

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

CRIMINAL APPEAL NO. AAU 077 of 2018
[High Court Criminal Case No. HAC 172 of 2015]

BETWEEN : **TUI LESI BULA**

Appellant

AND : **THE STATE**

Respondent

Coram : Prematilaka, JA

Counsel : Appellant in Person
: Mr. S. Babitu for the Respondent

Date of Hearing : 18 March 2020

Date of Ruling : 20 April 2020

RULING

- [1] The appellant had been charged together with the two appellants in AAU 0084 of 2018 and AAU 086 of 2018 and another in the High Court of Lautoka for having committed aggravated robbery contrary to section 311(1)(a) of the Crimes Act. The charge was as follows.

FIRST COUNT

Statement of Offence

AGGRAVATED ROBBERY: Contrary to section 311 (1) (a) of the Crimes Act, 2009.

Particulars of Offence

KELEPI SALAUCA, VERETI WAQA & TUI LESI BULA in the company of another on the 11th October, 2015 at Sigatoka in the Western Division

robbed **KAVTTESH KIRIT PRASAD** of the following items: Nissan Navara (Registration HA 448) valued at \$60,000.00, \$300.00 cash, Assorted cards namely Westpac, Westpac Debit Card, Australian Master Card, Australian Drivers Licence, Joint FNPF/FIRCA, Black SFIDA pair of canvas, Gym Gloves, White iPod, Nokia Lumia Phone, Euphoria Calvin Klein Perfume, Encounter Fresh Calvin Klein perfume, Mangal Sutra valued at \$10, 000.00, Bangles valued at \$6,000.00, Hair set valued at \$9,000.00, Bracelet valued at \$2,000.00, Ear ring valued at \$3,000.00, Bedstone Necklace valued at \$900.00, Wedding Ring (Female) valued at \$2,000.00, Wedding Ring (Male) valued at \$1,200.00, Gold Chain (22 carat) valued at \$1,200.00, Wrist Watch (Fossil-Citizen) valued at \$800.00, Ladies Watch (Pulsar) valued at \$300.00, Black Label (x 15 bottles) valued at \$1,350.00, Bombay Sapphire (x 5 bottles) valued at \$400.00, Galaxy Samsung S5(x2) valued at \$2,400.00, ITB Hardware (x2) valued at \$1,000.00, 1 Flash Drive valued at \$500.00, 1 Toshiba laptop valued at \$1,800.00 and assorted branded BLK Clothing valued at \$80.00 all to the **Total Value of Approximately \$93, 930.00.**

- [2] After full trial, the assessors had expressed a unanimous opinion that all the accused were guilty of the single count of aggravated robbery. The Learned High Court Judge had agreed with the unanimous opinion of the assessors and convicted the appellant of the same count on 15 June 2018 and sentenced him on 10 July 2018. He was sentenced to 12 years 02 months and 21 days imprisonment with a non-parole period of 11 years.

- [3] At the first call over of AAU 086 of 2018 a judge of the Court had directed that all three appeals including those of the other two appellants in AAU 0084 of 2018 and AAU 086 of 2018 be taken up together and similar orders had been made in those appeals as well. Therefore, all three appeals were taken for leave to appeal hearing together as they arise from one and the same High Court trial.

- [4] The appellant had filed a timely appeal containing 06 grounds on 24 July 2018 against conviction only. Additional grounds of appeal against conviction (07) had been tendered by the appellant on 23 July 2019. The appellant had tendered written submissions on 11 grounds of appeal against conviction on 28 August 2019. The State had tendered its written submissions on 27 January 2019.

- [5] The facts are briefly as follows. On 11 October, 2015 the complainant and his wife (husband and wife) were asleep in their house at Malaqereqere, Sigatoka. At about 2.00 a.m. they were awoken by the sound of someone breaking into their bedroom. Three persons of iTaukei origin in the company of each other and another had broken into the house of the victims. The victims were asked to cooperate so that no one was harmed, blankets were thrown over them, curtains drawn and the lights in the house turned on. The victims were questioned regarding the whereabouts of their valuables in the house. The pregnant wife of the complainant was grabbed by her hair and dragged from one room to the other so that she could show them where the valuables were. The house was searched for about an hour and the intruders fled from the scene having stolen the following properties belonging to the victims namely Nissan Navara vehicle (registration no. HA 448), mobile phone, assorted jewellery, assorted liquor, wallet with cash of \$300.00, credit cards, perfumes, laptops, BLK clothes, shoes, black and white SFIDA canvas, watches etc. all to the value of about \$93,000.00. Upon police investigation the accused were found to be in possession of most of the items stolen from the complainants. They were arrested and charged.
- [6] The Court of Appeal has rightly raised the bar in timely leave to appeal applications by applying the test of ‘**reasonable prospect of success**’ to determine whether leave to appeal should be granted (see Caucan v State AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, Navuki v State AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and State v Vakarau AAU0052 of 2017:4 October 2018 [2018] FJCA 173 and Sadrugu v The State Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87.

Grounds of Appeal

[7]

Ground 1

That the learned Trial Judge erred in law and in fact in not analyzing the facts before him before he made a decision that the Appellant was guilty as charged on the charge of Aggravated Robbery. Such error of the learned trial judge in law by failing to make an independent assessment of the evidence before affirming a verdict which was unsafe, unsatisfactory and unsupported by evidence has given rise to a grave miscarriage of justice.

Ground 2

The learned Trial Judge seriously erred in law when he stated in paragraph 184 of the summing up in regard to the alibi in the defence case. Alibi put forward by the appellant.

Ground 3

That the summing up was unfairly put to the assessors, the summing up is unusual, the transcript running some 40 typed written pages exceeding 215 paragraphs and is not clear and intelligible, it is confusing and fails to clearly identify the issues that the assessors have to decide within a 30 minutes break resulting in the appellant's conviction caused a substantial miscarriage of justice.

Ground 4

That the learned Trial Judge erred in law and in fact when he unfairly summed up as follows:

That the learned trial judge failed by not properly and adequately give a warning and caution to the assessors as to the reliability of the evidence given by the State witnesses and in particular on the fact that there was no eye witnesses who saw any of the accused persons at the scene of the crime or actually committing the robbery. Failure to do so caused a substantial miscarriage of equality to justice.

Ground 5

That the learned Trial Judge failed to sum up to the assessors on the Turnbull special guidance as articulated in the R v Turnbull (1977) QB 224 (1976) 3 WLR 445 (1977) 65 or App 242 in support to his summing up in paragraph 20, on the correctness of the circumstances on the case in which the identification by each witness came to be made towards the appellant. Failure to direct the assessors of the Turnbull guidelines, as implicated in this case the conviction quash.

Ground 6

That the learned trial Judge erred in law and in fact when he unfairly summed up as follows:

Unfairly stated at paragraph 189 of the summing up that the stolen items belonging to the complainant were recovered from three accused persons when the evidence crystal clearly shows such few items were not the properties named in the charge particulars that all the accused have no knowledge to the bags contained the two phones and the stolen items

prescribed in the count as charged. Therefore there was a grave miscarriage of justice.

Ground 7

That the learned trial Judge failed to direct the assessors and himself regarding the effect or conscious of omission. What his Lordship direction was only in consistent evidence, he failed to direct the assessors and himself on contradiction and omission [Please view Nadim v. State; [2015] FJCA 130, AAU 0080,2011 (2 October 2015)]

Ground 8

Incorrectly stated in paragraph 193, line 6-8 and mislead the assessors that the contents of the two bags were checked by police the items found in both the bags were identified by the complainant as stolen from his house when these items are not included as the stolen properties implicated in this crime when connote to the charges particulars.

Ground 9

The learned trial judge has erred in law and in fact in not directing and/or adequately directing the assessors and himself on the inconsistent statement of prosecution witness Manoa Dugulele. The learned Judge ought to have directed the assessors and himself that when a witness is shown to have made previous statements at trial, he ought to have directed the assessors that the evidence given at the trial should be regarded as unreliable. The failure to do so caused a substantial miscarriage of justice (full particulars will be given after recap of court record).

Ground 10

The learned trial judge has erred in law when he misdirected himself in his judgment where he stated at paragraph 31 "That the defence failed to create reasonable doubt" thus shifting the burden and onus of proof. This so called misdirection was capable of affecting the trial judges judgment in properly assessing the defence case.

Ground 11

The learned trial judge has erred in law and in fact in not directing himself and or the assessors to refer to n the summing up the possible defence on evidence and as such by his failure there has occurred a substantial miscarriage of justice.

Grounds of appeal 1-3

- [8] The appellant has made submissions on grounds 1-3 together. His first complaint is regarding the alleged failure of the learned trial judge to independently assess the evidence against him. However, on a perusal of the summing-up it is clear that the trial judge had summarised all the evidence led against the appellant from paragraphs 38-132 and thereafter directed his attention to the same in the judgement dated 15 June 2018 in paragraphs 15 and 16. They are as follows.

'15. When the Police Officers searched the boat in which all the three accused persons were they found two Canterbury bags. These two bags were in the possession of the second and the third accused when they were at the Nabukadra Village on 11 October, 2015. According to Etiwini Sivo (PW7) the blue bag was in the possession of the second accused and the black bag was in the possession of the third accused. After the contents of the two bags were checked by police the items found in both the bags were identified by the complainant as stolen from his house.

16. The third accused Tui Lesi Bula was seen by Etiwini Sivo (PW7) to be carrying a black Canterbury bag at Nabukadra Village after the boat he was in got intercepted by the police. The accused had left the boat and gone into the nearby bush leaving the bag behind. This accused was arrested from the house of Manoa Dugulele in the evening of 11 October. Manoa was able to identify the third accused as the person he had met earlier in the day and who came to his house in the evening of 11 October, 2015 before been arrested by the police.'

- [9] The two Canterbury bags had been marked as exhibit 13 and the search list relating to recoveries from the boat as exhibit 7. The two bags and some items found inside them were not part of the items listed in the information and the trial judge had carefully directed the assessors in paragraph 112 of the summing-up on this matter to ensure that no prejudice would be caused to the appellant. The rest of the items recovered from inside the two bags had been identified by the complainant (PW1) as robbed from his house. In the circumstances there was evidence to support the verdict against the appellant. The verdict being 'unsatisfactory' and/or 'unsafe' is not the criteria applied in Fiji under section 23 (1) of the Court of Appeal Act (see Sahib v State AAU0018u of 87s; 27 November 1992 [1992] FJCA 24 also).

- [10] The appellant also complains that the learned trial judge had erred in law in his directions on the *alibi* but not elaborated how and where the summing-up is lacking in required directions in relation to his defense of *alibi*. The learned judge had from paragraph 175-183, 197 and 198 had dealt with the appellant's defense and directed the assessors as to how they should evaluate the defense of *alibi* from paragraphs 184 - 186, 204 and 209. In the judgment, the learned judge had stated that he did not believe the version of the accused and found no motive for the prosecution witnesses to falsely implicate them. He specifically had commented on their demeanor as follows and agreed with the assessors.

"26. Both the accused persons were not forthright in their evidence from their demeanour it was obvious that they did not tell the truth in court. It was noted in cross examination that they very cautious in choosing their words and were not forthright in answering the questions asked they were obviously not telling the truth.

31. I reject the evidence of both the accused persons and their witnesses as unreliable and untruthful. The defence has not been able to create any doubt in the prosecution case."

- [11] The appellant also challenges the summing-up on the basis that it contains more than 40 typed written pages and 215 paragraphs, and is not intelligible, confusing and fails to clearly identify the issues that the assessors had to decide. The appellant cites **Armogam v State** [2003] FJCA 32; AAU0032 of 2002(30 May 2003) in support of his argument where the three appellants were charged with two offences. The first was that with intent to do some grievous harm to the complainant the appellants unlawfully wounded him. The second was that on the same day they committed the same offence against another the complainant. The Court of Appeal remarked

'The summing up occupies 64 pages in the case on appeal. For a relatively straightforward case, it is inordinately long. The principal reason for this is that in the summing up, the judge repeated almost verbatim the evidence in chief, cross-examination and re-examination of each witness. Not only is this unnecessary, but the tediousness of this process detracts from the force of the directions on matters of law, and makes it more difficult for the assessors to identify and decide the crucial factual issues. As Lord Hailsham LC said in R v Lawrence [1982] AC 510, 519:

"A direction is seldom improved and may be considerably damaged by copious recitations from the total content of a Judge's note book."

What the Judge should do when dealing with factual matters is to identify the crucial factual issues that the jury will need to determine, refer only to those passages in the evidence that bear directly on those issues, and put clearly the case for the prosecution and the case for the defence on each.
In Lawrence Lord Hailsham put it this way:

"...it must include references to the burden of proof and the respective roles of jury and judge. But it should also include a succinct but accurate summary of the issues of fact as to which a decision is required, a correct but concise summary of the evidence and arguments on both sides, and a correct statement of the inferences which the jury are entitled to draw from their particular conclusions about the primary facts."

Unsatisfactory though the summing up is, we do not consider that its defects amount to a misdirection.'

- [12] The decision in *Armogam* has no application to the current case where the charge was one of aggravated robbery and the case against the appellant was based on recent possession and circumstantial evidence. 15 witnesses had been summoned by the prosecution with 13 exhibits being marked and two of the accused had given evidence and called two witnesses. The learned trial judge had given a balanced and an objective summing-up giving equal coverage to the prosecution as well as the defence case and explained all relevant legal principles. He himself has written a 07 page judgment agreeing with assessors. Judge's directions to the assessors were clear and intelligible and not confusing at all as alleged by the appellant. In fact in paragraph 37 the trial said as follows:

'I will now remind you of the prosecution and defence cases. In doing so it would not be practical of me to go through all the evidence of every witness in detail. Although it was a fairly long trial still I hope things are fresh in your minds. I will refresh your memory and summarize the important features. If I do not mention a particular piece of evidence that does not mean it is unimportant. You should consider and evaluate all the evidence in coming to your opinion in this case.'

- [13] Therefore, grounds of appeal 1-3 have no reasonable prospect of success.

Grounds of appeal 04 and 05

- [14] The appellant had made submission on grounds of appeal 4 and 5 together. He complains that the learned trial judge's failure to warn and caution the assessors of the prosecution witnesses and of the fact that the appellant had not been seen at the scene of the crime committing the robbery had resulted in a miscarriage of justice. It is precisely because the appellants had not been identified by the complainants at the crime scene that the prosecution relied on evidence of recent possession and other circumstantial evidence.
- [15] The trial judge addressed the assessors in paragraph 20 of the summing-up exactly on the above scenario. In addition to the burden of proof the trial judge had addressed them in paragraphs 199 - 201 of the summing-up on the credibility of all witnesses. Thus, it is clear that the appellant's above criticisms have no basis.

20. What is in dispute is whether each of the three accused persons was involved in the robbery. There are no eye witnesses who saw any of the accused persons at the scene of the crime or actually committing the robbery. The prosecution relies on the principle of recent possession and circumstantial evidence to prove that the accused persons in the company of each other had committed the offence.'

'199. You have seen the witnesses giving evidence keep in mind that some witnesses react differently when giving evidence.

200. Which version you are going to accept whether it is the prosecution version or the defence version is a matter for you. You must decide which witnesses are reliable and which are not. You observed all the witnesses giving evidence in court. You decide which witnesses were forthright and truthful and which were not. Which witnesses were straight forward? You may use your common sense when deciding on the facts. Assess the evidence of all the witnesses and their demeanour in arriving at your opinions.

201. In deciding the credibility of the witnesses and the reliability of their evidence it is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and is correctly recalling the facts about which he or she has testified. You can accept part of a witness's evidence 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 not be accurate in another.

202. You will have to evaluate all the evidence and apply the law as I explained it to you when you consider the charge against the accused persons have been proven beyond reasonable doubt. In evaluating evidence, you should see whether the evidence is probable or improbable, whether the witness is consistent in his or her own evidence or with his or her previous statement or with other witnesses who gave evidence. It does not matter whether the evidence was called for the prosecution or the defence. You must apply the same test and standards in applying that.

- [16] Under appeal ground 5 the appellant argues that there should have been directions on Turnbull guidelines. He makes this criticism in relation to the evidence of the complainant. However, it is very clear that the complainant was unequivocal that he had not seen or met the appellant before. The other witnesses namely PW5, PW7, and PW9 who have spoken to the presence of the appellant at different times at different places after the robbery had ample time to register his presence in their minds. PW9 and the appellant were known to each other. Turnbull guidelines were not required in the face of the evidence the prosecution led in this case and the identity of the appellant was not in issue. Grounds of appeal 4 and 5 have no reasonable prospect of success.

Grounds of appeal 06 - 11

- [17] The appellant has made submission on the remaining grounds (6-11) together. His criticisms are levelled at paragraph 189 and 193 of the summing-up under appeal ground 6 and 8 and the trial judge said there as follows.

'189. The stolen car of the complainant was found abandoned in the interior of Rakiraki and also some of the stolen items belonging to the complainant were recovered from the three accused persons.'

'193. When the Police Officers searched the boat in which all the three accused persons were they found two Canterbury bags. These two bags were in the possession of the second and the third accused when they were at the Nabukadra Village on 11 October, 2015. According to Etuwini Sivo (PW7) the blue bag was in the possession of the second accused and the black bag was in the possession of the third accused. After the contents of the two bags were checked by police the items found in both the bags were identified by the complainant as stolen from his house.'

[18] The appellant's position is that paragraph 189 may have given an impression to the assessors that they were still in the car when some of the stolen items were recovered from them. A summing-up should be read and understood as a whole and cannot be compartmentalised. Further, the assessors had heard the evidence themselves during the trial. When one considers the manner in which the learned trial judge had carefully dealt with all the evidence of each and every prosecution witness in summary, it becomes clear that there is no such danger at all as suspected by the appellant arising from paragraph 189 and there would have been no doubt in the minds of the assessors that finding the abandoned car and recovery of some stolen items from the appellants were two distinct events.

[19] It is true that not all items in the two bags carried by the appellant and his co-appellant Vereti Waqa were identified by the complainant as robbed from his house. The learned trial judge had been mindful of it and taken care to direct the assessors accordingly in paragraphs 110, 111 and 112 of the summing-up as follows to address the type of concern expressed by the appellant.

'110. The others ran away, the witness was able to seize two bags from the boat one was black and the other blue. The witness was able to open the bags and see the contents of both bags. A search list was prepared by the witness dated 11 October, 2015. The search list was marked and tendered as prosecution exhibit no. 7. The witness was able to recognise those items mentioned in the search list in court.

Madam and Gentlemen Assessors

'111. There are some items mentioned in the search list which the witness had recovered from the bags that are not part of the information before you namely one Nokia touch screen and Alcatel phone which were marked as prosecution exhibits no. 8 and 9 including the two Canterbury bags which were tendered as prosecution exhibit no. 13.

'112. You will have to approach this aspect of the evidence with caution. The prosecution witnesses Police Officers Eremasi Vuli and Misidomo Baseisei did not suggest these items were stolen they only told the court what they had recovered as part of their search. You are not to draw any adverse inference against any of the accused persons in respect of these items. The information has not mentioned anything about the theft of the two phones and the two bags similarly the prosecution is not making any allegation that these items were stolen. This also applies to the Samsung S3 phone mentioned in the search list which is not part of the information as well and there is no allegation by the prosecution that it was stolen from the complainant.'

- [20] Considering the appellant's argument that the learned trial judge had not adequately addressed the assessors on contradiction and omissions as stated in the ground of appeal 07, I find that the directions in paragraph 101-103 regarding some inconsistencies in the evidence of PW8 is sufficient on the facts of this case. Contradictions, omissions and inconsistencies have to be considered and treated more or less in the same manner. All of them go to the credibility of a witness. The trial judge said

101. In this trial you have seen and heard in cross examination of the prosecution witnesses the accused persons were cross examining the witnesses about some inconsistencies in the statement they gave to the police immediately after the incident when facts were fresh in their mind with their evidence in court. I will now explain to you the purpose of considering the previously made statement of the witnesses with their evidence given in court. You are allowed to take into consideration the inconsistencies in such a statement when you consider whether the witnesses are believable and credible as a witness. However, the police statement itself is not evidence of the truth of its contents.

102. It is obvious that passage of time can affect one's accuracy of memory. Hence you might not expect every detail to be the same from one account to the next.

103. If there is any inconsistency, it is necessary to decide firstly whether it is significant and whether it affects adversely the reliability and credibility of the issue that you're considering. If it is significant, you will need to then consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, you may then conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for you to decide as to what extent that influences your judgment of the reliability of the witness.

- [21] The appellant had cross-examined PW5 and confronted the witness with his police statement. The trial judge had specifically referred to that fact in paragraph 70-73 of the summing-up. There was no reason or need to direct the assessors that PW5's evidence should be regarded as unreliable as contemplated by the appellant under appeal ground 09. The appellant had also cross-examined PW7 who had signed the search list - exhibit 7- in respect of the recovery of two bags from the boat and the witness had admitted that he did not know the contents of the bags. It is PW9 who seized the bags and recovered the items listed under exhibit 7. Therefore, there has been no obstacle for the appellant to cross-examine PW9 either on exhibit 7,

[22] The appellant also finds fault with the learned trial judge's statement in paragraph 31 of the judgment under appeal ground 10 which is as follows:

'I reject the evidence of both the accused persons and their witnesses as unreliable and untruthful. The defence have not been able to create any doubt in the prosecution case.'

[23] It cannot be said that by the aforementioned statement that the defence has not been able to create any doubt in the prosecution case, the trial judge had shifted the burden of proof to the appellant. The judge has eloquently put the burden of proof in its correct perspective in paragraphs 8, 35, 204, 206 and 209 of the summing-up.

[24] The appellant's final contention under appeal ground 11 is that the learned trial judge has not placed before the assessors all possible defences arising on evidence and not adequately analysed the defence case. I disagree. The only defence that arose in evidence was the *alibi* taken by the appellant. The trial judge had dealt with it fully in paragraphs 175-187 and 197 & 198 of the summing-up. Grounds of appeal 6-11 have no reasonable prospect of success.


[25] Therefore, I hold that none of the grounds urged by the appellant has a reasonable prospect of success and leave should be refused.

[26] Accordingly, leave to appeal is refused.

Order

1. Leave to appeal against conviction is refused.




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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL