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

CRIMINAL APPEAL NO.AAU 134 of 2020
[In the High Court at Suva Case No. HAC 447 of 2018S]

BETWEEN	**:**	**SEKOVE VADEI**	
			Appellant
AND	**:**	**THE STATE**	
			Respondent
Coram	**:**	**Prematilaka, RJA**	
Counsel	**:**	**Appellant in person**	
	:	**Mr. R. Kumar for the Respondent**	
Date of Hearing	**:**	**14 June 2023**	
Date of Ruling	**:**	**15 June 2023**	

RULING

[1] The appellant had been charged and found guilty in the High Court at Suva on a single count of aggravated robbery committed in the company of others contrary to section 46 and 311(1) (a) of the Crimes Act, 2009. The charge is as follows:

*"**Statement of Offence***

***AGGRAVATED ROBBERY**: Contrary to Sections 46 and 311 (1) (a) of the Crimes Act 2009.*

Particulars of Offence

***SEKOVE VADEI** in the company of others, on 16 November 2018, at Lami in the Central Division, stole 02 Samsung phones, 01 black IPhone, 01 Vodafone modem, 01 pouch of jewelry containing 02 pairs of Swarovski earrings, 01 pair pearl earrings, 01 Gaine and Stone ring, 01 yellow stone ring, 01 diamond and gold pendent, 01 Westpac Debit card, 01 wallet containing $200.00 cash, 01 pair of sunglasses, 01 red key holder containing 04 keys and 01 car alarm key, and 01*

Jacks of Fiji Reward Card from MARYANN ELENOA MAAFU-MOSS and immediately before stealing from MARYANN ELENOA MAAFU-MOSS, used force on her."

[2] The assessors had expressed a unanimous opinion that the appellant was guilty as charged. The learned High Court judge had agreed with the assessors' opinion, convicted him and sentenced the appellant on 28 September 2020 to a period of 10 years' imprisonment with a non-parole period of 09 years.

[3] The appellant's appeal filed in person against conviction and sentence is timely.

[4] In terms of section 21(1)(a) and (b) 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 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)].

[5] Further 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)].

[6] The learned High Court judge had briefly set out the fats in the sentencing order as follows:

> 2. *The brief facts of the case were as follows. The complainant (PW1) was a 43 year old business woman from Nadi. On 16 November 2018, at about 2.30 am, early Friday morning, she was asleep alone in an apartment at 69 Marine Drive, Lami. She woke to visit the bathroom, but suddenly was attacked by two males in her bedroom. She could not identify their faces. One of the men jumped on her and shoved her cardigan down her throat to prevent her raising the alarm. The man demanded money. She nodded, and at the same time had difficulty breathing.*
>
> 3. *The two men ransacked her apartment and stole her properties as itemized in the charge. The complainant's friend (PW2), in a nearby apartment, came to her rescue when he heard her scream. PW2 raised the alarm, and two policemen (PW3 and PW4), who were on foot patrol in Lami Town, responded. The thieves fled the crime scene, but the accused was caught by PW3 and PW4 at Tikaram Park after 3 am. The policemen later escorted the accused to Lami Police Station.*
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> 4. *At the station, he was searched. He was also searched at Tikaram's Park. The complainant's bunch of keys, Westpac Debit Card, Jack's card and her pouch and sunglass were found on the accused. He was caution interviewed by police at Lami Police Station on 16 and 17 November 2018. He admitted he was part of the group that violently robbed the complainant on 16 November 2018 after 2.30 am. He had been tried and convicted as charged in the High Court at Suva.*

[7] PW1 or PW2 had not identified the perpetrators and the identity of the appellant had been established through his confessional statement coupled with the presumption arising from the evidence of recent possession of stolen goods. The appellant had given evidence at the trial and denied his involvement in the robbery. He had given evidence at the *voir dire* inquiry as well.

[8] The grounds of appeal against conviction and sentence are as follows:

> *'**Conviction:***
>
> ***Ground 1***
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> *THAT the investigation carried out by police as procedurally flawed and wrong in law where the police witnesses had conspired in concert to defeat or subvert*

justice which was prejudicial to the appellant and contrary to section 16 (1) (a) of the Constitution.

Ground 2

THAT the Judge erred in law when he convicted the appellant on propensity evidence.

Ground 3

THAT the charge upon which the Judge convicted the appellant was defective and contradicts the principles of a joint enterprise.

Ground 4

THAT the Judge erred in law and in facts in allowing the concept of joint enterprise and pre-planning when directing the assessors.

Ground 5

THAT the Judge erred in law and in facts when he found a prima facie case against the appellant in light of: i) The assault of the appellant by police; ii) The manner of the appellant's confession was obtained; and iii) The appellant's evidence which he sworn on oath.

Ground 6

THAT the Judge had failed to warn himself and or the assessors on the issue of lies by the police witnesses.

Ground 7

THAT the evidence upon which the Judge convicted the appellant was illegal evidence and wrong in law given the manner the confession was obtained from the appellant and the Judge's refusal to issue a production order for the appellant's witnesses in remand custody in breach of the Constitution.

Sentence

Ground 8

THAT the sentence is too harsh and very excessive in all its circumstances.

Ground 9

THAT the Judge erred in law and in facts when he double counted the aggravating factors while considering the sentence ordered for the appellant.

Ground 1

[9] The appellant complains that the police had not investigated in a lawful and rational manner and the police investigation had not been procedurally fair (robbers not caught) in that his confession had been obtained by torturing him to implicate someone for the actual perpetrators in the robbery. The appellant had not elaborated these allegations further; nor had he cited clear examples of such unsavoury instances in the police investigation carried out with regard to this robbery.

[10] The voluntariness of the appellant's caution interview had been tested at a *voir dire* inquiry and the trial judge had held it to be voluntary in the *voir dire* ruling dated 31 December 2020. The appellant's allegation of assault and threats were rejected by the trial judge. The appellant produced no medical evidence or any other evidence to raise a reasonable doubt of the prosecution version of voluntariness. He had made no complains of such treatments at the hand of the police to the Magistrate either.

[11] The trial judge's directions on the appellant's cautioned statement at paragraph 27 of the summing-up is substantially in line with the long-established principles as summarised in **Tuilagi v State** [2017] FJCA 116; AAU0090.2013 (14 September 2017) as follows:

> *'[26] Unfortunately, it is clear that the trial Judge had directly placed the issue of voluntariness of the confessions before the assessors when they had already been ruled voluntary and admitted in evidence as part of the judge's function. It is only the making of it, truthfulness/weight and probative value/sufficiency for the conviction that should have gone before the assessors. The correct law and appropriate direction on how the assessors should evaluate a confession could be summarised as follows:*
>
> *(i) The matter of admissibility of a confessional statement is a matter solely for the judge to decide upon a voir dire inquiry upon being satisfied beyond reasonable doubt of its voluntariness (vide **Volau v State** Criminal Appeal No.AAU0011 of 2013: 26 May 2017 [2017] FJCA 51).*
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> *(ii) Failing in the matter of the voir dire, the defence is entitled to canvass again the question of voluntariness and to call evidence relating to that issue at the trial but such evidence goes to the*

*weight and value that the jury would attach to the confession (vide **Volau**).*

*(iii) Once a confession is ruled as being voluntary by the trial Judge, whether the accused made it, it is true and sufficient for the conviction (i.e. the weight or probative value) are matters that should be left to the assessors to decide as questions of fact at the trial. In that assessment the jury should be directed to take into consideration all the circumstances surrounding the making of the confession including allegations of force, if those allegations were thought to be true to decide whether they should place any weight or value on it or what weight or value they would place on it. It is the duty of the trial judge to make this plain to them. (emphasis added) (vide **Volau**).*

*(iv) Even if the assessors are sure that the defendant said what the police attributed to him, they should nevertheless disregard the confession if they think that it may have been made involuntarily (vide **Noa Maya v. State** Criminal Petition No. CAV 009 of 2015: 23 October [2015 FJSC 30])*

*(v) However, **Noa Maya** direction is required only in a situation where the trial Judge changes his mind in the course of the trial contrary to his original view about the voluntariness or he contemplates that there is a possibility that the confessional statement may not have been voluntary. If the trial Judge, having heard all the evidence, firmly remains of the view that the confession is voluntary, Noa Maya direction is irrelevant and not required (vide **Volau** and **Lulu v. State** Criminal Appeal No. CAV 0035 of 2016: 21 July 2017 [2017] FJSC 19.*

[12] The appellant was caught within approximately half an hour of the robbery in a distance of about 100 meters from the crime scene with the complainant's Westpac Debit Card, Jack's Card and pouch and sunglass in his possession.

[13] The appellant's explanation had been that he found the complainant's bunch of keys, Westpac Debit Card, Jack's Card and the pouch with the sunglass, near a bus stop at Lami Town, close to the complainant's apartment after the alleged robbery, which had been rejected by the assessors and the trial judge.

[14] Therefore, the presumption that the appellant was involved in the robbery arising from the possession of recently stolen property remained unrebutted (see:

Batimudramudra v State [2021] FJCA 96; AAU113.2015 (27 May 2021) and **Boila v State** [2021] FJCA 184; AAU049.2015 (4 May 2021) and is a strong piece of evidence against the appellant.

Ground 2

[15] The appellant argues that he should not have been convicted for his involvement in the offending on his propensity to do so due the proximity of the place of arrest to the crime scene without considering his *alibi*.

[16] The appellant was not in fact convicted on his closeness in terms of time and place to the crime. He was convicted on his confession and the possession of recently stolen property. His physical proximity to the place and time of the offending is only another piece of circumstantial evidence against him. There was no *alibi* presented by the appellant either.

Ground 3

[17] On examination of the charge levelled against the appellant, I do not find any defect in the charge. The trial judge had given sufficient directions on joint enterprise at paragraph 13 of the summing-up. The appellant seems to argue that because he was not at the crime scene he could not be made liable on the basis of a joint enterprise.

[18] According to his confession, he was acting as the lookout or watchman. He had clearly admitted his involvement in the robbery at questions and answers 10-52 of the confession. His complaint has no merits. Presence at the crime scene is not essential to impose criminal liability under 'joint enterprise'.

Ground 4

[19] The appellant argues that the trial judge's directions on joint enterprise is erroneous in that he should have told them that there must have been a preplanning to commit the robbery if he was to be made liable under 'joint enterprise'.

[20] Section 46 of the Crimes Act, 2009 on offences committed by joint offenders in prosecution of common purpose is as follows:

> *46. When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.*

[21] The key words as far as this case is concerned is "When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another". In **Sean Patrick McAuliffe v The Queen** [1995] HCA 37; 183 CLR 108; 69 ALJR 621; 130 ALR 26 the High Court of Australia said:

> *'Such a common purpose arises where a person reaches an understanding or arrangement amounting to an agreement between that person and another or others that they will commit a crime.* ***The undertaking or arrangement need not be express and may be inferred from all the circumstances. If one or other of the parties does, or they do between them, in accordance with the continuing understanding or arrangement, all those things which are necessary to constitute the crime, they are all equally guilty of the crime regardless of the part played by each in its commission.*** *Further, each party is guilty of any other crime falling within the scope of the common purpose which is committed in carrying out that purpose, the scope of that purpose being determined by what was contemplated by the parties sharing that common purpose.'*

[22] Thus, preplanning in the form of agreement/undertaking in writing or even by words of mouth is not essential. If the circumstances including the conduct of the accused and his role suggest that he was acting in furtherance of a common intention formed with another to prosecute an unlawful purpose that would be sufficient. In this case the appellant's confession is said to have established that the appellant was a joint offender in prosecution of common unlawful purpose of robbing the victim.

Ground 5

[23] The alleged assault of the appellant by police and as to how his confession was obtained had been dealt with at the *voir dire* inquiry by the trial judge prior to trial

proper and for the second time in the summing-up. Given the evidence led at the trial, there was no surprise at all in the trial judge's finding that there was a *prima facie* case against the appellant at the close of the prosecution case. The appellant's evidence had also been considered at both stages and disbelieved.

Ground 6

[24] Nowhere had the trial judge held that the police evidence was lies. On the contrary, both the trial judge and the assessors had treated evidence of police officers as credible. Thus, there was no question of the trial judge warning himself against police 'lies'.

Ground 7

[25] The complaint about the manner in which the appellant's confession had been obtained had been dealt with earlier in this Ruling. The trial judge held it to be voluntary after following due process of law namely a *voir dire* inquiry. Not stopping at that the judge had directed the assessors to evaluate it in terms of the applicable law.

[26] There is no indication on the summing-up or the judgment that the trial judge had refused to issue a production order for the appellant's witnesses at any stage.

Ground 8

[27] This is an aggravated robbery in the form of a home invasion in the night which could have taken a very serious turn as one of the robbers had jumped on the complainant and shoved his cardigan down her throat to prevent her raising the alarm and demanded money resulting in her agreeing as she had difficulty in breathing.

[28] The sentencing range for this type of aggravated robbery is 08-16 years (vide: **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015). The appellant's sentence is 10 years which is not harsh and excessive at all.

Ground 9

[29] The trial judge had may have committed double counting by treating home invasion as an aggravated factor, for the tariff of 08-16 years may have already consumed that fact. However, 05 years addition was not only for that but for two other legitimate aggravating factors.

[30] 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 the appellate court in an appeal against sentence 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)].

[31] 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).

[32] The sentence of 10 years of imprisonment is towards the lower end of the tariff and there is no reasonable prospect of the full court making any downward adjustment to that sentence.

Order of the Court:

1. Leave to appeal against conviction and sentence refused.

COURT OF APPEAL FIJI

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

Solicitors:

Appellant in person
Office for the Director of Public Prosecutions for the Respondent