspect that the house he was staying had an illicit drug since he did not analyze the evidence.

[45] The trial judge before his analysis of the evidence from paragraphs 130-169 had found whether the appellant was in possession of the drug as the real issue for consideration and stated that to prove his possession, the prosecution relied upon the factual presumption provided by section 32 of the Illicit Drugs Control Act. According to the judge, for the presumption to apply, the prosecution must have proven beyond reasonable doubt that the premises in which the drugs were found was under the control of the appellant which is a question of fact. The defence case was that the premises in which the drugs were found was not under the control of the appellant. The focus of the rest of the analysis from paragraph 136 was on this issue.

[46] After embarking on a great deal of discussion on prosecution evidence the trial judge had concluded at paragraph 141 that he was satisfied and feel sure that the house in which the drugs were found was under a joint control of the appellant and his father.

The judge had referred to the factual presumption (provided by section 32 of the Illicit Drugs Control Act) that the appellant was in possession of the drugs unless he could show that it was more likely than not that he didn't know or believe or had no reason to suspect that the premises under his control had an illicit drug of some sort and added at paragraph 142 that if the account given by the appellant (i.e. he did not know or believe or had no reason to suspect that the premises under his control had an illicit drug of some sort) was or may have been true, then he was not guilty of the offence.

[47] Therefore, from paragraph 143 the trial judge had considered the appellant's evidence again at length and concluded at paragraph 166 that the evasiveness and contradictions in his evidence led him not to believe his account that he didn't know or believe or had no reason to suspect that the house he was staying had an illicit drug. The trial judge had added at paragraphs 167, 168 and 169 that on the contrary he found that the prosecution had rebutted the appellant's evidence that he didn't know or believe or had no reason to suspect that the house he was staying had an illicit drug and was satisfied beyond reasonable doubt an inference of guilt was the only rational conclusion available from the combined effect of all the facts proved by the prosecution and concluded that he was satisfied beyond reasonable doubt that the appellant, without lawful authority was in joint possession of an illicit drug with another between 23 January 2019 and on 14 February 2019 at Caubati in the Central Division.

[48] Therefore, the same legal position set out under grounds 20, 22 & 23 appear to apply to this analysis and conclusions of the trial judge. However, in coming to the above conclusions whether the trial judge had placed a higher burden on the appellant than the law required to discharge in rebutting the factual presumption as discussed under grounds 18 and 19 could be considered by the full court and in order to facilitate that exercise, I am inclined to allow leave to appeal on this ground of appeal as well.

Grounds 31 & 32

[49] The appellant submits that the trial judge has wrongly relied on the evidence that the appellant's father had pleaded guilty in New Zealand to rebut his involvement in drugs

(in Fiji) that he didn't know or believe or had no reason to suspect that the house under his and his father's control at the relevant time had an illicit drug and to find him guilty.

[50] The respondent argues that the trial Judge didn't use Tallat Rahman's guilty pleas as evidence of what the appellant knew or suspected about the drugs in his house and that the appellant's involvement in a range of legitimate and criminal business enterprises with his father was one of the ways in which the prosecution (successfully) demonstrated the lack of credibility in the appellant's denial that he knew, believed or suspected that the drugs were in the house. The trial judge had stated that the only use he made of the evidence of the appellant's involvement to the drug offences that his father pleaded guilty in New Zealand was to rebut his evidence that he didn't know or believe or had no reason to suspect that the house under his and his father's control at the relevant time had an illicit drug.

[51] Thus, the basis of ground 31 seems well-founded. However, whether the trial judge was wrong to do so is a different issue which, however, may be examined by the full court as it forms one part of the reasoning of the trial judge (though in small measure) leading to the rejection of the appellant's challenge of the factual presumption leading to the eventual conviction of the appellant discussed in relation to ground 30 which in turn is connected to the issue of burden of proof on the appellant regarding the said presumption in relation to grounds 18 & 19. Therefore, I am inclined to grant leave to appeal for ground 31 too.

Ground 33

[52] The basis of this general ground of appeal appears to say that the verdict is unreasonable or cannot be supported having regard to the evidence under section 23 (1)(a) of the Court of Appeal Act.

[53] In the context of a trial by judge assisted by assessors it was held in **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992) that the question the appellate court should ask itself is whether there was evidence before the court on which a reasonably minded jury (in Fiji assessors) could have convicted the appellant in that

having considered the evidence against the appellant as a whole, whether the court can or cannot say whether the verdict was unreasonable in that whether there was clearly evidence on which the verdict could be based. See **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015) as well.

[54] This court has elaborated this test further under section 23 of the Court of Appeal Act again in **Kumar v State** AAU 102 of 2015 (29 April 2021), **Naduva v State** AAU 0125 of 2015 (27 May 2021) in relation to a trial by a judge with assessors [before Criminal Procedure (Amendment) Act 2021 effective from 15 November 2021] in the light of several decisions of the High Court of Australia as follows:

> *'[23] .....**the correct approach by the appellate court is to examine the record or the transcript** to see whether by reason of inconsistencies, discrepancies, omissions, improbabilities or other inadequacies of the complainant's evidence or in light of other evidence the appellate court can be satisfied that the assessors, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt. 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 assessors to be satisfied beyond reasonable doubt of the commission of the offence. **These tests could be applied mutatis mutandis to a trial only by a judge or Magistrate without assessors'***

[55] It was held in **Filippou v The Queen** [2015] HCA 29; 256 CLR 47:

> *'9. As was also explained in Fleming, perforce of s 133 of the Criminal Procedure Act, each of the three limbs of s 6(1) of the Criminal Appeal Act is capable of application to the verdict of a judge alone[6]. For the purposes of the first limb, the question is whether, upon the evidence on which the judge acted, or upon which it was open to the judge to act, the judge's finding of guilt is "unreasonable" or "cannot be supported".'*
>
> *12. Authority makes plain that a jury's finding of guilt is not to be disturbed unless it appears that there is no or insufficient evidence to support the finding, or the evidence is all the one way, or the finding is otherwise unreasonable, or unless there has been a misdirection leading to a miscarriage of justice[10].It follows perforce of s 133(1) of the Criminal Procedure Act that, in the case of an appeal against a judge's finding of guilt, the finding is not to be disturbed under the first limb of s 6(1) of*

the Criminal Appeal Act unless there is no or insufficient evidence to support the finding, or the finding is otherwise unreasonable, or the evidence was all the one way, or the judge has so misdirected himself or herself on a matter of law as to result in a miscarriage of justice. It is, however, to be borne steadily in mind that, as with a jury's verdict, so also with the judgment and verdict of a judge alone, in most cases a doubt experienced by an appellate court will be a doubt which the judge ought to have experienced. To adopt and adapt the language of M v The Queen[11]:

> *"It is only where a [judge's] advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. ... If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the [judge], there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence."*

[56] See **Fleming v The Queen** [1998] HCA 68 (11 November 1998) 197 CLR 250; 73 ALJR 1; 158 ALR 379; 103 A Crim R 121 as well.

[57] Section 133 (1) Criminal Procedure Act 1986 (NSW) states:

> *'133 Verdict of single Judge*
>
> *(1) A Judge who tries criminal proceedings without a jury may make any finding that could have been made by a jury on the question of the guilt of the accused person. Any such finding has, for all purposes, the same effect as a verdict of a jury.'*

[58] Section 6(1) of Criminal Appeal Act 1912 (NSW) which is similar to section 23 (1) of the Court of Appeal Act in Fiji, is as follows:

> *'The court on any appeal under section 5 (1) against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any other ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal; provided that the court may, notwithstanding that it is of opinion that the point or points raised by the appeal might be decided in favour*

of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred..... .....'

[59] Since I have allowed leave to appeal on grounds 18, 19, 30 and 31 which *inter alia* require the full court to read the record of evidence, I am inclined to grant leave to appeal in respect of this ground of appeal as it also requires the examination of the totality of evidence.

[60] Accordingly, I allow leave to appal against conviction on grounds 18, 19, 30, 31 and 33 and refuse leave to appeal on other grounds of appeal.

Sentence

[61] The respondent has agreed that the leave should be granted for the sentence appeal to proceed to the full bench of this Court, not for the reasons offered by the appellant, but enable the court the opportunity to replace the manifestly lenient sentence imposed in this case with a higher sentence which properly reflects the gravity of the offending in this case, and current sentencing practice in Fiji. The respondent has filed a separate appeal AAU 65 of 2021 against the sentence alleging it was unduly and manifestly lenient.

Grounds 34 and 35

[62] The appellant was sentenced to 20 years imprisonment with a non-parole period of 14 years. The appellant complains that the sentence imposed by the learned sentencing judge was harsh and excessive, and based on consideration of a number of irrelevant factors, and failure to consider a number of relevant matters. However, 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 [vide **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006)]. The approach taken by the appellate court in an appeal against sentence 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)]. Possession of 39.5 kg of cocaine falls under category 5 of the recommended tariff by the Court of Appeal in ***Abourizk*** [**Abourizk v State** [2019] FJCA 98; AAU0054.2016 (7 June 2019)]. Thus, the appellant's sentence well within ***Abourizk*** tariff.

Ground 36

[63] The appellant argues that the trial judge should not have followed the principles set out in the case of **Abourizk** because the Court of Appeal does not discuss the sentencing guidelines, such as the role of the person being convicted for possession, for example a minor role in that he may only have had some knowledge or suspicion that the principal offender was in possession of the said drugs, that are to be applied when the drugs found in a property exceed 01kg.

[64] The sentencing tariff for possession of all hard/major drugs (such as Cocaine, Heroin, and Methamphetamine etc.) set in ***Abourizk*** was validated and approved by the Acting Chief Justice in the Supreme Court decision in **Kreimanis v State** [2023] FJSC 19; CAV13.2020 (29 June 2023). There is nothing in ***Abourizk*** which debars a trial judge from taking into account any relevant consideration in the matter of sentence for possession over 01 kg to determine where the sentence should lie between 20 years and life imprisonment.

Grounds 37 & 38

[65] The appellant's argument is that in applying the sentencing guidelines in ***Abourizk*** to the appellant the trial judge breached section 14(1) (n) of the Constitution.

[66] I see no merit in this contention.

Ground 39

[67] The appellant contends that in applying the sentencing guidelines in **Abourizk** v **State [2019] FJCA 08** to him the trial judge breached section 5 of the Illicit Drugs Control Act 2004.

[68] I see no reason to differentiate between persons who are caught red-handed in possession of illicit drugs and those who are deemed to have been in possession of them when it comes to their criminal liability or sentence, for such an artificial distinction would completely defeat the very objective of the Illicit Drugs Control Act.

Ground 40

[69] The appellant submits that in applying the sentencing guidelines in ***Abourizk*** to him the trial judge breached section 11 of the Constitution which states that every person has the right to freedom from disproportionately severe treatment or punishment and ignored relevant factors pertaining to the appellant.

[70] The sentence of 23 years for possession of 39.5 kg of cocaine is by no stretch of imagination could be termed as severe or disproportionate.

[71] Therefore, I do not see a reasonable prospect of success in any of the grounds of appeal against sentence. However, since the respondent has agreed that leave may be granted for the sentence appeal to proceed to the full bench of this Court to enable the full court to hear its appeal AAU 65 of 2021 against sentence and I have granted leave to appeal in AAU 65 of 2021, in fairness to the appellant I would allow leave to appeal in this appeal as well so that the full court may consider both appeals against sentence together.

Orders of the Court:

1. Leave to appeal against conviction is allowed on grounds 18, 19, 30, 31 and 33.
2. Leave to appeal against sentence is allowed.

COURT OF APPEAL FIJI

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

Solicitors:

R. Patel Lawyers for the Appellant
Office of the Director of Public Prosecution for the Respondent