

**IN THE COURT OF APPEAL, FIJI**  
**APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO. AAU 0071 of 2010**  
**High Court Criminal Action No. HAC 190 of 2008**

**BETWEEN** : **VILIAME GAUNA**

*Appellant*

**AND** : **THE STATE**

*Respondent*

**Coram** : **Chandra RJA**

**Counsel** : **Appellant in person**  
**Mr M Korovou for the Respondent**

**Date of Hearing** : **29 January 2013**

**Date of Ruling** : **4 July 2013**

**RULING**

1. This is an application for leave to appeal against conviction and sentence.
2. The Appellant was charged with another for one count of robbery with violence contrary to section 293(1)(a) of the Penal Code and one count of Damaging Property contrary to section 324(1).
3. The other accused pleaded guilty and he was sentenced on 1<sup>st</sup> February 2010.
4. The Appellant was convicted on 29<sup>th</sup> April 2010 after a High Court trial, and sentenced on the 19<sup>th</sup> of August 2010 to 17 years imprisonment.

5. The Appellant in his application for leave to appeal against conviction filed on 22<sup>nd</sup> September 2010 set out the following grounds:
  - (i) That the learned trial Judge erred in law and in fact in failing to consider as to how immunity was granted to PW3 Vereniki Ravulolo.
  - (ii) That the learned trial Judge erred in law and in fact in allowing the prosecution to tender additional evidence before the commencement of the trial to bring the wife of the virtual complainant to give evidence without considering the objection raised by the Appellant.
6. The Appellant in his application for leave to appeal filed on 8<sup>th</sup> of October 2010 raised the issue that the learned trial Judge failed to pronounce a written judgment and as such the burden of proof was not satisfied due to the fact that it was not clear which evidence he relied on and for what reasons he accepted the evidence and hence the conviction was unsafe and should be quashed on the ground that there is a miscarriage of justice.
7. The Appellant filed further amended grounds of appeal on 9th December 2010 which are as follows:
  - (i) the learned trial judge erred in law and fact for failing to take precaution before accepting the amendment of the charge to have the evidence of the complainant's wife taken and recorded without enquiring from the Police why her statement was not taken during the initial stage of the investigation.
  - (ii) The Appellant was not given reasonable time of this amendment and as such he was disadvantaged by failing to prepare for his defense.
  - (iii) That the learned trial Judge erred in law and fact when he ruled that there were no new materials of surprise from the complainant's wife's statement to jeopardize the Appellant's case and allowed the prosecution to proceed with the amendment, and since

he was not given reasonable notice in writing and the fact that he was not represented his right to a fair trial was contravened.

(iii) that the learned trial Judge failed in his duty as a Judge to be fair and just when he failed to take precaution in analysing the evidence before the Assessors.

8. On 8 March 2011 the Appellant filed further amended grounds of appeal to the effect that the trial Judge erred when he accepted the proposed amendment by the prosecution without issuing a pre-trial order in the light of the objection raised by the Defence and that the learned Judge failed to pronounce a written judgment.
9. Section 214 of the Criminal Procedure Decree of 2009 provides for amendment of the information as the court thinks necessary to meet the circumstances of the case. The Appellant had been informed of the proposed amendment to add the witness who was an eye witness to the incident. She was the wife of the complainant who had since died. Section 228(1) of the Criminal procedure Decree 2009 provides for the calling of a witness who had not been included in the briefs of evidence provided by the prosecution to the defence before the trial unless the accused person had been given reasonable notice in writing of the intention to call the witness. The Appellant had been given reasonable notice and that there was no element of surprise in allowing the amendment and the learned trial Judge had given a considered ruling regarding same. Therefore I do not see any merit in that ground adduced by the Appellant.
10. On the issue of a pre-trial order, relating to the amendment of the information, as stated in the above paragraph the learned trial Judge having considered the objection taken by the defence, gave a written ruling in allowing the witness to be called on behalf of the prosecution. In the course of his ruling the learned Judge stated that considering the time duration given to the accused, that he was convinced that a reasonable time had been

given to prepare his defence. In view of this position the ground regarding pre-trial order fails.

11. The Appellant urged as a ground that the learned trial Judge had not inquired as to how immunity was granted to witness (PW3) Veriniki Ravulolo. The issue of granting immunity to the said witness was not before Court and the evidence of the said witness was led by the prosecution and the Appellant had cross examined him regarding his statement to the Police and the evidence that he gave in Court implicating the Appellant. The learned trial Judge in his summing up to the Assessors dealt with the evidence of this witness and gave the necessary warning to the Assessors when they were to consider the evidence of such a witness. Therefore I see no merit in this ground adduced by the Appellant.
12. The Appellant has also urged the ground that the learned trial Judge failed in his duty to be fair and just when he failed to take precaution in analyzing the evidence before the Assessors. A perusal of the summing up of the learned trial Judge to the Assessors shows that he had dealt with the evidence led in the case in detail and given the necessary warning as regards the evidence of witness Veriniki Ravulolo, who was considered as an accomplice. The learned trial Judge having dealt with the evidence left it to the Assessors to arrive at their conclusion regarding same. I see no merit in this ground urged by the Appellant.
13. The other ground urged by the Appellant is that the learned trial Judge failed to pronounce a written judgment. In proceedings before a High Court, after the Assessors have returned their verdict, the judge would pronounce his judgment. Section 237 of the Criminal Procedure Decree 2009 deals with the pronouncement of the judgment.

S.237(1) – When the case for the prosecution and the defence is closed, the judge shall sum up and shall then require each of the assessors to state their opinion orally, and shall record each opinion.

(2) The judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors.

(3) Notwithstanding the provisions of section 142(1) and subject to sub-section (2), where the judge's summing up of the evidence under the provisions of subsection(1) is on record, it shall not be necessary for any judgment (other than the decision of the court which shall be written down) to be given, or for any such judgment (if given) –

(a) to be written down; or

(b) to follow any of the procedure laid down in section 141; or

(c) to contain or include any of the matters prescribed by section 142.

(4) When the judge does not agree with the majority opinion of the assessors, the judge shall give reasons for differing with the majority opinion, which shall be-

(a) written down, and

(b) pronounced in open court.

(5) In every such case the judge's summing up and the decision of the court together with (where appropriate) the judge's reasons for differing with the majority opinion of the assessors, shall collectively be deemed to be the judgment of the court for all purposes.

(6) If the accused person is convicted, the judge shall proceed to pass sentence according to law.

(7) Nothing in this section shall be read as prohibiting the assessors, or any of them, from

(a) retiring to consider their opinions if they wish; or

- (b) from consultation with one another during any retirement or at any time during the trial.

It would follow from the above provisions that if the Judge agrees with the opinion of the Assessors in terms of section 237(3) there is no need for the judgment to be written down as required by section 141 and 142 of the Criminal procedure Decree which deal with a judgment that has to be given by a Magistrate in proceedings in the Magistrate's Court. Further, in terms of section 237(5) the judge's summing up and the decision of the court is collectively deemed to be the judgment of the court.

14. In the present case the learned trial Judge after his summing up and the verdict of the Assessors read out his judgment from his notes which are in the record of the High Court copies of which were not given to the prosecution and the Appellant. There was due compliance with the provisions of section 237 even though copies of the judgment were not handed down to the parties. Therefore this ground urged by the Appellant lacks merit.
15. The grounds urged by the Appellant are without merit and therefore his application for leave to appeal is refused.

### **Order of Court**

Application for leave to appeal against conviction is refused.

Suresh Chandra  
**Resident Justice of Appeal**