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

CRIMINAL APPEAL NO. AAU 065 OF 2021
[Suva Criminal Case No. HAC 063 of 2019]

BETWEEN : **THE STATE**

Appellant

AND : **JOSHUA AZIZ RAHMAN**

Respondent

CRIMINAL APPEAL NO. AAU 066 OF 2021
[Suva Criminal Case No. HAC 063 of 2019]

BETWEEN : **JOSHUA AZIZ RAHMAN**

Appellant

AND : **THE STATE**

Respondent

Coram : **Mataitoga, P**
Qetaki, RJA
Clark, JA

Counsel : **Mr. D. Sharma and Ms. G. Fatima for the Appellant**
: **Mr. M. Vosawale for the Respondent**

Date of Hearing : **9 February 2026**
Date of Judgment : **27 February 2026**

JUDGMENT

(A). BACKGROUND

[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 2004. The charge is as follows:

First Count

Statement of Offence

Unlawful Possession of Illicit Drug: *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 14th day of April 2019 at Caubati in the Central Division, without lawful authority, was found in possession of illicit drugs, namely cocaine, weighing 39.5 kilograms.*

[2] On 12 October 2021, the appellant was sentenced to a total of 23 years imprisonment with a non-parole period of 14 years.

[3] The appellant filed a timely application for leave to appeal against conviction and sentence, which were allowed in a ruling dated 12 February 2024.The respondent had also filed its application for leave to appeal sentence and leave was granted on 12 February 2024.

[4] A single Judge (Hon. Prematilaka, RJA), granted the appellant's application for leave to appeal against conviction on grounds 18, 19, 30, 31 and 33, and leave to appeal sentence. The respondent's leave to appeal sentence was also allowed.

[5] No renewal application has been filed for the disallowed grounds of appeal against conviction and sentence.

(B). FACTS

[6] The factual background to the case is 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 Veisevuraki. In Suva police observed them meeting with a local man subsequently identified as Joshua Rahman, the appellant.*
>
> *3. Police arrested Guiseppe Mangolini, Samuel Amine and Samuel Veisevuraki and interviewed them about the cash. They made no*

admission 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 Veisevuraki. The interview began at 1756 hours. The interview was suspended for the appellant to consult his lawyer and for overnight. 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 Veisevuraki. With insufficient evidence to take this matter further/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 short time later at 1955 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 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.

(C). GROUND OF APPEAL

[7] The grounds of appeal are as follows:

Against Conviction

Ground 18

The learned Judge erred in law when he held at paragraph [19] that the presumption that the appellant had to rebut on balance of probabilities was that he neither believed or suspected or 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.]

Ground 19

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.

Ground 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.

Ground 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 did not 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.

Ground 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.

Against Sentence

Ground 34

That the learned trial Judge erred in fact and in law in imposing a sentence that was manifestly harsh and oppressive under the circumstances and failed to consider [specied] relevant factors.

Ground 36

*That the learned trial judge erred in fact and in law in following the principles set out in **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.*

Ground 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.*

Ground 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.*

(D). THE LAW – DETERMINATION OF APPEALS

[8] Section 23(1)(a) and (2) (a) of the Court of Appeal Act state:

> *"Determination of appeal in ordinary cases*
>
> *23(1) The Court of Appeal-*
>
> *(a) on any such appeal against conviction shall allow the appeal if they think that the verdict 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 before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal; and*
>
> *(b) ……..*
>
> *Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal against conviction or against acquittal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has occurred.*
>
> *(2) Subject to the provisions of this Act, the Court of Appeal shall-*
>
> *(a) if they allow the appeal against conviction, either quash the conviction or direct a judgment and verdict of acquittal to be entered, or if the interests of justice so require, order a new trial."*

(E). HIGH COURT JUDGMENT (per Daniel Goundar. J)

Directions

[9] The learned trial Judge took into account the following legal principles in determining the verdict:

"[10] The Accused is presumed to be innocent. The burden to prove the charge is on the prosecution. Each element of the charge must be proved, but not every fact of the story.

[11] The prosecution must prove the charge beyond a reasonable doubt .That simply means that I must feel sure of the Accused's guilt before convicting him. If I entertain reasonable doubt of guilt, I must find him not guilty of the charge.

[12] The burden to prove the charge remains on the prosecution throughout the trial unless the law expressly specifies that the burden of proof in relation to a matter in question is a legal burden on an accused, or requires the accused to prove a matter, or create a presumption that a matter exists unless the contrary is proved. Whenever there is a reverse burden on the accused, he is required to discharge that burden on the balance of probabilities.

[13] The verdict must be based solely upon the evidence. Evidence consists of sworn testimony of the witnesses examined in court, as well as the physical and documentary exhibits tendered in court. Media coverage of the case is not evidence. Opening and closing addresses of counsel are not evidence.

[14] In order to prove the offence of Found in Possession of an Illicit Drug", the prosecution must prove beyond reasonable doubt that on the date and place the Accused was in possession of an illicit drug without any lawful authority.

[15] A person acts with lawful authority in relation to an illicit drug if that person has been prescribed the drug on a medical ground or the persons lawful profession involves administration of an illicit drug. There is no suggestion that the Accused acted with lawful authority in this case. This brings me to the element of possession.

[16] The word possession" has a legal meaning. It is not necessary for you to have something in your hand, pocket or physical custody before the law says that you have it in your possession. Further you do not need to own something in order to possess it. You can possess something temporarily, or for some limited purpose. You can possess something jointly with one or more other persons. However, if something has been, for example, slipped into you're luggage unknown to you, you are not regarded as having possession of it in law, even though the bag you are carrying could be said to be under your control.

[17] The essence of the concept of possession in law is that, at the relevant time, the Accused intentionally have control over the object in question. The Accused may have this control alone or jointly with some other person or persons. The Accused and those persons (if any) must have a right to exclude other people from it. If these conditions are fulfilled then the Accused may be said to have possession of that object, whether it is his own sole possession or whether it is a joint possession with somebody else.

[18] There is a factual presumption provided by section 32 of the Illicit Drugs Control Act that when any illicit drug is found on any premises

under the control of the accused, the accused is presumed to be in possession, until the contrary is proved.

[19] Whenever an issue is raised by an accused that he didn't know or believe or had reason to suspect that the premises under his control has an illicit drug of some sort, the onus is on him to show on the balance of probabilities that he neither believed nor suspected nor had reason to suspect that the substance found on the premise was an illicit drug. In other words, it is for the Accused to show that it is more likely than not that, he didn't know or believe or had reason to suspect that the premises under his control had an illicit drug of some sort.

[20] A person's state of mind is as much a question of facts as any other question of fact. It is not possible to have direct evidence of this. No one can look into the accused's mind and describe what he knew or believed at any particular time.

[21] However, it is something that can be inferred from all the proved facts and circumstances. They include for instance what the accused himself actually did. That will often be a very important matter. A person's actions, in themselves, may clearly show his intention or knowledge.

[22] Other matters that may be relevant are what the accused said and did before the alleged offence. What the accused said at the time of the alleged offence, including his statement to the police, and what the accused said in evidence may indicate his intentions, beliefs and knowledge.

[23] In this case the Prosecution relied on circumstantial evidence to prove guilt. That simply means that the prosecution is relying upon evidence of various circumstances relating to the crime and the Accused which they say when taken together lead to sure inference that the Accused committed the alleged crime.

[24] An inference is a logical deduction from the facts that have been proved. It must not be mere speculation or guesswork. It is not sufficient that the proved circumstances are merely consistent with the Accused having committed the crime. For the Accused to be guilty, an inference of guilt must be the only rational conclusion to be drawn from the combined effect of all the facts proved. It must be an inference that satisfies beyond reasonable doubt that the Accused committed the crime. If the inference to be drawn from the circumstantial evidence falls short of that standard, then the Accused must be not guilty.*"*

The Admitted Facts

[10] The appellant had admitted to certain facts, which are considered true and these facts are listed in paragraph [26] of the judgment.

The Prosecution's Case

[11] The evidence for the prosecution is set out in paragraphs [27] to [69] of the judgment.

Defence Case

[12] The evidence for the defence is set out in paragraphs [70] to [129] of the judgment.

Trial Judge's Analysis of Evidence

[13] On the **use of bedrooms**, paragraphs [138] to [148] are reproduced below:

> *"[138] The Accused had his own bedroom in the house. He had personal effects in his bedroom. The Accused had an ability to regulate his and his father's affairs from the house. There is evidence that the Accused was free to entertain his own guests and as well his father's guests in the house. The Accused had the keys to the house. He was free to leave and return to the house at any time. In other words, the Accused had a free access to the property at any time he was in Fiji. Above of all, he had free access to all the rooms including the master bedroom occupied by his father.*
>
> *[139] When the discovery of the drugs was made inside the master bedroom, the Accused was the only person who had a free access to the house. The Accused's father had left for New Zealand on 8 February 2019.The Accused was in Suva on 9 February 2019. He admitted meeting three unknown men in Suva on 9 February 2019.The security guard saw the Accused returned to his home drunk on 10 February 2019.From 31 December 2018 till 12 February 2019 the Accused was the legal occupant of the house.*
>
> *[140] The caretakers had the keys but their evidence is that they only accessed the property once or twice in the past when the tenants told them to attend to something. The caretakers did not have a free access to the house like the Accused.*
>
> *[141] Based on the evidence I am satisfied so as to feel sure that the house in which the drugs were found was under a joint control of the Accused and his father. There is a factual presumption that the Accused was in possession of the drugs unless the accused can show that it is more likely than not that he didn't know or believe or had reason to suspect that the premises under his control had an illicit drug of some sort."*

[14] On **credibility** of witness-see paragraphs [142] to [144] of judgment, as follows:

> *"[142] If the account given by the Accused to court is or may be true, then he is not guilty of the offence. 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.*
>
> *[143] The credibility of a witness and reliability of his evidence is to be assessed like any other witness. There are no set rules for assessing credibility and reliability of evidence. Demeanour, spontaneity and consistency are important tools but not an exhaustive list. What is required is a common-sense approach to determine whether the evidence of a witness ring a bell of truth to be reasonably reliable. I am entitled to accept part of a witness's testimony and reject other parts. A witness may tell the*

truth about one matter and lie about another; he or she may be accurate in saying one thing and be wide of the mark about another.

[144] I observed the demeanour of the Accused during his video interview and during his evidence in court. He has a calm demeanour. He was very composed when giving his answers to the questions put to him. He was spontaneous and consistent about one matter, that is, he did not know the premises he was occupying had an illicit drug of some sort."

[15] **On Inconsistent evidence-** see paragraphs [145] to [151], as follows:

"*[145] However, he was evasive or inconsistent on other material issues during his caution interview and his evidence in court.*

[146] The Accused was reluctant to reveal the identities of the men he met at Gloria Jeans and Nando's on 9 February 2019 to police during the caution interview. I quote from the transcripts of the interview (PE 25)."

[16] Having reproduced the interview transcripts PE 25, the learned trial Judge continued as follows:

"[147] In his evidence, the Accused admits meeting three men at Gloria Jeans, Damodar city and then accompanying them to Nando's, Laucala Bay for lunch on 9 February 2019.His evidence is that they didn't introduce themselves to each other because he thought it was a general understanding that they may have seen each other in passing by before.

[148] the identity of the three men that the Accused met at Gloria Jeans on 9 February 2019 has been reliably established by the prosecution. The three men were Sam Amine, Mangolini and Veseicuraki. But the Accused's position is that he did not know that the three men he met at Gloria Jeans were called Sam Amine, Mangolini and Veseivuraki.

[149] I accept the prosecution evidence that Sam Amine and Mangolini drove a rental car from Nadi, picked Veseivuraki. at Maui Bay and then drove to Gloria Jeans Damodar City to meet the Accused. From there all four went together on the same vehicle to Nando's and had a meeting there before exiting the restaurant one by one. They then boarded the same vehicle and drove to Damodar City where the Accused got off.

[150] The evidence led by the prosecution reveal that the meeting at Gloria Jeans and Nandos were not fleeting encounters with strangers. It was an organized meeting with acquaintances

[151] I find the evidence of the Accused that he did not know the identity of the three men he met on 9 February 2019 at Gloria Jeans and Nandos not plausible."

[17] On the **Hand Written Notes,** the learned trial judge stated that "The Accused was also evasive or contradictory about the hand written notes (PEs 18, 19, 20, and 21), found in the house during the search on 14 February 2019".(PE 25).Relevant parts of

the caution interview was reproduced).The learned Judge also made the following observations:

> *"[153] The Accused in his evidence said that the notes were found inside the house during the search but not inside his bedroom as claimed by the police officers. His evidence is that the notes were found in the living room.*
>
> *[154] It dies not really matter where in the house the notes were found. The real issues regarding the notes are whether the notes are in the Accused's hand writing and whether he knew what the notes meant.*
>
> *[155] The prosecution relies upon the notes (Exhibits 18, 19, and 20) to link the Accused to drug offences in New Zealand involving his father, Tallat Rahman. The relevance offered by the prosecution for that evidence is that it rebuts the Accused'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.*
>
> *[156] I accept the Accused's evidence that the notes were found inside the house during the search on 14 February 2019 as true. But I do not believe his evidence that the handwriting may not be his but his father's handwriting as they have a similar handwriting, or that he did not know what the notes meant."*

[18] On the **Relationship between the Accused and his father,** the learned Judge stated as follows:

> *"[157] The evidence of the close relationship that the Accused had with his father does not tally with his account that he cannot distinguish his handwriting from his father's handwriting. The Accused was consistently evasive in the caution interview to commit that the notes are in his handwriting. He was consistently contradictory in his evidence to assert that if the notes are in his hands writing then he did not know what they meant.*
>
> *[158] The Accused in his evidence has presented himself as an intelligent person who has completed his tertiary qualifications in Business Administration in Canada. He may not have any direct interests in his father's businesses but he knew a lot about his father's businesses. He kept his father's money in his bank account when his father moved to Fiji for good to do business. On occasions his father made him transfer money from Canada to Fiji although he was not aware of the purpose for which the funds were required.*
>
> *[159] He made a number of trips to Fiji in 2018 to visit his father. His evidence is that he stayed with his father and that his father financially supported him by giving him allowances. He entertained his father's overseas friends on occasions by taking them out to see land for business options. He had his father's bank card when his father went to New Zealand on 8 February 2019.He admitted using his father's bank card to make a payment for the change of air tickets of his two business associates on 12 February 2019 and in return receive a reimbursement in foreign*

currency from them. This evidence show that the Accused had access to funds that his father kept in bank in Fiji.

[160] The trip that the Accused made to New Zealand in December 2018 was also funded by the Accused's father, Tallat Rahman. The Accused admits staying in the same hotel with his father and that his father gave him an allowance of $2000.00 or $3,000.00 before returning to Fiji on 23 December 2018."

[19] On **Sergeant Espinosa's Evidence**, the learned trial Judge stated:

"[161] Sergeant Espinosa's evidence that on 22 December 2018 Tallat Rahman and the Accused delivered a bag with cash to Mr Timu who resided at 9 Hendry Avenue, Hillsborough for the sale of methamphetamine. Seargent Espinosa said that Mr Timu pleaded guilty to importing methamphetamine in relation to the consignment addressed to Ben Hura of 9 of 9 Hendry Avenue. The same name and address are contained in the note (PE 18) found in the house occupied by the Accused and Tallat Rahman in Fiji.

[162] I find Sargent Espinosa's evidence in relation to the Accused and his father's involvement in paying money to Timu for the importation of methamphetamine which his father and Mr Timu pleaded guilty, to be reasonably reliable. The Accused by his own admission places himself with his father exiting the hotel with bags on 22 December 2019.According to travel history records, Tallat Rahman was in New Zealand from 18 December till 23 December 2018 while the Accused was in New Zealand from 21 December till 31 December 2018.

[163] I find Sargent Espinosa's evidence that Tallat Ram pleaded guilty to importing methamphetamine in relation to a consignment that arrived in New Zealand from USA on 4 February 2019 and was addressed to Necani Little of ¼ Crewe Close, Albany, Auckland with phone contact number 0214174269. These details appear in the note (PE 19) found in the house occupied by the Accused and Tallat Rahman in Fiji.

[164] I accept Sargent Espinosa's evidence that Mangolini was called Karate and Veisevuraki was called Mr White, and that Mangolini was known as Veisevuraki associate to New Zealand Police as reasonably reliable. The words "KARATE" and "WHITE" appear in the note (PE 20) found in the house occupied by the Accused and Tallat Rahman in Fiji.

[165] The identity of Mangolini and Veisevuraki was established by the police officers in Fiji. The surveillance photos support the oral evidence of the police officers that the Accused met Mangolini and Veisevuraki in Suva on 9 February 2019, a day afterTallat Rahman had left for New Zealand.

[166] The evasiveness and contradictions of the evidence of the Accused lead me 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.

[167] On the contrary I find the prosecution has rebutted the Accused's evidence that he didn't know or believe or had reason to suspect that the house he was staying had an illicit drug. The only use I make of the evidence of the Accused's involvement to the drug offences that his father

pleaded guilty in New Zealand is to rebut his evidence that he didn't know or believe or had reason to suspect that the house under his or his father's control at the relevant time had an illicit drug."

[20] The verdict of the Court that the Accused is guilty as charged:

"[168] I am satisfied beyond reasonable doubt an inference of guilt is the only rational conclusion available from the combined effect of all the facts proved by the prosecution.

[169] I am satisfied beyond reasonable doubt that the Accused, 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."

(F). LEAVE FOR APPEAL RULING (per Prematilaka, RJA)

[21] Of the 33 grounds against conviction before him, the single Judge allowed leave to appeal against conviction on grounds 18, 19, 30, 31 and 33. Leave to appeal sentence was also granted. In paragraph [59] of ruling, it is stated:

"Since I have allowed leave to appeal on grounds 18, 19, 30, and 31 which inter alia requires the full court to read the record of evidence, I am inclined to grant leave to appeal in respect of this ground of appeal [Ground 33] as it also requires the examination of the totality of evidence."

(G). CASE FOR APPELLANT

Grounds 18 and 19

[22] The appellant submits that the learned Judge applied the wrong test and therefore misdirected himself. The test was not whether the appellant had to show that he neither believed nor suspected nor had reason to suspect that the substance found in Caubati house was an illicit drug. The correct test was for the appellant to show on a balance of probabilities he was not in possession of the drugs. The appellant only need to point to evidence that suggested reasonable possibility that he was not in possession of the illicit drugs.

[23] The appellant submits that he had adduced sufficient evidence at the trial to show that: he was not in control of the premises; he had no knowledge about the drugs found in his father's bedroom; he had no cocaine in his room and none on his person; there were no fingerprints or DNA evidence to show he had entered his father's bedroom or had ever dealt with the cocaine in any manner.

[24] There was no evidence to show when the drugs arrived in Fiji and how it got here. The appellant submits that *"The correct test is not being found in possession of the cocaine but involved a more substantial analysis of the evidence to establish possession, knowledge and control over the drugs*". The appellant had shown through evidence that he was not in control of the Caubati premises, which was clearly under the control of his father who lived there full time. The appellant was staying in his father's rented house, and was not in joint control of the premises with his father. The learned Judge erred when he found that the appellant was equally and jointly in control of the Caubati house.

[25] From authorities cited is clear that there was no evidence that the appellant had actual control over the cocaine and an ability or opportunity to control the cocaine would not be enough: **R v Mogford** [1970 63 Cr.App.R 168, and **R v Campbell** [1982] Crim.App.R 525.

[26] Although the Judge observed that the appellant could go to his father's bedroom if he wanted to and that he had knowledge of his father's business, but his Lordship never directed his mind to any evidence that logically supported such inference and he never explained on what basis the appellant had control over the cocaine.

[27] There are factors that negate the finding that the appellant had knowledge about the cocaine or had control over the same. For example, in **Bath v H.M. Advocate** [1995] S, C. C.R.32 police found a Class A drug under cover of the windscreen wiper of a motor vehicle that was kept for repair in a garage rented by B. Both B and his father were seen working in the garage. It could not be determined whether B or his father concealed the drug and accordingly there was insufficient evidence to show that B knew of the existence of the offending substance and B's conviction for unlawful possession was quashed. For similar reasons, the learned Judge misdirected himself about the test for possession and in fact he fell far short of applying the correct test to prove possession. A great miscarriage of justice will remain if the decision is not overturned. The personal prejudice to the appellant is that he had already spent around 9 years in custody to date.

Ground 30

[28] The appellant submits that the learned judge erred in holding that the State had rebutted the defence evidence that the appellant had no knowledge of the drugs. The appellant argued that the State relied *"on the flimsiest of evidence",* just because the appellant had called the Caubati flat his home, although it did not mean he was in possession of the flat. Secondly, *the Court did not analyse or give reasons what was evasive and what the contradiction were, when the Court found that some of the answers given by the appellant in his caution interview were evasive and contained contradictions*. Further, how was the caution interview about what was contained in a notebook relevant to the issue about being found in possession? The appellant had explained that he could not recall whether some of the handwriting in the note book was his or his father's as they had similar handwriting but he maintained that he had no idea what the contents related to. The appellant submits, that if the State was so reliant on these handwritten notes, they could have called a handwriting expert to give an opinion or interview Tallat Rahman. *One cannot say that the appellant's answers were evasive if nothing was adduced to contradict what the appellant said.*

Ground 31

[29] The appellant submits that the Court relied on the fact that the appellant's father had pleaded guilty to unrelated drug charges in New Zealand to rebut the appellant's evidence that he did not know about the drugs ion the Caubati house. The trial Judge, at paragraph [167] stated:

> *"[167] On the contrary I find the prosecution has rebutted the Accused's evidence that he did not know or believe or had reason to suspect that the house he was staying had an illicit drug. The only use I make of the evidence of the Accused's involvement to the drug offences that his father pleaded guilty in New Zealand is to rebut his evidence 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."*

[30] The appellant submits as follows:

> (a) The Learned Judge sought to vilify the Appellant because of his father's conduct. This was quite clearly wrong and highly unfair and prejudicial;(b) Just because his father had pleaded guilty to a charge in New Zealand couldn't make the Appellant guilty of being involved in

drug related offences;(c) How could his father's plea in a New Zealand Court for a separate unrelated offence rebut the Appellant's clear evidence 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;** (d) No proper evidence was before the Court about what the father Tallat Rahman had pleaded guilty to; (d) No facts of the NZ case were before the Court; (e) No judgment from the NZ Court was placed before the Fijian Court; (f) The NZ facts and evidence had nothing to do with the Fijian facts; (g) Tallat Rahman **had his own reasons why he pleaded guilty to the charges in NZ but that cannot be used to incriminate the Appellant in his case in Fiji;** (h) By using such grounds to impute guilt on the part of the Appellant the Learned Judge clearly caused substantial prejudice to the Appellant and resulted in a miscarriage of justice .

Ground 33

[31] The appellant commented on the observations of the learned single Judge in paragraphs [52] to [60] of the Ruling, and had made the following Submissions and Analysis:

> *"a. There was so many unestablished facts and uncharged acts which the learned trial Judge drew upon to find the Appellant Guilty of the charge of being found in possession; b. This was a case where there were serious doubts whether the Appellant was found in possession of the drugs; c. This was a case where there were serious doubts about whether the Appellant was even in possession of the rented Caubati house on 12th February 2019 as he wasn't even in Suva; d. This was a case where the Appellant should have been given the benefit of the doubts that existed on crucial elements of the offence; e. The doubts was also caused by these other factors: it was unsafe and dangerous to convict the Appellant based on the following factors:*
>
> > *i. He was not under surveillance. Mangolini and Veisevuraki were. He appeared to be an easy target after Police interviewed and released Mangolini and Veisevuraki.* ***The covert surveillance against them was in fact unlawful;*** *ii. The Appellant was detained without an explanation. He was arrested in Nadi and not told why he was being searched or why he was being arrested [13(1) (a)] .During their evidence the Officers said the Appellant became a person of interest as he had foreign currency on him. Is having USD$800.00 a crime?; iii. The Appellant was detained since that time and brought to Suva. He was detained from 12th February 2019*

when he was arrested in Nadi; iv. The Appellant was detained beyond 48 hours. The Court does not have before it any evidence to show why it was not reasonably possible to release the appellant or to charge him and bring him before a Court. Instead, the Prosecution's witnesses had said that the Appellant was released and rearrested within a span of 10 minutes. If this was to be accepted, what transpired in 10 minutes? What were the exceptional circumstances that transpired within 10 minutes that required the Officers to re-arrest the Appellant? Or is it just a way to create a further 48 hours window? This evidence was not refuted by Prosecution and it appears the Prosecution endorsed it. The Court cannot endorse such actions by the Police or by Prosecution. The Yellow Note pad seized from the Caubati residence ***was not part of the search list.*** *The Yellow Notepad was not retained properly as an exhibit,* ***instead it was retained by detective Nagatalevu personally [p.1916, 1917 R. Vol 6];*** *vi. Detective Espinosa did not offer a single shred of evidence in relation to the New Zealand investigation. How can the Court consider his evidence without having before it the relevant investigation material relied upon in New Zealand? The Appellant Was not provided with any evidence in respect of the matters raised by Detective Espinosa; vii. Nothing that was mentioned about Tallat's arrest or conviction is before the Court. Nothing that Detective Espinosa stated about the Appellant's alleged involvement in New Zealand or him being under surveillance with his father, Tallat was backed up by evidence. The High Court did not have any material whatsoever regarding these matters before it. The Appellant has not been given the opportunity to examine any of this material; viii. Joshua was not in control of the property nor were the drugs found on his person or in his bedroom. There is no evidence to tie Joshua to the drugs that were found. Detective Espinosa's evidence attempted to place Joshua closely with Tallat and his dealings, but again – nothing is before this Court to prove any of this. Detective Espinosa's evidence did not relate to the alleged crimes committed in Fiji. His evidence did not include anything relating to Joshua and his involvement in the discovery of the cocaine in the Caubati residence; ix. There was no direct evidence before the Court to convict the Appellant for the offence he was charged with.;x. Nothing from Detective Espinosa's evidence could be considered by the Court to say that the Appellant had knowledge of the drugs. The Court could not impute knowledge on the Appellant's part by considering Detective Espinosa's evidence; xi. The Appellant's consent or acquiescence during a search, seizure, strip search, detainment or caution interviews* ***does not cure the unlawfulness*** *of the warrants, actions of Police Officers with respect to his detainment, the surveillance undertaken, questions asked in his caution interview beyond 48 hours and all other matters raised in these submissions and Trial; xii. .The evidentiary burden was not on the Appellant. It was on the Prosecution. Whether it be relating to the offence itself or in respect of the Appellant's rights. Prosecution has not satisfied the evidentiary burden in this case.*

Detective Espinosa's Evidence (Interlocutory Motion)

[32] The appellant had addressed this and related issues in paragraphs 79 to 130 of the Appellant's Written Submissions. His submissions concludes with the following:

> *"126. The Learned Judge used Espinosa's evidence to "rebut the Accused's claim of innocent association with his father or innocent occupation of the house where the illicit drug was found", however the following things must be kept in mind:*
>
> *(i) Espinosa's evidence was solely related to alleged events in New Zealand and was therefore incapable of proving anything regarding the circumstances of the Appellant's occupation of the house in Fiji where the drugs were found (for example, Espinosa had no knowledge of a drug operation being run out of the house in Fiji); and*
>
> *(ii) Espinosa did not adduce any evidence regarding the relationship or association between the Appellant and his father, nor did he tender any evidence of intercepted communications between the Appellant and his father to "rebut the claim of innocent association".*
>
> *127. The only evidence which Espinosa gave regarding the Appellant and his father was that they were seen leaving a hotel together with the father carrying a backpack, however, it is important to note that:*
>
> *(i) When the father allegedly received the backpack during a meeting with another individual, the Appellant was not present;*
>
> *(ii) Espinosa only witnessed this event via CCTV footage long after the event actually happened and therefore had no direct knowledge of either the contents of the backpack or what was done with the backpack after the Appellant and the father exited the hotel, and*
>
> *128. It is clear that, based on the Learned Trial Judge's own summary of Espinosa's evidence (at para 64-69 of the judgment)…….the main crux of Espinosa's evidence was establishing that the Appellant's father was a person of bad character and then inviting the Learned trial Judge to draw an inference of guilt by association (which his Lordship in fact did,* ***[p. 14R Vol 1 para 10 and 11 of the Sentence]****. This evidence had very little, if any, probative value to the charge before the Court but was highly prejudicial to the Appellant for the reasons discussed above and it is therefore respectfully submitted that the Learned Trial Judge erred in exercising his discretion to admit the evidence.*
>
> *129. As a final point, The Appellant humbly asks this Honourable Court to ask itself this question: Would it have been permissible for the Respondent to have called only the Investigation Officer in Fiji to narrate their entire case and give evidence on behalf of the*

> *other19 witnesses without disclosing anything but his Police Statement? The answer is quite obvious no, yet this is exactly what was allowed to happen with Espinosa and the New Zealand investigation.*
>
> *130. It is respectfully submitted that this issue is intricately tied to the Appellant's constitutional right to a fair trial and, in order to protect that right, Espinosa's evidence should have been excluded."*

Renewed Grounds of Appeal

[33] These Grounds of appeal deal with 3 primary issues: Namely, the unlawful search and seizure executed by police at the Appellant's hotel room in Nadi on 12th February 2019.; the unlawful arrest of the Appellant on 12th February 2019, and the unlawful detention of the Appellant for approximately 130 hours before producing him in court (from 12th - 18th February 2019). The appellant's submissions can be summed up, as follows:

> *(a) Firstly, that no fewer than five of the Appellant's constitutional rights were violated by the Fiji Police Force between the 12th and the 18th of February 2019.Firstly, the police unlawfully executed a search and seizure at the appellant's hotel room in Nadi on 12th February 2019 and thereby violated his rights to freedom from unreasonable search and seizure under* ***section 12(1) of the Constitution.(b)*** *Secondly, the police disregarded the Appellant by making him submit to a full strip search in his hotel room on 12th February 2019 in circumstances where it was neither necessary nor justifiable to conduct such a search and thereby violated his right to freedom from degrading treatment under* ***section 11(1) of the Constitution.*** *(c) Thirdly, the police unlawfully arrested the Appellant from his hotel room on 12th February 2019 without reasonable suspicion that he had committed an offence (or any other permissible reason for arrest) and thereby violated his right to liberty under* ***section 9(1) of the Constitution.*** *(d) Fourthly, the police did not promptly inform the Appellant of the essential legal and factual ground for his arrest on 12th February 2019 or the nature of any charge that may have been brought against him, and thereby violated his right to that information under* ***section 13(1)(a)(i) of the Constitution.*** *(e) Fifthly, the police unlawfully detained the Appellant for approximately 130 hours, from 11pm on 12th February 2019 to* ***9am*** *on 18th February 2019, and thereby violated his right to be brought before a court as soon as reasonably possible under* ***section 13(1)(f) of the Constitution.***

Appeal Against Sentence

[34] The appellant submits that:

> *"(a) By imposing a minimum sentence of 20 years on the Appellant the Court was going to impose the same type of sentence on Tallat Rahman*

and the Appellant; (b) Imposing a starting point of 20 years against the Appellant was disproportionately severe in this case ; (c) The 20 minimum sentence should be reserved for hard offenders; (d) There should not be a minimum sentence in the guidelines; (e)The Court should have a discretion irrespective of how much drugs are involved; (f) In this way a person who is caught up in unfortunate circumstances can have a lesser starting sentence ; (g) The Appellant was simply a tourist visitor at his father's house. No other evidence linked him to the drugs found in the house. There was no other evidence he had any role in importing the drugs into Fiji; (h) He did not possess any unexplained wealth; (i) At worst he was found to be in control of his father's rented house in which the drugs were found. It may be inferred that at worst he should have had some knowledge that his father was keeping drugs in the house; (j) Does this mean that his starting sentence is 20 years in prison? ; (k) What about any chance he has for reform? ; (l) Putting a starting sentence of 20 years is unconstitutional in that it is extremely severe and disproportionate as a penalty and to the principle that Prisoners must be given a chance to learn and reform ; (m) The law should be changed so that the Courts can ignore any minimum starting point if the circumstances warrant the same ; (n) The Full Court of Appeal should be allowed to consider such a submission , and (o) In this case the High Court just blindly followed the minimum starting sentence. This we submit was erroneous."

[H]. CASE FOR RESPONDENT

Grounds 18 and 19

[35] It was not in dispute at the trial that a search was conducted by police on the house leased to the appellant's father Mr Tallat Rahman at Caubati Road ("the premises). During the search, 1 bar of cocaine was found in the bedside drawer of the master bedroom and a further, 38 bars of cocaine were found under the bed base in the master bedroom. The drugs were later tested and found to weigh 39.5kg in total. It was also not in dispute, that the appellant was residing at the premises at the material time where he had his own bedroom. The master bedroom, to which the appellant had open access, was used by the appellant's father, but he was not in Fiji at the material time, and the appellant had access to it,

[36] The prosecution's contention was that the appellant and his father were in joint control of the illicit drugs and likewise in joint control of the premises which enlivened the presumption under section 32 of the IDCA that they were in joint possession of the illicit drugs. The prosecution based its case on strong circumstantial evidence to prove the criminal standard that the appellant had knowledge and control of the illicit drugs

at the premises and was therefore in possession of the illicit drugs contrary to section 5(1) of the IDCA.

[37] The respondent submits, that the Judge may, on the face of it have erred in directing himself that the presumption under section 32 of the IDCA imposes a legal burden as opposed to a lower evidential burden on an accused person. However, the trial Judge's direction was entirely in line with the accepted legal thinking at the time.

[38] The respondent submits that it cannot reasonably be argued that the error has given rise to a miscarriage of justice. The error does not amount to a miscarriage of justice. That it is accepted that in Fiji and other comparable jurisdictions, the reverse burden provisions (as in section 32 of the IDCA) generally offend against the fundamental presumption of innocence because they, in effect, require an accused person to prove his innocence, albeit to the lower standard of proof. This has been found to be contrary to the golden thread because it means that an accused person who has failed to discharge his legal burden on the balance of probabilities will be convicted even if the tribunal of fact harbours doubt as to his guilt

[39] Had the learned Judge convicted the appellant on the basis that he failed to discharge the burden of proving his lack of knowledge that would certainly be considered by the Full Court to amount to a substantial miscarriage of justice. The learned Judge did not convict the appellant on the basis of his failure to rebut the presumption of possession, that is, he did not shift the burden of proof to the appellant's prejudice – this is clear from his remarks in paragraphs 11, 142,168 and 169 of the judgment.

[40] The respondent submits that the principal reasons for finding the appellant guilty as charged were: (i) The appellant had his bedroom in the premises, where he had his personal effects. There was evidence that appellant had an ability to regulate his and his father's affairs from the premises. He was free to entertain his own guests as well as his father's guests in the premises. The appellant had the keys to the premises and he was free to leave and return to the premises at any time he was in Fiji. Above all, the appellant had free access to all rooms including the master bedroom occupied by his father; (ii) Drugs were discovered inside the master bedroom, and the appellant was the only person who had free access to the premises. His father left for New Zealand on 8 February 2019. The appellant was in Suva on 9 February 2019, he

admitted meeting the unknown men in Suva on 9 February 2019.The security guard saw the appellant return to his home drunk on 10 February 2019. He was the legal occupant of the premises;(iii)The evasiveness and contradictions in the evidence of the appellant led the learned trial Judge not to believe his account that he did not know or believe or have reasons to suspect that the illicit drugs were stored inside the premises; (iv) The learned trial Judge was satisfied beyond reasonable doubt an inference of guilt was the rational conclusion available from the combined effect of all the facts provided by the prosecution, and (v)The learned trial Judge was satisfied beyond reasonable doubt that the appellant without lawful authority was in joint possession of the illicit drugs with another between 23 January 2019 and on 14 January 2019 at Caubati.

[41] The respondent submits that there was strong circumstantial evidence led by the prosecution at trial that led the learned trial Judge to make irresistible inference of guilty, as follows: i) The caretakers did not enter the premises jointly occupied by the appellant and his father unless instructed; ii) Finding of notepads with inscriptions inside the appellant's bedroom; iii) Detective Sergeant Espinosa's account that meeting in Auckland City between Tallat Rahman and Timu where bag of cash was given to Tallat for the sale of methamphetamine. Tallat exited the hotel with the appellant. Timu resided in 9 Hendry Avenue Hillsborough; iv) Written notes found in the appellant's bedroom referencing "Karate" and "White" according to Detective Sergeant Espinosa Guiseppe Mangolini is "Karate" and Samuela Veisevuraki is "White"; v. PW5 Sekove Vuniwaqa conducted surveillance on Mangolini and Sam Amin when they arrived in Nadi, they later joined by Samuela Veisevuraki. vi). Mangolini, Sam Amin and Samuela Veisevuraki were joined by the appellant at the coffee shop in Damodar then later for lunch at Nandos"

Direction on Section 32 Presumption

[42] The respondent raised the case of **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015) on the Full Court's observations on the application of section 23(1) of the Court of Appeal Act.

[43] Taking all the material circumstantial evidence in its totality there was only a single irresistible conclusion, that is, the guilt of the appellant. The appellant was jointly in

control of premises at the material time and in joint possession of the illicit drugs seized from the premises.

[44] The respondent submits that even with proper direction on the law as per section 32 of IDCA, it would without a doubt yield the same verdict. Though the appellant may have arguable ground of appeal, it is the respondent's submission that the appeal be dismissed as there is no substantial miscarriage of justice.

Ground 30

[45] The gist of the appellant's complaint on this ground of appeal is that the learned trial Judge failed in making a proper analysis of the evidence presented by prosecution to prove the charge against the appellant. The trial Judge came to the conclusion at paragraph [167] after having thoroughly reviewed the whole evidence. The respondent submits that the livening of section 32 would have only transpired if the prosecution had presented a *prima facie* case. That it did in this current appeal.

[46] The respondent submits, that the giving of evidence by the appellant does not automatically displace section 32 presumption, The trial Court has to evaluate that evidence on the same basis it evaluated prosecution evidence.

[47] The learned trial Judge in reviewing the evidence presented by the prosecution and the sworn account of the appellant, found that the appellant's account failed to raise a reasonable doubt.

Ground 31

[48] The respondent submits that the learned trial Judge had considered all the evidence as per the preceding paragraphs of the judgment prior to stating part of the pronouncement in paragraph [167] .

[49] In the preceding paragraph [166] , the trial Judge had made clear that the appellant's account was not to be believed:

> *"The evasiveness and contradiction in the evidence of the Accused lead me not to believe his account that he didn't know or believe or had reason to suspect that the house he was staying in had an illicit drug."*

[50] The respondent submits that the learned trial Judge did not use Tallat Rahman's guilty plea as evidence of what the appellant knew or suspected about the drug in the house, and, that the appellant's involvement in a range of legitimate and criminal business enterprise 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 learned 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 to 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.

Ground 33

[51] The appellant contends that the verdict of the Court was unreasonable and cannot be sustained having regard to the evidence, as inference of guilt had been drawn from unestablished facts, and like so, the appellant had not been given the benefit of a doubt.

[52] The learned trial Judge had reviewed the material evidence led by the prosecution and the defence before confirming the guilt of the appellant. Aside from a detailed analysis of salient facts for prosecution and defence, the learned trial Judge also considered the following in its judgment: Whether covert surveillance was unlawful? (Paragraphs 98-109); whether detention and search of appellant was unlawful? (Paragraphs 110- 119), and whether the accused was detained for more than 48 hours without charge?

[53] The respondent submits that this Court in **Kumar v State** [2021] FJCA 181; AAU102.2015 (29 April 2021) deliberating on the issue of unreasonable verdicts stated:

> *"[20] In Fiji the Court of Appeal in Sahib v State [1992] FJCA 24; AAU0018u.87s (27 November 1992) stated as to what approach the appellate court should take when it considers whether verdict is unreasonable or cannot be supported by evidence under section 23(1) (a) of the Court of Appeal Act.*
>
> *'……. 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 witness statements of the appellant and his brother's evidence, consider that there was miscarriage of*

> *justice…. There was undoubtedly evidence before the Court that, if accepted, would support such verdicts."*
>
> *In Kaiyum v State [2013] FJCA 146; AAU71 of 2012 (14 March 2013) the Court of Appeal had said that when a verdict tested on the basis that it is unreasonable the test is whether the trial Judge could have reasonably convicted on the evidence before him 9see also Singh v State [2020] FJCA 1; CAV0027 of 2018 (27 February 2020)."*

[54] In **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992), this Court observed:

> *"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, accepting that the prosecution witnesses' evidence as credible evidence. interfere. There was undoubtedly evidence before the Court that, if accepted, would support such verdicts."*

[55] The respondent submits that the learned trial Judge had ventilated all relevant material evidence in its judgment, accepting that the prosecution witnesses' evidence as credible evidence.

Against sentence

[56] The learned sentencing judge had identified all relevant factors before determining the final sentence. The factors identified by the Court were facts adduced in evidence and the appropriate tariff for *hard drugs,* however, the appellant should consider himself fortunate to avoid a much serious sentence given the weight of the illicit drugs. The sentence appeal must fail as the sentence was manifestly lenient.

(I). ANALYSIS

[57] In this appeal, 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(a) of the IDCA and section 46 of the Crimes Act 2009.

[58] It was not in dispute at the trial that the police had conducted a search on the house leased by the appellant's father at Caubati Road (the premises"). During the search, 1 bar of cocaine was found in the bedside drawer of the master bedroom and, 38 bars of cocaine were found under the bed base in the master bedroom. The drugs were later tested and found to weigh 39.5 kilograms in total. Other details in relation to the drugs

found and seized from the premises are contained in paragraph [4] of the judgment under "Admitted Facts ".

[59] It was also not in dispute, that the appellant was residing at the premises at the material time where he had his own bedroom. The master bedroom, is used/occupied by the appellant's father, but he was not in Fiji at the material time, and the appellant had access to it. The relevant parts of the judgment related to the bedrooms are in the judgment – see paragraph [13] above.

[60] The prosecution contends that the appellant and his father were in joint control of the illicit drugs and likewise in joint control of the premises which enliven or bring into the forefront the presumption under section 32 of the IDCA, and that they were in possession. The prosecution based its case on strong circumstantial evidence to prove that the appellant had knowledge and control of the illicit drugs at the premises and was therefore in possession of the illicit drugs contrary to section 5(1) of the Act. Section 32 of the Act sates:

> *"Factual presumption relating to possession of illicit drugs*
>
> *32.Where in any prosecution under the Act it is proved that any illicit drug, controlled chemical or controlled equipment was or in any premises, craft, vehicle or animal 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, controlled chemical or controlled equipment."*

[61] The real issue for consideration is whether the accused was in possession of the drugs? To prove possession the prosecution relies upon the factual presumption provided by section 32 of the IDCA.

[62] For the presumption to apply, the prosecution must prove beyond reasonable doubt that the premises in which the drugs were found was under the control of the accused and the question whether the house on which the drugs were found under the control of the accused is a question of fact.

Grounds 18 and 19

[63] These two grounds are dealt with together as they relate to the "test" applied by the learned trial Judge in paragraph [19] of the judgement. The trial Judge held that whenever an issue is raised by the accused that he didn't know or believe or had reason

to suspect that the premises under his control had an illicit drug of some sort, the onus is on him (the appellant) to show on the balance of probabilities that he neither believed nor suspected nor had reason to suspect that the substance found on the premises was an illicit drug.

[64] In other words, it is for the accused to show that it is more likely than not that he did not believe or have reason to suspect that the premises under his control had an illicit drug of some sort.

[65] The appellant submits that the learned trial Judge was mistaken. He did not analyse or apply the correct test, the test that the appellant is to show on a balance of probabilities that he was not in possession of drugs. The appellant submits that he had adduced sufficient evidence at the trial to show that he was not in control of the premises. He had no knowledge of the drugs being found in his father's bedroom. He had no cocaine in his room or his person. There are no fingerprints or DNA evidence to show he had entered his father's bedroom or had ever dealt with the impugned cocaine in any manner.

[66] The prosecution based its case in circumstantial evidence that the appellant and his father were in joint control of the illicit drugs and likewise in joint control of the premises which enlivened the presumption under section 32 of the IDCA. The strong circumstantial evidence enabled the prosecution to prove the criminal standard that the appellant had knowledge and control of the illicit drugs at the premises and was therefore in possession of the illicit drugs contrary to section 5(1) of the IDCA.

[67] The respondent had conceded that the trial Judge may have erred in his direction. We accept that the learned trial judge was mistaken in directing himself that the presumption under section 32 imposes a legal burden as opposed to an evidential burden on an accused person. While the trial Judge's direction was in line with the accepted legal thinking at the time the judgment was delivered, the applicable legal principle has since changed. In **Kumar's** case, it was held that the reverse burden under section 32 represented by the phrase *"until contrary is proved* "is only an evidential burden of proof to be discharged on the balance of probabilities. The Court further held that the factual presumption relating to possession of illicit drugs in section 32 of the IDCA may be rebutted by an accused adducing or pointing to

evidence that suggests a reasonable possibility that the matter exists as per section 59 of the Crimes Act. The section defines **evidential burden** in relation to a matter to mean *"the burden of adducing or pointing to evidence that suggests a reasonable possibility that a matter exists or does not exist".*

[68] This point is clarified in paragraphs [67] to [68] **Kumar** as follows:

> *"[67] ……A provision that a fact shall be taken or deemed, to exist unless there is "proof to the contrary" as in section 32 of the IDCA does cast an onus upon the person disputing the existence of this fact, to disprove its existence (with the applicable standard being the civil one). Reverse burden requires the defendant to prove or disprove certain facts or defence, which would typically be the responsibility of the prosecution. However, the imposition of a reverse burden in criminal law can be seen as a departure from the fundamental principle of the presumption of innocence and is subject to constitutional and human rights consideration.*
>
> *[68] ....., section 32 of the Illicit Drugs Control Act 2004 operates to limit the right to presumption of innocence but not a complete denial of it, for it imposes a burden on the appellant to rebut only the factual presumption on possession, being the physical element of the of possession of illicit drugs, and section 32 does not per se create a presumption of guilt of the offence of possession of illicit drugs under section 5. The fault element needs to be proved by the prosecution beyond reasonable doubt. Thus, section 32 imposes a "reverse burden" on the accused to prove that he was not in possession of the illicit drugs on the balance of probability when the prosecution had proved beyond reasonable doubt that it was an illegal drug……..The presumption phrased in the way similar to section 32 ("until the contrary is proved") have been held to give rise to a legal burden (see **Ex parte Minister of Justice: in re R v Jacobson and Levy** 1931 AD 466) and not an evidential burden, It has also been held that presumptions of facts "unless the contrary is proved" impose a legal burden upon accused persons (see **S v Guess** 1976(4) SA 715(A) at 719B-C; **S v Radloff** 1978] (4) SA66 at 71H). A legal burden would require an accused to demonstrate on a balance of probabilities that he or she was not guilty of possession in order to be acquitted of the offence of possession of illicit drugs under section 32.Even if the accused raises a reasonable doubt as to whether he or she was in possession of the illicit drugs, but fails to show it on a balance of probabilities, he or she must nevertheless be convicted. The effect of imposing a legal burden on the accused may therefore result in a conviction for possession of illicit drugs under section 32 despite the existence of reasonable doubt as to his or her guilt. An evidential burden on the other hand would require the accused, once the prosecution has proved beyond reasonable doubt that it was an illicit drug, it was on or in any premises, craft or vehicle which was under the control of the accused, to adduce evidence which raises a reasonable doubt whether he or she was in possession of the illicit drug in order to be acquitted of the offence of possession of illicit drug.*
>
> *[69] Thus, the reverse burden certainly contains a limitation on the right to be presumed innocent but it is prescribe by law namely section 32 of the*

> *Illicit Drugs Control Act. The important question then to be determined is whether the limitation is necessary and if so what extent. If it is necessary, section 32 limitation on presumption of evidence is not per se inconsistent with section 14(2) (a) and not invalid. Is it necessary to the extent of transferring the burden of proof on a balance of probability onto the accused? If the answer is "no", and if section 32 appears to be inconsistent with section 14(2)(a) of the Constitution to some extent, the court must to that extent accord a reasonable interpretation to section 32 that is consistent with the presumption of innocence. In answering the question whether the limitation is necessary in the matter of interpretation of section 32, the court must also promote the values of a democratic society based on human dignity, equality and freedom and in so far as relevant may consider international law applicable to the protection of rights and freedoms.*
>
> *[70] ……where a statute reverses the burden of proof, requiring the accused to prove an ultimate fact which is necessary to determine his guilt or innocence he is required to satisfy the burden on the balance of probabilities [vide* ***HKSAR v Gurung Krishna*** *[2010] 4 HKLRD 456 (21 July 2010).*

[69] At the leave stage, the learned single Judge observed that:

> *"[29] The trial Judge seems to have referred to the fault element of possession by the impugned words challenged by the appellant element of control appears to be 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 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 suggest a reasonable possibility that the matter exists or does not exist as per section 59 of the Crimes Act.*

[70] We agree with the Single Judge on this point and also with his observations at paragraph [30] of the ruling that in light of **Kumar**, in the context of paragraphs 18 and 19 of the judgment on the trial Judge's analysis of section 32 of the IDCA. The learned trial Judge seems to have misdirected himself on the appellant's burden in rebutting the presumption. The appellant is only required to comply with the evidential burden, that is, to show on the balance of probabilities that he neither believed nor suspected nor had reason to suspect that the substance found on the premises was an illicit drug.

[71] Based on **Hofer v The Queen** and **Weiss v The Queen**, the Court ordered a new trial even where the appellate court, notwithstanding error, is satisfied of the appellant's

guilt on admissible evidence beyond reasonable doubt, where 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.

[72] The grounds succeed.

Grounds 30

[73] The gist of the appellant's complaint is that the trial Judge had failed to properly analyse the evidence presented by the prosecution to prove the charge against the appellant. In the first limb of paragraph [167], the trial Judge had refuted the appellant's assertion that he did not know or believe or have reason to suspect that the house he was staying had an illicit drug by affirming that in his analysis of the prosecution's evidence, "*I find the prosecution has rebutted the Accused's evidence that he did not know or believe or had reason to suspect that the house he was staying had an illicit drug."*

[74] Paragraph [167] of the Judgment states:

> *"[167] On the contrary I find the prosecution has rebutted the Accused's evidence that he didn't know or believe or had reason to suspect that the house he was staying had an illicit drug. The only use I make of the evidence of the Accused's involvement to the drug offences that his father pleaded guilty in New Zealand is to rebut his evidence 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."*

[75] The appellant argues that the learned trial Judge did not properly or adequately analyse his evidence at the trial, and had relied *"on the flimsiest of evidence* "in arriving at the above conclusion. The appellant's reference to flimsiest evidence include: (a) the fact that the appellant called the Caubati flat home, what it meant as the appellant did not mean possession; (b) did not specify or identify what he meant and generally a lack of support for the finding that the appellant did not analyse or give reasons on what was *"evasive and contradictory"* in his evidence; (c) the relevance of the *notebook contents* to the issue of being in possession of drugs.

[76] The learned trial Judge, in support of his statement regarding the appellant's evasive and contradictory evidence had referred to, and reproduced the transcripts of the trial- see paragraph [145] where he stated that the appellant was evasive and inconsistent

on the material issues during his caution interview and his evidence in Court. In paragraph [146] he stated the accused was reluctant to reveal the identities of the men he met at Gloria Jeans and Nandos on 9 June 2019 to police during his caution interview. He then quoted from the transcripts of the interview (PE 25). At paragraph [152] the learned trial Judge pointed to the appellant being evasive and contradictory about the handwritten notes (PEs 18, 19, 20 and 21) found in the house during the search on 14 February 2019.He quoted from the transcripts of the interview (PE 25).

[77] We refer to the judgment which states that in order to prove the offence of "*Found in Possession of Illicit Drug"* the prosecution must prove beyond reasonable doubt that on the date and place the accused was in possession of an illicit drug without lawful authority (Paragraph 14), and in defining the word *"possession*", as follows:

> *"[16] The word "possession" has a legal meaning. It is not necessary for you to have something in your hand, pocket or physical custody before the law says that you have it in your possession. Further, you do not need to own something in order to possess it. You can possess something temporarily, or for some limited purpose. You can possess something jointly with one or more other persons. However, if something has been for example, slipped into your luggage unknown to you, you are not regarded as having possession of it in law. Even though the bag you are carrying could be said to be under your control.*
>
> *[17] The essence of the concept of possession in law is that, at the relevant time, the Accused intentionally have control over the object in question. The Accused may have this control alone or jointly with some other person or persons. The Accused and those persons (if any) must have a right to exclude other people from it. If these conditions are fulfilled than the Accused may be said to have possession of that object, whether it is his own sole possession or whether it is a joint possession with somebody else.*
>
> *[18] there is a factual presumption provided by section 32 of the Illicit Drugs Control Act that when any illicit drug is found on any premises under the control of the accused, the accused is presumed to be in possession, until the contrary is proved."*

[78] We note that the learned trial Judge fully considered the evidence of the Accused, the "*Defence Case* " and he had carefully analysed all the evidence in his *''Analysis of Evidence from* paragraphs [130] to [167].

[79] The learned trial Judge held, that the question of whether the house in which the drugs were found was under the control of the accused is a question of fact. The appellant's evidence was analysed and evaluated (see paragraphs [136] to 139] to the time when

the discovery of the drugs was made inside the master bedroom, the accused being the only person in the house who had access to the house.

[80] In his Video Caution Interview conducted on 15 February 2019 (see Record of High Court, Volume 4 of 6, at pages 1 to 44), several interview questions were about the house and below are a selection of those questions and answers:

(Page 4/44 of Interview transcript)

Inspector Muktar: How often do you come to Fiji?

Joshua: …….since I graduated from University, I've been here maybe 4 times and a year and half, or 5 times not exactly sure how many but….

Inspector Muktar: The address you gave me is Caubati road, where your house is. Whose house is that Are you renting that house?

Joshua: I believe, I do not know how to say the full name.

(Page 7/44 onwards)

CPL Avinesh: So, you're telling me…How long have you stayed on that property? That lot?

Joshua: I think my dad would have moved in there maybe a year ago.

CPL Avinesh; Did your dad told you that he had bought the property or he's renting the property?

Joshua: He told me he was rent it.

CPL Avinesh: So where is your dad now?

Joshua: Right now, he's in New Zealand.

CPL Avinesh: Thank you. So, when your dad is away who is looking after the house?

Joshua: We have a security guard there during the night time and there is a caretaker in the back If Ian not around……those people watch the house.

CPL Avinesh: So, you're telling me when he is out, you are responsible for the house in his absence, since you stay at the property?

Joshua: Not necessarily. Its more so that caretakers because……., If I am there than obviously, I'm in charge but if I'm not there there's the caretaker.

CPL Avinesh: So own the keys to the house?

Joshua: Yes

CPL Avinesh:….. So you have a separate bedroom in your home?

Joshua: Yes.

CPL Avinesh: So, when you enter the house which one is your bedroom?

Joshua: ……My bedroom is the furthest one in the left corner.

CPL Avinesh: So, you're telling me, only 2 of you stay at that house?

Joshua: Yeah, there's only 2 of us that usually reside at that house but there's other people that come and go ….

So who are those two persons that are staying in that house?

Joshua: My father and myself.

CPL Avinesh: So… which one is your father's bedroom?

Joshua: The one opposite mine. In fact it's the master bedroom.

[81] Having analysed the appellant's evidence to establish whether the house in which the drugs were found were under the control of the accused, the learned trial concluded this enquiry by stating;

> *"[141] Based on the evidence, I am satisfied so as to feel sure that the house in which the drugs were found was under a joint control of the accused and his father. There is a factual presumption that the accused was in possession of the drugs unless the accused can show that it is more likely than not that he didn't know or believe or had reason to suspect that the premises under his control had an illicit drug of some sort."*

[82] This means that the learned trial Judge is satisfied based on evidence, that the appellant and his father were in control of the house , in the circumstances.. We agree. We note in this regard, and as discussed in relation to grounds 18 and 19 that the learned trial Judge had misdirected himself on the appellant's burden. That does not detract from the finding based on the analysis of the evidence that the appellant was in control of the premises at the material time. He is also in possession by virtue of section 32, subject to rebuttal by the appellant.

[83] The learned trial Judge in the second stage of the analysis of evidence considered the question: whether it is true that the accused did not know or believe or had reason to suspect that the premises under his control had an illicit drug of some sort. And, if the account of the appellant to the court is true, then he is not guilty of the offence.

[84] The learned trial Judge held that the credibility and reliability of the accused is to be assessed like any other witness. There are no set rules for assessing credibility and reliability of evidence, which may include demeanour, spontaneity and consistency which are important tools but not an exhaustive list.

[85] The learned trial judge having observed the accused's demeanour during the video interview and his evidence in court, found the appellant has a calm demeanour; was very composed when answering questions put to him, and he was spontaneous and

consistent about one matter, that is, he did not know that the premises he was occupying had an illicit drug of some sort.

[86] In addition, the learned trial Judge found that the accused was evasive or inconsistent on other material issues during the caution interview and his evidence in court. As raised earlier, the accused was reluctant to reveal the identities of the men he met at Gloria Jeans and Nandos on 9 February 2019 and he was evasive or contradictory about the handwritten notes. The learned trial Judge accepted as true the evidence of the accused that the notes were found inside the house during the search on 14 February 2019, however, he did not believe the accused's evidence that the handwriting may not be his but his father's as they have a similar handwriting, or that he did not know what the notes meant.

[87] The evidence of the close relationship between the accused and his father was also analysed-see paragraphs [157] to [160] of the judgment. Espinosa's evidence was analysed from paragraph [161] to [[165] of the judgment. Further, at paragraph [166] the learned trial Judge stated: *" The evasiveness and contradictions in evidence of the accused lead me 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."*

[88] It is clearly demonstrated from the analysis above that contrary to the appellant's contention and submissions, the learned trial Judge had properly and adequately analysed the appellant's own evidence and had come to the conclusion that the appellant was an evasive, contradictory, inconsistent, incredible witness. He found that the prosecution had rebutted the accused's evidence that he didn't know or believe or had reason to suspect that the house he was staying had an illicit drug.

[89] This ground has no merit.

Ground 31

[90] The appellant alleges that the trial Judge was mistaken in paragraph [167] when he relied on the evidence that the appellant's father had pleaded guilty in New Zealand to rebut the appellant's evidence 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 fair trial.

[91] This ground points to the second limb of paragraph [167] of the judgment, the first limb was discussed earlier in the context of ground 30. The appellant's submission on this issue are set out in paragraphs [29] and [30] above.

[92] The respondent submits that the trial Judge did not use the appellant's father's guilty plea in New Zealand as evidence of what the appellant knew or suspected about the drugs in the house and that the appellant's involvement in a range of legitimate and criminal businesses enterprise 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 second limb of paragraph [167] of the judgment states:

> *"[167] ……. The only use I make of the evidence of Accused's involvement to the drug offences that his father pleaded guilty in New Zealand is to rebut his evidence that he didn't know or believe of had reason to suspect that the house under his and his father's control at the relevant time had an illicit drug."*

[93] The learned Single Judge stated that the basis of this ground seems well-founded, however, whether the learned trial Judge was wrong is a different issue. This issue forms a part of the trial Judge's reasoning 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 and 19. He allowed leave to appeal.

[94] A closer look at the second limb of paragraph [167] reveals that it limits itself to the "*evidence of the Accused's involvement"* in the drug offences that his father pleaded guilty to in New Zealand. The judgment at paragraph [155], [162] and [163] states:

> *"155. The prosecution relies upon the notes (Exabits 18,19, and 20) to link the Accused to drug offences in New Zealand involving his father, Tallat Rahman. The relevance offered by the prosecution for that evidence is that it rebuts the Accused'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."*

> *"[162] ……The Accused by his own admission places himself with his father exiting the hotel with bags on 22 December 2019.According to travel history records, Tallat Rahman was in New Zealand from 18 December 2018 while the Accused was in New Zealand from 21 December till 31 December 2018".* (Note the date 22 December 2019, appear to be a mistake. It should logically be 22 December 2018)
>
> *[163] I find Segreant Espinosa's evidence that Tallat Rahman pleaded guilty to importing methamphetamine in relation to a consignment that arrived in New Zealand from USA on 4 February 2019 and was addressed to Necani Little of ¼ Crewe Close, Albany, Auckland with phone contact number 0214174269.These details appear in the note (PE 19) found in the house occupied by the Accused and Tallat Rahman in Fiji."*

[95] This ground has no merit.

Ground 33

[96] The appellant says that the learned trial Judge was mistaken in fact and law since he drew the inference that the appellant was guilty from unestablished facts; and he did not give the appellant the benefit of a doubt.

[97] The appellant identified the unestablished facts as follows - (a) There were so many unestablished facts and uncharged acts which the learned Judge drew upon to find the appellant guilty of the charge of being found in possession; (b) This was a case where there were serious doubts whether the appellant was found in possession of the drugs;(c) This was a case where there were serious doubts about whether the Appellant was even in possession of the rented Caubati house on 12th February 2019 as he wasn't even in Suva;(d) this was a case where the appellant should have been given the benefit of the doubts that existed on crucial elements of the offences;(e) the doubt was also caused by these factors: the covert surveillance was unlawful**;** unlawful detention over 48 hours; the yellow notepad ceased being not part of the search list; control and possession of the premesis; unlawful search and seizure etc. which the learned trial Judge had made findings on.

[98] We note that the issues raised in support by the appellant were generalised referring to unestablished facts and uncharged acts. Most of the issues had been scrutinized by the trial Judge, and raised at the leave stage before the Single Judge, and were grounds which were disallowed at the leave stage. No Notice of Renewal of Grounds against

Conviction had been filed in respect of those grounds/issues, by the appellant before this Court.

[99] The appellant submits that, the learned trial Judge used Espinosa's evidence to *"rebut the Accused's claim of innocent occupation of the house where the illicit drug was found", however,* it has to be kept in mind that: (i) Espinosa's evidence was solely related to the alleged events in New Zealand and was therefore incapable of proving anything regarding the circumstances of the Appellant's occupation of the house in Fiji where the drugs were found (for example, Espinosa had no knowledge of a drug operation being run out of the house in Fiji) ; and (b) He did not adduce any evidence regarding the relationship or association between the Appellant and his father, nor did he tender any evidence of intercepted communications between the appellant and his father to *"rebut the claim of association"*.

[100] The appellant submits that the only evidence which Espinosa gave regarding the appellant and his father was that they were seen leaving a hotel together with the father carrying a backpack.

[101] The appellant submits that based on the learned trial Judge's own summary of Espinosa's evidence, the main crux of such evidence was establishing that the appellant's father was a person of bad character and then inviting the learned Judge to draw an inference of guilt by association. The appellant submits that Espinosa's evidence had very little, if any, probative value, to the charge before the Court but was highly prejudicial to the appellant. It is submitted therefore that the learned trial Judge erred in exercising his discretion to admit the evidence. The question posed in the appellant's written submissions, at paragraph [129] is noted but it distorts the facts and circumstances of Espinosa's involvement in this case judging by the Record of the trial.

[102] Finally, the appellant submits that this issue is intricately tied to the appellant's constitutional right to a fair trial and, in order to protect the right, Espinosa's evidence should have been excluded.

[103] The learned Single Judge at paragraph [52] of the ruling states that the basis of the ground appears to say that the verdict is unreasonable and cannot be supported having regard to the evidence under section 23(1) (a) of the Court of Appeal Act. Having

studied the written submissions of the appellant, it seems that the ground suggests that the learned trial Judge had wrongly exercised his discretion in admitting Espinosa's evidence based on the above issues challenging the admission of the evidence. Further, that the admission of the evidence and their nature are detrimental to the appellant's constitutional right to a fair trial and the evidence ought to be excluded.

[104] We note the submissions of the respondent in reply on this ground.

[105] Having read the relevant parts of the Record, the judgment and the ruling of the learned Single Judge, we consider it critical for the Court to clearly establish the "use" to which the learned trial judge put Espinosa's evidence, in his determination of the guilt or otherwise of the appellant. In this exercise it is important that the evidence of the other nineteen prosecution witnesses is kept firmly in mind in terms of what evidence they each establish to make up the case leading the trial Judge to make a finding of guilt, and convict the appellant of the charges. The Prosecution Case setting out the evidence of twenty witnesses including Espinosa's evidence is set out in paragraphs [28] to [69] of the judgment. Espinosa's evidence is set out in paragraphs [64] to [69].

[106] The question that should now be asked is: if Espinosa's evidence is excluded totally, would there be sufficient evidence available for the Court to convict the appellant given it was not the appellant's submission, that the exclusion of Espinosa's evidence will leave no other option for the Court but to activate the proviso to section 23(1)(a) of the Court of Appeal Act and acquit the appellant.

[107] Turning to the "Legal Analysis", the Key paragraphs are [166] and [167], as follows:

> *"[166] The evasiveness and contradiction in the evidence of the accused lead me 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.*
>
> *[167] On the contrary I find the prosecution has rebutted the Accused's evidence that he didn't know or believe or had reason to suspect that the house he was staying had an illicit drug. The only use I make of the evidence of the Accused's involvement to the drug offences that his father pleaded guilty to in New Zealand is to rebut his evidence 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."*

[108] In our considered view, there it is open to a Court given the facts and circumstances of this case, to hold that there are sufficient materials in the evidence by the other nineteen prosecution witnesses, and from the evidence of the accused, and the totality of the evidence (excluding Espinosa's evidence) which could reasonably be capable of rebutting the appellants evidence that he didn't know or believe or reason to suspect that the house under his and his father's control at the relevant time had an illicit drug.

(J). CONSTITUTIONAL ISSUES- RIGHT OF ACCUSED

[109] In addressing the appellant's submissions on the constitutional implications of the trial Judge's decision, both in relation to section 32 presumption of possession, and the effects of the trial Judge's admission of Espinosa's evidence on fair trial and other related rights, we refer to the pronouncements on the matter in **Kumar v State** (supra) to selected excepts from the judgment of the full court as follows:

> *"[62] According to section 2(2) of the Constitution subject to its provisions, any law inconsistent with the Constitution is invalid to the extent of the inconsistency. Section 3(1) requires any person interpreting or applying the Constitution to promote the spirit, purpose and objects of it as a whole, and the values that underlie a democratic society based on human dignity, equality and freedom and as per section 3(2), if a law appears to be inconsistent with a provision of the constitution, the Court must adopt a reasonable interpretation of the law that is consistent with its provisions over an interpretation that is inconsistent with the, rights and freedoms under Chapter 2- Bill of Rights may be limited inter alia by limitations which are necessary and are prescribed, permitted by law or provided under a law [vide section 6(5)(c) of the Constitution].Section 7(1) states that in addition to complying with section 3, when interpreting and applying Chapter 2, a court, tribunal or other authority (a) must promote the values that underlie a democratic society based on human dignity, equality and freedom; and (b) may, if relevant, consider international law, applicable to the protection of the rights and freedoms in Chapter 2.Section 7(3) states that a law that limits a right or freedom set out in Chapter 2 is not invalid solely because the law exceeds the limits imposed by Chapter 2 if the law is reasonably capable of a more restricted interpretation that does not exceed those limits, and in that case, the law must be construed in accordance with the more restricted interpretation. According to section 7(5), in considering the application of Chapter 2 to any particular law, a court must interpret Chapter 2 contextually, having regard to the content and consequences of the law, including its impact upon individuals. This is the constitutional framework within which the presumption of innocence under section 14(2) (a) should be considered and interpreted. I am also mindful that the Illicit Drugs Control Act 2004 had been enacted prior to the promulgation of the Constitution of Fiji (2013) and preserved by section 173(1) of the Constitution which states:*

"173-(1) Subject to subsection (2), all written laws in force immediately before the date of commencement of this Constitution (other than the laws referred to in Part C of the Chapter) shall continue in force as if they had been made under or pursuant to this Constitution, and shall be construed with such modifications, adaptations, qualification and exceptions as may be necessary to bring them into conformity with this Constitution,"

……

"[65] Section 6(5) of the constitution of Fiji states that the rights and freedoms set out in Chapter 2 apply according to their tenor and may be limited by-(a) limitations expressly prescribed, authorised or permitted (whether by or under a written law) in relation to a particular right or freedom in this Chapter,(b) limitations prescribed or set out in, or authorised or permitted by, other provisions of this constitution; or (c)limitations which are not expressly set out or authorized (whether by or under a written law in relation to a particular right or freedom in this Chapter, but which are necessary and are prescribed by a law or provided under a law or authorised or permitted by a law or by actions taken under the authority of a law.

……

[67] ……. A provision that a fact shall be taken or deemed, to exist unless there is "proof to the contrary" as in section 32 of the IDCA does cast an onus upon the person disputing the existence of this fact, to disprove its existence (with the applicable standard being the civil one). Reverse burden requires the defendant to prove or disprove certain facts or defence, which would typically be the responsibility of the prosecution. However, the imposition of a reverse burden in criminal law can be seen as a departure from the fundamental principle of the presumption of innocence and is subject to constitutional and human rights consideration.

*[68] Obviously, section 32 of the Illicit Drugs Control Act 2004 operates to limit the right to presumption of innocence but not a complete denial of it, for it imposes a burden on the appellant to rebut only the factual presumption on possession, being the physical element of the offence of possession of illicit drugs, and section 32 does not per se create a presumption of guilt of the offence of possession of illicit drugs under section 5.The fault element needs to be proved by the prosecution beyond reasonable doubt. Thus, section 32 imposes a "reverse burden" on the accused to prove that he was not in possession of the illicit drugs on the balance of probability when the prosecution has proved beyond reasonable doubt that it was an illicit drug, it was on or any premises, craft or vehicle which was under the control of the accused. The presumption phrased in the way similar to section 32 ("until the contrary is proved") have been held to give rise to a legal burden (see **Ex parte Minister of Justice: in re R v Jacobson and Levy** 1931 AD 466) and not an evidential burden. It has also been held that presumptions of facts "unless the contrary is proved" impose a legal burden upon accused persons (see **S v Guess** 1976 (4) SA 715(A) at 719B-C;**S v Radloff** [1978] (4) SA66(A) at 71H).A legal burden would require an accused to demonstrate on a balance of probabilities that he or she was not guilty of possession in order to be acquitted of the offence*

of possession of illicit drugs under section 32 .Even if the accused raises a reasonable doubt as to whether he or she was in possession of the illicit drugs, but fails to show it on a balance of probabilities, he or she must nevertheless be convicted. The effect of imposing the legal burden on the accused may therefore result in a conviction for possession of illicit drugs under section 32 despite the existence of a reasonable doubt as to his or her guilt. An evidential burden on the other hand would require the accused, once the prosecution has proved beyond reasonable doubt that it was an illicit drug, it was on or in any premises, craft or vehicle which was under the control of the accused, to adduce evidence which raises a reasonable doubt whether he or she was in possession of the illicit drug in order to be acquitted of the offence of possession of the illicit drug.

[69] Thus, the reverse burden certainly contains a limitation on the right to be presumed innocent but it is prescribed by law namely section 13 of the Illicit Drugs Control Act 2004.The important question then to be determined is whether the limitation is ***necessary*** *and if so to what extent. If it is necessary, section 32 limitation on presumption of evidence is not per se inconsistent with section 14(2)(a) and not invalid. Is it necessary to the extent of transferring the burden of proof on a balance of probability onto the accused? If the answer is" no", and if section 32 appears to be inconsistent with section 14(2)(a) of the Constitution to some extent, the court must to that extent accord a reasonable interpretation to section 32 that is consistent with the presumption of innocence. In answering the question whether the limitation is necessary in the matter of interpretation of section 32, the court must also promote the values of a democratic society based on human dignity, equality and freedom and in so far as relevant may consider international law applicable to the protection of rights and freedoms……..*

[70]……..Where a statute reverses the burden of proof, requiring the accused to prove an ultimate fact which is necessary to determine his guilt or innocence he is required to satisfy the burden on the balance of probabilities[vide ***HKSAR Gurung Krishna*** *[2010] 4 HKLRD 456 (21 July 2010."*

[110] The above discussion does confirm that the burden placed on the appellant by section 32 of the IDCA is evidentiary and not a legal burden. Also, where a statute reverses the burden requiring the accused to prove an ultimate fact which is necessary to determine his guilt or innocence, he is required to satisfy the burden on the balance of probabilities.

Ground has no merit

(K) PROVISO TO SECTION 23(1)(a) OF COURT OF APPEAL ACT

[111] The application of the proviso to section 23(1)(a) of the Court of Appeal Act was critically analysed in **Aziz v State** (supra) where the Court of Appeal clarified its application as follows:

> *"[55] The approach that should be followed in deciding whether to apply the proviso to section 23(i) of the Court of Appeal Act was explained by the Court of Appeal in **R v Haddy** [1944] 1 KB 442.The decision is authority for the proposition that 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 to one of guilty there is no substantial miscarriage of justice. This decision was based on section 4(1) of the Criminal Appeal Act 1907(UK)which was in the same terms as section 23(1) of the Court of Appeal Act.*
>
> *[57] This will be so notwithstanding that the finding of guilt may have been due in some extent to the faulty direction given by the Judge. In other words, the misdirection may give rise to the conclusion that there has been a miscarriage of justice (ground 4 in section 23(1)) by virtue of the faulty direction but when considering whether to apply the proviso the appeal may be dismissed if the Court considers that there was no miscarriage of justice.*

[112] There appears to be tension between the command to allow an appeal where the court is of the opinion that there was a miscarriage of justice, and the proviso that the court may dismiss the appeal if it considers that no substantial miscarriage of justice has occurred. In **Hofer v The Queen** (supra), the High Court of Australia said that the resolution of it is (as per the decision in **Weiss v The Queen (supra):**

> *"[59] ……. not to be undertaken by attempting to predict what a jury (whether the jury at trial or some hypothetical future jury) would or might do", but on the basis that the appellate court is itself satisfied of the appellant's guilt beyond reasonable doubt. As was explained in the plurality in Kalbasi v Western Australia, in such a case "the appellate court is not predicting the outcome of a hypothetical error-free trial, but is deciding whether, notwithstanding error, guilt was proved to the criminal standard on the admissible evidence at the trial that was had."*

[113] In paragraph [60] of **Hofer,** it is admitted that in some cases the error which has occurred at the trial may be such as to prevent the appellate court from making the assessment and these cases include but are not limited to, cases which turn on issues of contested credibility, cases in which there has been a failure to leave a defence or partial defence for the jury's consideration and cases in which there has been a wrong direction on the elements of liability in issue or on a defence or partial defence. In such cases regardless of the apparent strength of the prosecution case, the appellate court cannot be satisfied the appellant's guilt has been proved. At paragraph [51] in **Hofer,** it is said that even where the appellate court is satisfied of the appellant's guilt

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".*

[114] **Hofer** does not contemplate a scenario where excluding the application of reverse burden on the appellant under section 32 of the Illicit Drugs Control Act to be discharged on a balance of probability, whether it is still possible to conclude beyond reasonable doubt that the appellant was guilty. In this case, there is a significant denial of procedural fairness affecting a fair trial due to an error of law at the trial. It would therefore be proper to allow the appeal, set aside the conviction and order a retrial in terms of section 23(2)(a) of the Court of Appeal Act in the interest of justice.

[115] This decision to order a new trial is taken with guidance of **Laojindamanee v State** [2016] FJCA 137; AAU0044.2013 (30 September 2016) where the Court of Appeal provided guidance relevant to ordering a retrial, as follows:

> *"103] The power to order a retrial is granted by section 23(2) of the Court of Appeal Act. A retrial should only be ordered if the interests of justice so require……the interests of justice are not confined to the interests of either the prosecution or the accused in any particular case. They also include the interests of the public that people who are guilty of serious crimes should be brought to justice. Other relevant considerations are the strength of evidence against an accused, the likelihood of a conviction being obtained on a new trial and any identifiable prejudice to an accused while awaiting a retrial. A retrial should not be ordered to enable the prosecution to make a new case or to fill in any gaps in evidence (Asmatullah v State) unreported Cr App No. AAU0060 of 2006S:14 November 2008."*

(L) RENEWAL GROUNDS

Grounds 8 - 11 and 14

[116] The appellant submits that there was a serious miscarriage of justice in his case and he instructed Counsel to raise these grounds of appeal before the full Court. However, we note and are concerned that the grounds had been fully argued before the learned Single Judge at the leave stage, and in a ruling delivered on 12 February 2024, allowed leave to appeal against conviction only for grounds 18,19,30,31and 33, which means that leave to appeal conviction on grounds 8-11 and 14 were disallowed.

[117] The appellant, did not instruct his Counsel to file a Notice of Renewal of Grounds Against Conviction for these grounds to be considered by the full Court. The grounds have been fully considered and disallowed in the ruling of the Single Judge. The proposed renewal grounds are:

Ground 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.

Ground 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 even though the magistrate or Justice of Peace who authorised the Warrant did not sanction the search at night.

Ground 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 12 February 2019 was lawful since this was an uncharged act.

Ground 11

That the learned 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 Sam Amine; Mr Mangolini and Mr Veisevuraki (paragraphs [35] and [48] of the judgment) and this was an uncharged act.

Ground 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 15 February 2019.

[118] The learned Single Judge stated the following after considering Grounds 8-12, and Grounds 13-15 in his Ruling:

> *"[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, Amine and Veisevuraki had no direct bearing on the cocaine found at his house for which he was subsequently convicted, and the trial Judge was right to so conclude. The appellant had 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."*
>
> *"[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 the learned 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."*

[119] On this point, we consider that section12 (Freedom from unreasonable search and seizure) and section 13 – (Rights of arrested and detained person) are subject to the same interpretation as accorded to section 14 of the Constitution.

(M). CONCLUSION

[120] In view of the foregoing, the appeal against conviction is allowed. In accordance with section 23(2) (a) of the Court of Appeal Act the appellant's conviction is quashed, and in the interests of justice we order a new trial.

[121] Having reached the above conclusion there is no need to deal with the sentence appeals.

Orders of the Court

1. *The appeal against conviction is allowed.*
2. *The appellant's conviction is quashed and sentence is set aside.*
3. *A New Trial is to be held as soon as practicable.*

Hon. Mr. Justice Isikeli Mataitoga
PRESIDENT OF THE COURT OF APPEAL

COURT OF APPEAL FIJI

Hon. Mr. Justice Alipate Qetaki
RESIDENT JUSTICE OF APPEAL

Hon. Madam Justice Karen Clark
JUSTICE OF APPEAL

Solicitors:
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