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

CRIMINAL APPEAL NO.AAU 151 of 2020
[In the High Court at Suva Case No. HAC 331 of 2018]

BETWEEN	:	**ASESELA NAUREURE** **MAIKA TOVAGONE**
		Appellants
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Appellants in person**
	:	**Ms. U. Tamanikaiyaroi for the Respondent**
Date of Hearing	:	**07 December 2022**
Date of Ruling	:	**12 December 2022**

RULING

[1] The appellants had been charged in the High Court at Suva on a single count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009 committed on 20 August 2018 at Suva in the Central Division.

[2] The information read as follows.

'***Statement of Offence***

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

Particulars of Offence

ASESELA NAUREURE and MAIKA TOVAGONE *with others on the 20th day of August 2018, at Suva in the Central Division, in the company of each other committed theft of assorted properties namely $100 cash, 1 x brown leather*

Wallet and 1 x Oakley bag belonging to ***ROY FARRELES*** *and immediately before committing the theft, used force on* ***ROY FARRELES*** *and* ***PRIYA KUMAR****.'*

[3] After the summing-up, the assessors had expressed a unanimous opinion that the appellants were guilty as charged. The learned High Court judge had agreed with the assessors' opinion, convicted them for aggravated robbery and sentenced them on 30 November 2020; 01st appellant to a period of sixteen (16) years imprisonment with a non-parole period of 14 years [actual period of 15 years and 05 months subject to a non-parole period of 13 years and 05 months] and the 02nd appellant to a period of 14 years imprisonment with a non-parole period of 12 years [actual period of 11 years and 11 months subject to a non-parole period of 09 years and 11 months].

[4] The appellants' appeals in person against conviction and sentence had been timely.

[5] In terms of section 21(1)(b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence only with leave of court. For a timely appeal, the test for leave to appeal against conviction and sentence is **'reasonable prospect of success'** [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) that will distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[6] Guidelines to be followed when a sentence is challenged in appeal are whether the sentencing judge (i) acted upon a wrong principle; (ii) allowed extraneous or irrelevant matters to guide or affect him (iii) mistook the facts and (iv) failed to take into account some relevant considerations [vide **Naisua v State** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **House v The King** [1936] HCA 40*;* (1936)

55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011)].

[7] The prosecution case against the 01st appellant was based on the evidence that he was found in possession of the two stolen items, namely the bag and the wallet of Dr.Roy Ferreles, a few minutes after this incident, at a location very close to the crime scene. Thus, the case against the 01st appellant was based upon the principle of possession of recently stolen property. Before his arrest by a civilian - Mr. Peceli, the appellant was seen running into a plantation. According to the 01st appellant he was hiding in the planation at the time of arrest by Mr. Peceli and he did so after seeing a police vehicle because he was on a bench warrant.

[8] In respect of the 02nd appellant, the prosecution had primarily relied on evidence of three video footages of the incident, captured by three CCTV cameras from three different directions. The prosecution had submitted that according to the captured footages the first person, who entered the medical centre wearing a blue coloured shirt with black stripes, black coloured surf shorts with blue stripes, and a pair of black coloured "puma" shoes with white coloured stripes, was the 02nd appellant. Apart from these three video footages, the prosecution had presented evidence to establish that the 02nd appellant was arrested a few minutes after the alleged incident at a location closer to the Rubina Medical Centre. At the time of the arrest, the 02nd appellant was still wearing the same black coloured surf shorts with blue stripes and black coloured "puma" shoes with white stripes and holding the blue coloured shirt in his hand but was wearing a yellow colour vest. Further, at the time he entered medical centre and met receptionist Priya Kumar, he had a gold tooth and inquired about fixing it. He was arrested by the police while on the run. He admitted in his evidence that in deed he had a gold tooth when arrested by the police while coming down the steps at a friend's place.

[9] The grounds of appeal against conviction and sentence urged on behalf of the 01st appellant are as follows.

Conviction:

Ground 1

THAT the Learned Judge erred in law and in fact when he failed to properly consider the inconsistencies and omissions in the evidence of the prosecution witnesses in determining the credibility and reliability of the prosecution's case and the possibility of fabrication of evidence.

Ground 2

THAT the Learned Judge erred in law and in fact when he accepted the prosecutions fabricated evidence in proving the doctrine of recent possession thus causing a substantial miscarriage of justice.

Ground 3

THAT the Learned Judge erred in law and in fact when he accepted that the evidence of DC Kumar corroborated the inconsistent evidence of Mr. Peceli and Mr. Paula as per paragraph [9] and [10] of the judgment.

Ground 4

THAT the Learned Judge erred in law and in fact when he convicted the appellant without the element of the offence being proven thus resulting in a miscarriage of justice and an unjust conviction.

Ground 5

THAT the Learned Judge prejudiced the appellant when he directed the assessors at paragraph 104 of the Summing Up.

Sentence:

Ground 6

THAT the Learned Judge erred in law and in fact when he sentenced the appellant using the wrong principle which resulted in a harsh and excessive sentence.

Ground 7

THAT the Learned Judge erred in law and in fact when he took into account extraneous or irrelevant matters to guide him.

01st ground of appeal

[10] As far as the vital evidence against the appellant is concerned, the omission is that witness Peceli's statement had not recorded that the appellant was running with a bag or he dropped a wallet (which he again put inside his pocket when pointed out). However, the witness had maintained that he said everything to the police but the police had not accurately recorded them. As for the inconsistency, SC Paula in his police statement had said that he searched the appellant and found the wallet and seized the bag also from him. Nevertheless, DC Kumar's evidence reveals that Peceli had handed over to him not only the appellant but also the green colour 'Oakley bag' and he in turn entrusted both the appellant and the bag to SC Paula. SC Paula had under oath confirmed the same and stated that that the appellant took out the wallet from his pocket and handed over it to him while the bag and the appellant were handed over to by DC Kumar. Thus, the omissions and inconsistencies were found when evidence of Peceli and SC Paula was compared with their police statements and no such omissions and inconsistencies surfaced in their evidence under oath at the trial.

[11] Thus, DC Kumar and SC Paula in evidence had effectively confirmed the material evidence of Peceli and the significance of the omission and inconsistency as highlighted above greatly diminished as a result.

[12] The trial judge's summing-up is as comprehensive as it can be on each and every item of evidence led against this appellant and he had dealt with how to assess the credibility, reliability, inconsistencies and omissions at paragraphs 80-83 and 113 & 115. He had also drawn the attention of assessors to how the defence had challenged such evidence *inter alia* as introduction on the part of the police. It is clear that Peceli had no reason or motive to fabricate any evidence against the appellant as he did not even know that there had been a robbery when he caught the appellant with the stolen bag and the wallet. The trial judge had particularly highlighted the omissions in Peceli's police statement at paragraph 38 and the inconsistency in SC Paula's statement at paragraph 46 of the summing-up and dealt with them at paragraph 9 and 10 of the judgment and treated then as immaterial at paragraph 11.

[13] When the trial judge agrees with the majority of assessors, the law does not require the judge to spell out his reasons for agreeing with the assessors in his judgment but he may follow the sound and best practice of briefly setting out evidence and reasons for his agreement with the assessors in a concise judgment so that the trial judge's agreement with the assessors' opinion is not viewed as a mere rubber stamp of the latter [vide **Fraser v State** [2021] FJCA; AAU 128.2014 (5 May 2021)]. The trial judge had complied with the above requirement of law more than adequately.

[14] The Court of Appeal recently dealt with a similar complaint in **Ram v State** [2021] FJCA; AAU 024 .2016 (02 July 2021) where the court considered **Singh v The State** [2006] FJSC 15] CAV0007U.05S (19 October 2006), **Ram v. State** [2012] FJSC 12; CAV0001 of 2011 (09 May 2012), **Prasad v State** [2017] FJCA 112; AAU105 of 2013 (14 September 2017) and reiterated the principles expressed in **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) and **Turogo v State** [2016] FJCA 117; AAU.0008.2013 (30 September 2016) that the weight to be attached to any inconsistency or omission depends on the facts and circumstances of each case. Further, that no hard and fast rule could be laid down in that regard. The broad guideline is that discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance.

02nd ground of appeal

[15] Once the assessors and the trial judge had decided to act upon the prosecution evidence the only question was whether such evidence would fit into the doctrine of possession of recently stolen property. The trial judge had told the assessors how the recent possession evidence is capable of proving that the appellant was one of the robbers at paragraph 19, 93 and 94. He had given his mind to the same at paragraphs 12-18 of the judgment.

[16] The Court of Appeal recently dealt with 'recent possession' in **Boila v State** [2021] FJCA; AAU 049.2015 (4 May 2021) and considered several past decisions. Before the court can draw the inference from the accused's possession of recently stolen property, it must be satisfied of five matters: (**i**) the accused was in possession of the

property (**ii**) the property was positively identified by the complainant (**iii**) the property was recently stolen (**iv**) the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and the circumstances of the case, recent (**v)** there are no co-existing circumstances, which point to any other person as having been in possession. Upon proof of the unexplained possession of recently stolen property, the trier of fact may--but not must--draw an inference of guilt of theft or of offences incidental thereto. This inference can be drawn even if there is no other evidence connecting the accused to the more serious offence such as burglary or robbery [see also **Timo v. State** [2019] FJSC 1; CAV0022 of 2018 (25 April 2019)]. The prosecution does not need to prove that the accused was actually caught with the property in his or her possession. It is sufficient to prove that the accused possessed the property at the relevant time.

[17] When the principles expressed in **Boila v State** (supra) are applied to the present case the assessors and the trial judge were entitled to draw the inference that the appellant was one of the perpetrators of the aggravated robbery based on the doctrine of recent possession. It was open to the assessors and the trial judge to be satisfied of the appellant's guilt beyond reasonable doubt (see **Naduva v State** AAU 0125 of 2015 (27 May 2021), **Balak v State** [2021]; AAU 132.2015 (03 June 2021), **Pell v The Queen** [2020] HCA 12], **Libke v R** (2007) 230 CLR 559, **M v The Queen** (1994) 181 CLR 487, 493), **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992).

03rd ground of appeal

[18] I have already discussed the gist of this ground of appeal under the 01st ground of appeal. The appellant's complaint is that the trial judge was wrong to have treated DC Kumar's evidence as corroborative of Peceli's evidence at paragraphs 9 and 10 of the judgment. The omissions complained of were in Peceli's police statement and not in his evidence under oath.

[19] Once the assessors and the trial judge had treated the omissions in Peceli as not sufficient to dent the basic substratum of the events as described by him, DC Kumar's

evidence did in fact corroborate Peceli's evidence under oath on the finding of the stolen bag and the wallet from the appellant's possession. So did SC Paula's evidence on the bag and the wallet. The inconsistencies of SC Paula as to how he came to take charge of the bag and the wallet were in his police statement and not in his evidence. Therefore, the trial judge was entitled to consider that the evidence DC Kumar and SC Paula did corroborate Peceli's evidence and the evidence of Peceli and DC Kumar corroborated that of SC Paula with regard to the finding of the stolen bag and the wallet.

04th ground of appeal

[20] The appellant's argument in a nutshell is that the prosecution had not proved beyond reasonable doubt his identity as one of the robbers. He challenges the element of identification of the offending.

[21] Upon proof of the unexplained possession of recently stolen property, the trier of fact may draw an inference of guilt of theft or of offences incidental thereto and such inference can be drawn even if there is no other evidence connecting the accused to the more serious offence such as burglary or robbery [see also **Timo v State** [2019] FJSC 1; CAV0022 of 2018 (25 April 2019)].

[22] The unexplained possession of recently stolen bag and the wallet coupled with circumstantial evidence in the form of the appellant's conduct not only of hiding in a plantation but dropping the wallet at some point on the ground along with his incredible explanation that he was there to buy tobacco (incidentally at the LA hearing he said that he was there to buy marijuana) was sufficient to draw the inference that he was one of the robbers.

05th ground of appeal

[23] The appellant's argument is relation to the trial judge's directions on circumstantial evidence. The judge had commenced his comments on circumstantial evidence at paragraph 101 and drawn the assessors' attention to some of the items of

circumstantial evidence at paragraph 104 against the appellant and asked them to consider any other such pieces of evidence, if they thought it fit to do so and told them that all of them must lead to a sure and indisputable conclusion that the appellant was involved in the robbery in order to find him guilty. I do not see any troublesome concerns on those directions.

06th ground of appeal (sentence)

[24] The appellant argues that the trial judge had used the wrong principle which resulted in a harsh and excessive sentence. The appellant seems to join issue with the trial judge having applied tariff of 08-16 years set in **Wise v State** [2015] FJSC 7; CAV0004 of 2015 (24 April 2015). He argues that the tariff of 08-16 years is applicable to aggravated robbery in the form of a home innovation and the learned trial judge had erred in applying the same tariff his offending.

[25] The Court of Appeal said in **State v Liku** [2022] FJCA 9; AAU067.2016 (3 March 2022) as follows.

> *'[25] Following **Nawalu v State** CAV 0012 of 2012: 28 August 2013 [2013] FJSC 11 concerning a spate of robberies, some subsequent decisions of the Supreme Court and the Court of Appeal had taken the tariff for aggravated robbery as 10-16 years [see **Nabainivalu v State** CAV 027 of 2014: 22 October 2015 [2015] FJSC 22 - two persons armed with a cane knife entered a gas station and took away a mobile phone, laptop and money after threatening the gas station attendant; **Mani v State** AAU0087 of 2013:14 September 2017 [2017] FJCA 119; **Waisele v State** AAU0081 of 2013: 30 November 2017 [2017] FJCA 136 - an aggravated robbery in the form of home invasion in the early hours of the day by a group of offenders armed with offensive weapons]. However, following the clarification the Supreme Court provided in **Wise v State** CAV0004 of 2015: 24 April 2015 [2015] FJSC 7 for **a single act of home invasion or a similar offence** the sentencing tariff has been taken consistently as between 08-16 years.*

[26] Thus, the Court of Appeal in ***Liku*** approved the use of ***Wise*** tariff i.e. 08-16 years of imprisonment not only for a single act of home invasion but also for other aggravated robberies similar to a home invasion in terms of level of harm and culpability.

[27] In **Cikaitoga v State** [2020] FJCA 99; AAU141.2019 (8 July 2020), the appellant and the other three had forcefully entered Comsol Moive Shop at Centerpoint, Nasinu and robbed one person of his mobile phone valued at $200.00. Whilst inside they had assaulted and locked another in the toilet and stolen $950.00 in cash, one Nokia N65 brand mobile phone valued at $400.00 all to the value of $1,350.00 from him. The single Judge of the Court of Appeal said:

> *'[18] ……I do not see why the same tariff should not apply to the current case involving an invasion of business premises in broad daylight with accompanying violence.'*

[28] In **Nabainivalu v State** CAV 027 of 2014: 22 October 2015 [2015] FJSC 22 where two persons armed with a cane knife entered a gas station and took away a mobile phone, laptop and money after threatening the gas station attendant and the mobile phone and laptop were subsequently recovered, but the money could not be found, the Supreme Court said:

> *'[3] I have said on a number of occasions that an appealable error cannot arise by comparing sentences imposed in other cases. Other cases are only relevant in identifying the range of sentence for a particular offence. Otherwise, each case is considered on its own facts.*
>
> *[4] In this case, the range for aggravated robbery is well established. The range is 10 to 16 years imprisonment (**Nawalu v State** Cr. App. No. CAV0012 of 2012).'*

[29] However, as indicated in in ***Liku,*** since the decision in ***Wise****,* for a single act of home invasion or a similar offence the sentencing tariff has been taken consistently as between 08-16 years. Therefore, the trial judge had not erred in applying ***Wise*** tariff for the offending in this case which involved a broad daylight planned robbery of a medical centre by a group of people armed with a weapon with accompanying violence on the employees including a doctor and terrifying the others present for medical attention. Courts have always regarded robberies of any entity providing services to the public as more serious warranting stiff punishments.

[30] The trial judge has adopted 'instinctive synthesis' method in arriving at the sentence. There is nothing wrong with it. The 'instinctive synthesis' approach has been recognized in the sentencing process in Fiji (see **Qurai v State** ([2015] FJSC 15; CAV24.2014 (20 August 2015) and specifically approved in **Kumar & Vakatawa v The State** AAU 33 of 2018 & AAU 117 of 2019 (24 November 2022).

> *'[47] As held in **Quari,** Sentencing and Penalties Act does not seek to tie down a sentencing judge to the two-tiered process of reasoning described above and leaves it open for a sentencing judge to adopt a different approach, such as "instinctive synthesis" if a sentecer is confident and comfortable with it.'*

[31] As stated by the trial judge the level of harm and culpability in the offending is high. So are the aggravating features. In addition, the trial judge had considering 07 previous convictions correctly declared the appellant as a habitual offender and therefore, he could have imposed a longer sentence than proportionate to the gravity of the offence (see section 12 of the Sentencing and Penalties Act) to be served consecutively to the appellants' remaining sentence of 13 years of imprisonment for another conviction for aggravated robbery committed on 24 November 2016. Yet, in the end the trial judge made his sentence of 16 years concurrent to the previous sentence making the current sentence effective only for 03 years after the appellant has served his previous sentence. There is no harshness or excessiveness in this sentence.

07th ground of appeal (sentence)

[32] The appellant complains that the trial judge erred in law and in fact when he took into account extraneous or irrelevant matters to guide him. However, on a perusal of the sentencing order it does not appear that the trial judge had considered any extraneous or irrelevant matters in sentencing the appellant. However, I shall take this opportunity to consider the effect of the appellant's 07 previous convictions, 05 of which for property related offences committed from 2016 to 2018.

[33] The Court of Appeal said in **Kumar & Vakatawa v The State** (supra):

> *'[44] Section 4(1) (a), (b), (c) and (e) of the Sentencing and Penalties Act set out the only purpose of sentencing as punishment, protection of community, deterrence and denouncement of the offence. Section 4(1)(d) prescribes rehabilitation of offenders as the only other purpose. Thus, most weight is given to punitive aspect of a sentence rather than rehabilitative aspect. Therefore, if a sentencing regime is far too lenient or too harsh it will not serve the purpose of sentencing.*
>
> *[45] The offenders must always be punished adequately but not more than adequately to signify that the courts and the community denounce the offences, in a way that must protect the community and deter the prospective offenders without, however, rendering rehabilitation ineffectual…..'*

[34] In sentencing offenders a court must have regard *inter alia* to the offender's previous character [vide section 4(2)(i) of the Sentencing and Penalties Act]. Previous character could be good character or bad character. In determining the character of an offender a court may consider (amongst other matters) (i) the number, seriousness, date, relevance and nature of any previous findings of guilt or convictions recorded against the offender, (ii) the general reputation of the offender and (iii) any significant contributions made by the offender to the community, or any part of it (vide section 5 of the Sentencing and Penalties Act). While (i) goes to an accused's bad character, (ii) and (iii) would relate to his good character.

[35] First time offenders usually represent a lower risk of reoffending as reoffending rates for first offenders are said to be significantly lower than rates for repeat offenders. In addition, first offenders are normally regarded as less blameworthy than offenders who have committed the same or similar crimes several times already. For these reasons first offenders receive a mitigated sentence compared to repeat offenders. Lack of previous findings of guilt or convictions (*i.e.* being a first offender) as a mitigating factor usually earns an offender a discount of the sentence. However, being a first offender or lack of previous convictions is only a part of an accused's good character.

[36] General reputation of the offender and any significant contributions made by the offender to the community/exemplary conduct as evidence of good character may be considered separately whether or not the offender has previous convictions. Evidence that an offender has demonstrated positive good character through, for example, charitable works may reduce the sentence. However, this factor is less likely to be relevant where the offending is very serious. Where an offender has used his good character or status to facilitate or conceal the offending it could be treated as an aggravating factor.

[37] Previous convictions form part or provide evidence or reflective of bad character of an offender. One of the purposes of sentencing is to protect the community from offenders [vide section 4(1)(b) of the Sentencing and Penalties Act] and a repeated offender obviously poses a greater threat to the community warranting a longer incarceration in order to keep him away from the community and facilitate a longer rehabilitation for him before being released to the society. This is not to punish the offender for his previous offences for which he has already been punished. As already stated, in sentencing offenders, a court must have regard *inter alia* to the offender's previous character. Thus, provisions in sections 4(2)(i) and 4(1)(b) of the Sentencing and Penalties Act read together unmistakably suggest that relevant statutory convictions could be considered as an aggravating factor when a court is considering the appropriate sentence for an offender in respect of the current offence.

[38] From Sentencing Council guidelines in the UK too, it is clear that the sentencing court may treat as an statutory aggravating factor each relevant previous conviction that it considers can reasonably be so treated, having regard in particular to — (a) the nature of the offence to which the conviction relates and its relevance to the current offence, and (b) the time that has elapsed since the conviction. The following helpful guidelines from Sentencing Council guidelines in the UK could be deduced for sentencing in Fiji in conjunction with section 4 and 5 of the Sentencing and Penalties Act.

[39] When a previous conviction is to be regarded as an aggravating factor the sentencing court should have regard to the following maters.

Under (a) - the nature of the offence to which the conviction relates and its relevance to the current offence

1. The primary significance of previous convictions (including convictions in other jurisdictions) is the extent to which they indicate trends in offending behaviour and possibly the offender's response to earlier sentences.

2. Previous convictions are normally relevant to the current offence when they are of a similar type which means that previous convictions are likely to be 'relevant' when they share characteristics with the current offence (examples of such characteristics include, but are not limited to: dishonesty, violence, abuse of position or trust, use or possession of weapons, disobedience of court orders). In general the more serious the previous offending the longer it will retain relevance.

3. Previous convictions of a type different from the current offence may be relevant where they are an indication of persistent offending or escalation and/or a failure to comply with previous court orders.

4. In cases involving significant persistent offending, punitive thresholds may be crossed even though the current offence normally warrants a lesser sentence.

Under (b) - the time that has elapsed since the conviction

1. The aggravating effect of relevant previous convictions reduces with the passage of time; older convictions are less relevant to the offender's culpability for the current offence and less likely to be predictive of future offending.

2. Where the previous offence is particularly old it will normally have little relevance for the current sentencing exercise.

3. The court should consider the time gap since the previous conviction and the reason for it. Where there has been a significant gap between previous and current convictions or a reduction in the frequency of offending this may indicate that the offender has made attempts to desist from offending in which case the aggravating effect of the previous offending will diminish.

4. Where the current offence is significantly less serious than the previous conviction (suggesting a decline in the gravity of offending), the previous conviction may carry less weight.

5. When considering the totality of previous offending a court should take a rounded view of the previous crimes and not simply aggregate the individual offences.

6. Where information is available on the context of previous offending this may assist the court in assessing the relevance of that prior offending to the current offence.

[40] Therefore, in my view, the sentence of 16 years imposed on the 01st appellant could be justified having regard to his previous relevant statutory convictions alone though the High Court judge had taken them only to declare him as a habitual offender and then imposed an increased sentence.

[41] Therefore, I do not see any basis to grant leave to appeal on conviction or sentence.

[42] The grounds of appeal against conviction and sentence urged on behalf of the 02nd appellant are as follows.

Ground 1

The Learned Judge erred in law and in fact when he allowed the first prosecution witness Ms. Rubina to adduce evidence about the previous owner and his involvement in the setup of the CCTV system without calling him as a prosecution witness and that Ms. Rubina had not given any descriptions of the robbers clothing thus creating a reasonable doubt in the prosecution's case.

Ground 2

The Learned Judge erred in law and in fact when he allowed the CCTV footage to be tendered as evidence via USB stick without a proper explanation from the second prosecution witness as to how the footage was retrieved and its origin.

Ground 3

The Learned Judge failed to provide a warning and or fully direct the assessors regarding recent inventions, inconsistencies and contradictions between the evidence adduced in trial and the police statements of the fourth prosecution witness, Ms, Priya Kumar as well as the ninth and tenth prosecution witnesses i.e. CPL Tabalailai and PC Apolosi.

Ground 4

The Learned Judge failed to adequately direct the assessors on how to approach the identification evidence and how much weight to give to the same and that the Learned Judge failed to evaluate the appellant's defence of Alibi

Ground 5

The Learned Judge erred in law and in fact when he did not consider the fact that the second appellant was a first offender thus arriving at a sentence which is harsh and excessive.

Ground 6

The Learned Judge erred in law and in fact when he selected a starting point from the higher end of the tariff.

01st ground of appeal

[43] The appellant complains about allowing the following evidence of Rubina without calling the previous owner who had installed the CCTV cameras.

> *22.Ms. Rubina states that all these cameras were working on the 20th of August 2018. The CCTV system has already been installed by the previous owner when she purchased the Clinic. She has not made any changes to the settings of the CCTV system. The previous owner had set the time of the CCTV system one hour ahead of the actual time. The date of the CCTV system has been set correctly.*

[44] In the first place, the defense counsel had neither objected to this item of evidence nor asked for redirections and secondly, the installation and operation of CCTV cameras were not trial issues. Therefore, Ms. Rubina's above evidence had been properly admitted and no prejudice or miscarriage of justice had been caused to this appellant.

[45] Though Rubina had not explained the colour of clothing the robbers were wearing as she did not have a close encounter with them, Ms. Priya Kumar, the receptionist had described them clearly.

02nd ground of appeal

[46] Rubina's evidence and James Lali's evidence as summarized at paragraph 21, 22 and 25 of the summing-up and the trial judge's reasoning at paragraphs 21-27 of the judgment amply demonstrate the basis upon which CCTV footages were allowed and how those footages combined with other circumstantial evidence had convinced the trial judge to conclude that the 02nd appellant was one of the robbers.

[47] This court had dealt with in detail the admissibility of CCTV recorded evidence in **Qaqanivalu v State** [2020] FJCA 142; AAU0092.2016 (21 August 2020) and I do not see any issues with regard to the admissibility of CCTV footages. The defense counsel too does not appear to have raised any objection to the admissibility of the same or sought any redirections on any aspect relating to this evidence.

03rd ground of appeal

[48] According to Ms. Priya Kumar, the 02nd appellant was dressed in a blue shirt and black shorts with blue strips. She had seen a gold tooth in him and the 02nd appellant had admitted under oath that he in fact had a gold tooth at the time of arrest. But, Priya had said that she did not describe the man in the blue shirt in her statement to the police because the police never took her to the police station, and her statement was recorded at the Clinic.

[49] According to Cpl. Salacieli Tabalailai, he had arrested this appellant when he was on the run and at the time of his arrest he was dressed in a yellow colored vest of Suva Grammer School and black colored surf short with blue stripes and wearing a pair of black colored 'puma' shoes with white stripes. He was holding a blue colored shirt with black stripes in his hand. The 02nd appellant was still wearing the same black surf shorts and the yellow vest and holding the blue shirt onto his hand when locked in the cell. However, in Cpl. Tabalailai's police statement, there is no mention that Maika (02nd appellant) was wrapping a blue shirt around his arm. Moreover, there is no mention that Maika was wearing a pair of canvas in the statement. The statement states that Maika was wearing a blue running shorts. Cpl. Tabalailai had made another

statement on the 01 October 2020 but again, he had made no mention of Maika wearing a pair of canvas in the second statement where, however, he had said that that Maika was wrapping a blue shirt around his hand. Cpl. Tabalailai had said that the omission in his statement regarding the blue shirt, the surf shorts, and the black shoes with white stripes was because he overlooked it in his statement.

[50] According to PC Apolosi, at the time of the arrest, the 02nd appellant was dressed in a yellow colour Suva Grammar School vest, black shorts, and black and white stripes "puma" shoes. A shirt was wrapped around his left hand. PC Apolosi made his statement to the police on the 01 October 2020. There is no mention in the statement about the blue and black puma canvas. It only states he was wearing shoes. Moreover, there is no mention of surf shorts, but it says that he was dressed in black shorts.

[51] The trial judge had brought the evidence Ms. Priya Kumar, Cpl. Salacieli Tabalailai and PC Apolosi to the attention of assessors and highlighted the omissions arising from their police statements. The trial judge had dealt with how to assess the credibility, reliability, inconsistencies and omissions at paragraphs 80-83 and 113 & 115 of the summing-up and concluded at paragraph 8 and 11 of the judgment that the inconsistencies highlighted by the Defence counsel in the evidence of Sgt. Tabalailai and DC Inoke have not materially affected the credibility of their evidence and that having observed the manner and how Sgt. Ofati gave evidence, the judge had found him a forgetful witness than a witness who purposely lied in his evidence.

[52] It appears that despite the omissions as highlighted above, the clothes and shoes as described by the witnesses were physically produced at the trial and identified by the witnesses as those worn by the 02nd appellant at the time of arrest. According to the summing-up and judgment, it had been clearly recorded in the CCTV footages that one of the robbers was wearing those garments inside the medical centre. In that context, those omissions and other inconsistencies with the police statements do not seem to have been material to the credibility, particularly given the fact that the 02nd appellant was arrested when he took to his heels upon seeing the police at a place very close to the crime scene within a very short period since the robbery and when

arrested was wearing cloths similar in color and description to those of one of the robbers. He admittedly had a gold tooth as described by Priya.

04th ground of appeal

[53] The learned trial judge has meticulously and in great detail directed the assessors on identification evidence in the form of CCTV footages and other circumstantial evidence at paragraphs 104(i) to (xii) and 108-112 of the summing-up. He had done so in his own judgment at paragraphs 20-27 and found no reason to disagree with the assessors.

[54] The trial judge had carefully outlined the 02nd appellant's *alibi* defense at paragraphs 71, 73, 77 and 86-112 of the summing-up and directed his own mind to it once again at paragraphs 6 of the judgment and in the light of the evidence against him had concluded that the *alibi* was false at paragraph 28 of the judgment.

[55] I see no reasonable prospect of success in the appeal against conviction.

05th ground of appeal (sentence)

[56] Contrary to the 02nd appellant's assertion, the trial judge was quite mindful that he was a first offender and in view of his previous good character but with no evidence or information before Court to consider his general reputation in society or any significant contribution he made to the community, sentenced the 02nd appellant to 14 years of imprisonment as opposed to 16 years of imprisonment imposed on the 01st appellant.

[57] As for the complaint that the sentence is harsh and excessive, I reiterate what I have stated in respect of the similar ground of appeal by the 01st appellant. The ultimate sentence of 11 years, 11 months is well within the tariff of 08-16 years for this kind of offences.

06th ground of appeal (sentence)

[58] The trial judge had not followed the two-tiered approach to sentencing in this case but adopted 'instinctive synthesis' method. Therefore, he had particularly not selected a starting point and then adjusted it upward and downward for aggravating and mitigating features. The judge had rather set out the level of harm and culpability of the offending, aggravating and mitigating features and fixed the final sentence. I have dealt with these matters already when discussing the 01st appellant's sentence appeal.

[59] When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered (vide **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006). In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range (**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015).

[60] Therefore, I do not see any sentencing error committed by the High Court judge. Length of sentence is hardly a ground of appeal against sentence.

Orders

1. Leave to appeal against conviction is refused for the 01st and 02nd appellants.
2. Leave to appeal against sentence is refused for the 01st and 02nd appellants.

COURT OF APPEAL FIJI

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