IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU 68 and 69 OF 2015
(High Court Civil Action No. HAC 147 of 2013)

BETWEEN	:	**TEVITA GONEVOU** **JOELI SOAQALI** **PETERO TUIVAKALEA**

Appellants

AND	:	**THE STATE**

Respondent

Coram	:	**Calanchini P**
Counsel	:	**Ms S Vaniqi for the Appellant Gonevou** **Mr S Waqainabete for the Appellants Soaqali and Tuivakalea** **Mr L Burney for the Respondent**
Date of Hearing	:	**11 July 2018**
Date of Ruling	:	**28 September 2018**

RULING

[1] Following a trial in the High Court at Suva the appellants were convicted on one count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act 2009. On 29 May 2015 the appellant Gonevou was sentenced to 12 years imprisonment with a non-parole

term of ten years. The appellants Soaqali was sentenced to 9 years 10 months imprisonment with a non-parole term of 8 years. The appellant Tuivakalea was sentenced to 8 years 10 months imprisonment with a non-parole term of 7 years.

[2] The three appellants filed timely notices of appeal against conviction and sentence. However on 2 May 2018 each appellant signed an application seeking to abandon their appeals against sentence. This is their applications for leave to appeal against conviction pursuant to section 21(1)(b) of the Court of Appeal Act 1949 (the Act). Section 35(1) of the Act gives a single judge of the Court power to grant leave. The test for granting leave to appeal against conviction is whether the appeal is arguable: **Naisua –v- The State** [2013] FJSC 14 CAV 10 of 2013, 20 November 2013).

Leave application by Gonevou

[3] The grounds of appeal against conviction relied upon by the Appellant Gonevou are as follows:

> *"1. **THAT** the Learned Judge erred in law and fact when he failed to direct the assessors in regards to the inherent weaknesses of the prosecution case.*
>
> *2. **THAT** the Learned Judge erred in law and fact when he at para 13 of the Summing Up directed the assessors*
>
> > *"If the Accused assisted each other in the planning and execution of the robbery on 2 April 2013, they are all liable for the offence. It's immaterial whether or not one performed a small or major task in committing the crime, they are all liable together."*
>
> *in that the defence case was that the prosecution needed to prove the element "offensive weapon" against the Appellant specifically, especially as there was no evidence to suggest that part of the plan to rob was using an offensive weapon. As such, a key element of the charge was not established against the Appellant resulting in a misdirection and miscarriage of justice.*
>
> *3. **THAT** the Learned Judge erred in law and fact when he at para 19 of the Summing Up failed to highlight the fact that the Appellant produced photo exhibits to establish he was assaulted by the police prior to his giving the caution interview, and also failed to sum up the cross*

examination of police witnesses showing they were not credible witnesses who colluded before and after testifying in court, such an error resulting in a miscarriage of justice against the Appellant.

4. ***THAT*** *the Learned Judge erred in law and fact when he at para 32 of the Summing Up failed to highlight the inconsistencies from the State witnesses when they had been cross examined. Neither did the Learned Trial Judge highlight that the police witnesses had admitted to colluding outside of court before and after giving their evidence, and therefore should have directed the assessors as to the proper weight and credibility to be given to the States witnesses. In failing to do so, there was a miscarriage of justice against the Appellant."*

[4] So far as ground one is concerned, it is not sufficiently particularized to enable the Court to determine whether there is an arguable issue for the consideration of the Court of Appeal. In so far as the appellant's submissions specify certain matters in paragraph 8, those matters have been adequately covered by the trial judge in paragraph 1 of his summing up. This ground is not arguable.

[5] Ground 2 alleges that the Respondent failed to prove beyond reasonable doubt an element of the offence of aggravated robbery against the appellant Gonevou. In particular it is submitted that there was no evidence relating to the element of "*offensive weapon*." It would appear that this ground is misconceived. In his sentencing decision the learned Judge stated that the appellants were charged under section 311(1)(a) of the Crimes Act 2009. Section 311 (1)(a) creates the offences of aggravated robbery in the form of robbery in company. The particulars of the offence list the three appellants as being in the company of each other. There was no requirement to establish the presence of an offensive weapon. The presence of an offensive weapon in a robbery is aggravated robbery under section 311(1)(b) of the Crimes Act. This ground is not arguable.

[6] It is necessary to indicate that the particulars of the offence as reproduced by the judge in his sentencing decision appear to allege stealing in company rather than robbery in company. The issue appears not to have been raised at any stage of the proceedings in

either the trial court nor in this Court. Stealing in company does not by itself constitute robbery in company.

[7] Ground 3 raises an issue concerning the directions given by the learned Judge to the assessors in relation to the admissions made by the appellant in his caution interview. The ground is not concerned with the admission into evidence of the caution interview. The ground relates to the evidence at the trial and whether the directions were sufficient for the assessors and the Judge to determine truthfulness, weight and voluntariness. At this point it must be recalled that the trial was by way of judge sitting with and assisted by three assessors. The judge is ultimately both the trier of fact and law since he is under no obligation to accept the unanimous or majority opinions of the assessors. In paragraph 7 of his judgment the learned Judge has considered the factual issues of truthfulness, weight and voluntariness in detail. He has considered the evidence to which the appellant refers in the submissions. In my view this ground is not arguable.

[8] Ground 4 relates to the omission by the trial Judge to direct the assessors on certain aspects of the evidence adduced by the Respondent against this appellant. In my opinion the Respondent relied essentially on the admissions made in the caution statement to establish the guilt of the appellant. When the trial Judge, for the reasons stated, accepted that the confession was made voluntarily and was true then whatever may have been the inconsistencies alleged by the appellant, he was satisfied that the evidence was sufficient to establish guilt beyond reasonable doubt. Leave is refused on this ground.

[9] For the reasons stated leave to appeal against conviction is refused.

Leave application by Soaqali

[10] The grounds of appeal against conviction relied upon by the appellant Soaqali are as follows:

> *"1. The learned Judge erred in law when he failed to give directions to the assessors in his summing up to first consider whether or not the*

confession was truly made by the appellant before considering whether the confession was made voluntarily or not and its truth.

2. *The learned Judge erred in law when he did not give directions to the assessors as to the weight they could attach to the confession depending on whether or not they accept the confession in the record of interview which was admitted.*

3. *The learned Judge erred in law when he failed to give a special warning to the assessors in the summing up about the unreliability of the dock identification without laying prior foundation through a photo identification or the identification parade unless with your appellant's objection.*

4. *The learned trial Judge did not properly consider the evidence of the appellant alleging that he was subjected to oppressive circumstances that made them agree to the allegation put to him in his record of interview."*

[11] In relation to ground 1 the appellant Soaqali claims that the directions to the assessors on how to assess the admissions in the caution interview were inadequate. However when the summing up at paragraphs 38 and 39 is read with paragraph 6 of the judgment the learned trial judge has considered both the issues of voluntariness and truthfulness when he agreed with the opinions of the assessors and convicted this appellant. This ground is not arguable.

[12] Ground 2 also relates to the directions in the summing up on the issue of the admissions made in the caution interview. In paragraph 6 of his judgment the learned Judge clearly sets out his reasons for agreeing with the unanimous opinions of the assessors. This ground is not arguable.

[13] Ground 3 relates to the issue of dock identification. In his summing up the learned Judge has directed the assessors and himself as to the inherent weakness of dock identification. However it is not the dock identification upon which the prosecution relied to establish its case. The admissions in the caution interview were the basis of the prosecution case. The judge has assessed and accepted the admissions and the dock identification evidence in paragraph 6 of his judgment. In my judgment in this case the ground is not arguable.

[14] Ground 4 again raises an issue concerning the evidence at the trial relating to voluntariness of the admissions. This ground has been considered earlier and is not arguable.

Leave application by Tuivakalea

[15] The grounds of appeal against conviction upon which the appellant Tuivakalea relies are as follows:

> *"**GROUND 1** – THE learned Trial Judge erred in law and in fact when he did not properly direct the assessors to first consider whether the confessions when implicate the Appellant were made by him before considering the weight to be given.*
>
> ***GROUND 2** – THAT the learned Trial Judge erred in law and in fact when he did not adequately direct the assessors to on the issue of weight which they could attach to the confessions.*
>
> ***GROUND 3** – THE learned Trial Judge erred in law and in fact when he failed to properly consider the circumstances of oppression that the Appellant was subjected to before and during his record of interview before finding the interview admissible.*
>
> ***GROUND 4** – THE learned Trial Judge erred in law and in fact when he failed to properly direct himself and the assessors on the dangers of relying on dock identification especially in the absence of prior identification.*
>
> ***GROUND 5** – THAT the learned Trial Judge erred in law and in fact when failed to adequately direct the assessors on the law of recent possession."*

[16] Grounds 1 – 3 are concerned with the directions given by the trial judge to the assessors and himself on the admissions made by the appellant in his caution interview. There are sufficient observations made by the judge in the course of his summing up to indicate that voluntariness and truthfulness must both be assessed by the trier of fact. Although the same directions have not been repeated for each appellant it is clear that the issues to be considered in relation to each caution interview included voluntariness and truthfulness. In his judgment the learned judge has stated clearly why he accepted the admissions as

being voluntary. His directions indicate that he has considered truthfulness. These 3 grounds are not arguable.

[17] Ground 4 relates to the issue of dock identification. The learned judge allowed dock identification and directed the assessors and himself as to the inherent weakness of such evidence. However the prosecution relied upon the admissions made by the appellant as the basis for its case. The learned judge has considered both issues in his judgment and explained why he has accepted the evidence. The ground in this case is not arguable.

[18] Ground 5 relates to recent possessions. This was not an issue upon which any significant reliance was placed by the Respondent. Counsel did not seek any additional directions for the trial judge on this issue. The ground is not arguable.

[19] For all of the above reasons the application for leave to appeal against conviction by each appellant is refused.

<u>Orders</u>:

1. *Application for leave to appeal against conviction by the first appellant is refused.*

2. *Application for leave to appeal against conviction by the second appellant is refused.*

3. *Application for leave to appeal against conviction by the third appellant is refused.*

4. *Each application to abandon the appeal against sentence is to be listed for hearing before the Court of Appeal on a date to be fixed.*

Hon Mr Justice W.D. Calanchini
PRESIDENT, COURT OF APPEAL