

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

CRIMINAL APPEAL NO. AAU 0092 of 2016
In the High Court at Suva Case No. HAC 47 of 2017

BETWEEN : **TEVITA QAQANIVALU**
Appellant

AND : **THE STATE**
Respondent

Coram : **Mataitoga, JA**
Qetaki, JA
Morgan, JA

Counsel : **Appellant in person**
Mr R. Kumar for the Respondent

Date of Hearing : **6 September, 2023**

Date of Judgment : **28 September, 2023**

JUDGMENT

Mataitoga, JA

[1] The appellant was jointly indicted with 3 others in the High Court on two counts of Act with Intent to Cause Grievous Harm [section 255(a)], one count of Aggravated Robbery [section 311(1)(a)] and Damage to property [section 369(1)] of the Crimes Act, 2009 committed with 04 others [three of whom are the appellants in AAU0092/2016, AAU 099/2016 and AAU 100/2016] on 06 April 2014 at Nadi in the Western Division.

[2] The information read as follows.

FIRST COUNT

Statement of Offence

ACT WITH INTENT TO CAUSE GRIEVOUS HARM: *Contrary to Section 255 (a) of the Crimes Decree 44 of 2009.*

Particulars of Offence

PENI YALIBULA, MIKAELE TURAGANIVALU, RUSIATE TEMO ULUIBAU, ULAIASI QALOMAI and TEVITA QAQANIVALU on the 6th day of April 2014 at Nadi in the Western Division, with intent to cause grievous harm to MANI RAM, unlawfully wounded the said MANI RAM by kicking, hitting and striking him in the head with a liquor bottle.

SECOND COUNT

Statement of Offence

ACT WITH INTENT TO CAUSE GRIEVOUS HARM: *Contrary to Section 255 (a) of the Crimes Decree 44 of 2009.*

Particulars of Offence

PENI YALIBULA, MIKAELE TURAGANIVALU, RUSIATE TEMO ULUIBAU, ULAIASI QALOMAI and TEVITA QAQANIVALU on the 6th day of April 2014 at Nadi in the Western Division, with intent to cause grievous harm to NAUSAD MOHAMMED, unlawfully wounded the said NAUSAD MOHAMMED by kicking, hitting and striking him in the head with a liquor bottle.

THIRD COUNT

Statement of Offence

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

Particulars of Offence

PENI YALIBULA, MIKAELE TURAGANIVALU, RUSIATE TEMO ULUIBAU, ULAIASI QALOMAI and TEVITA QAQANIVALU on the 6th day of April 2014 at Nadi in the Western Division, robbed MANI RAM of assorted liquor valued at \$3,400.00, assorted cigarettes valued at \$1,300.00 and \$5,300.00 cash all to the total value of \$10,000.00 and immediately before the robbery, force was used on the said MANI RAM.

FORTH COUNT

Statement of Offence

DAMAGING PROPERTY: *Contrary to Section 369 (1) of the Crimes Decree 2009.*

Particulars of Offence

*PENI YALIBULA, MIKAELE TURAGANIVALU, RUSIATE TEMO ULUIBAU, ULAIASI QALOMAI and TEVITA QAQANIVALU on the 6th day of April 2014 at Nadi in the Western Division, wilfully and unlawfully damaged assorted liquor valued at \$3,200.00, assorted juice valued \$580.00, 1 x computer valued at \$650.00, dried Kava valued at \$220.00 and 1 x cash register valued at \$499.00 all to the total value of \$6,609.00 the property of **MANI RAM**.*

- [3] After sentencing each of the appellant's pursued their respective appeals against conviction individually not as group. I will now consider each appellant's appeal separately and individually.

High Court

- [4] After the trial the assessors returned a verdict of guilty against the appellant for all the charges. The trial judge agreed with the assessors and convicted the appellant. He was sentenced on 11 July 2016 to 11 years for the offences with a non-parole period of 8 years.
- [5] The only evidence of identification at the trial against the appellant was given by DC Tukania who identified the appellant from a copy of the CCTV footage provided by the owner of the shop that was robbed. The quality of the image on the CCTV was poor. The original copy of the CCTV footage was not presented in court, only a copy. There were no evidence to authenticate the CCTV footage, except the statement of one of the shop employees that it the CCTV footage is one of 8 copies that was made.
- [6] The evidence of DC Leone Vurakania was relied heavily by the state to make the link between the appellant as one of the persons in CCTV footage taken by the shop security camera. While this evidence was crucial from the State's case, it nevertheless introduced evidence of previous bad character of the appellant, which at this stage of the trial would be prejudicial and unfair, and this should not have been allowed.
- [7] There was no identification parade conducted to identify the appellant.

- [8] On 2 August 2016 the appellant submitted a timely application for Leave to Appeal to the Court of Appeal. He filed written submission on 21 October 2019. The State submitted their submission in response on 17 August 2020.

Court of Appeal

- [9] Section 35(1) (a) of the Court of Appeal Act Cap 12, empowers a judge of the Court of Appeal to give leave to appeal. In exercising this power, the court is

Single Judge

- [10] In exercising the power by section 35(1)(a) of the Court of Appeal Act, the appellant submitted 7 grounds of appeal against conviction, alleging various errors of law and fact committed by the trial judge in his summing up at the trial. Each of these grounds were carefully reviewed individually taking into consideration, the submissions made by the appellant, in light of the evidence and relevant law. The learned Judge alone in his ruling was detailed in his coverage of the legal and evidential basis to support the conclusion he reached.
- [11] The learned Judge Alone concluded that none of the appeal grounds submitted, have a reasonable prospect of success on appeal and refused leave to appeal against conviction.

Full Court

- [12] On 2 September 2023 the appellant Qaqanivalu, filed a Notice of Renewal Application under section 35(3) of the Court of Appeal Act Cap 12. The appellant informs the court that the grounds advanced at the leave stage is being renewed with notice and the appellant will rely on the grounds and submissions filed in the application for leave to Appeal hearing before the single judge.
- [13] In addition, the appellant submitted three supplementary grounds as follows:
- (i) Trial Judge erred in law in allowing evidence of bad character through DC Leone VURAKANIA which was prejudicial & damaging to him
 - (ii) Trial judge erred in law in allowing the CCTV footage of identification when the images on it were unclear

- (iii) The trial judge erred in law in admitting unverified copy of CCTV footage which was unclear.
- [14] This court noted that these supplementary grounds were in essence the same as those submitted earlier for the Leave to Appeal Application before the learned single judge. I refer to supplementary grounds 1 and 2 which are the same as those submitted as grounds of appeal 1, 2 and 3 before the single judge. Supplementary ground 3, is the same as grounds 4 and 5 of the grounds submitted earlier.
- [15] The Court also noted that there are no substantive new submissions advanced by the appellant in the submission he filed in court on 2 September 2020, based on evidence and law to address the basis of the single judge's determination. It is as if, the single judge's determination remains unchallenged by the grounds of the renewed appeal.
- [16] During the hearing of the appeal on 6 September 2023, the court pointed out to the appellant that despite the clear findings of the learned judge at the Leave to Appeal Hearing, the 3 supplementary grounds advanced in court, is not new it is simply a rehashing of the grounds of appeal and supporting submission made earlier. The weaknesses in his case pointed out by the single judge ruling dated 21 August 2020 were not addressed in the renewed grounds and the supporting submissions.

Assessments of the Renewed Grounds of Appeal

Bad Character Evidence

- [17] The three supplementary grounds can be consolidated into one, as they relate to the issue of fairness and prejudice to the appellant when bad character evidence of DC Leone Vurakania and the CCTV Footage allegedly showing the appellant in the shop which was unclear regarding bad character.
- [18] It is not in dispute that bad character evidence was introduced into the trial by the evidence of DC Leone Vurakania, who testified that he knew the appellant and it was not specifically addressed by the trial judge in his summing up to the assessors. The appellant claims implicitly that this was prejudicial to his case and was not fairly addressed by the trial judge in the summing up to the assessors.

[19] The relevant part of the summing up are set out at paragraph 88 to 97 [Copy Record Pages 309 to 311] which covers DC Leone Vurakania evidence. It clear that the witness had testified that he has had previous occasions attending court cases in Suva. DC Leone Vurakania's evidence refers to encounter with the appellant was at the court house in Suva. This is evidence of bad character was not addressed by the trial judge when summing up to the assessors. This is a miscarriage of justice. It should not have been allowed.

[20] In **King v State** [2019] FJSC 11, CAV 00002/2016 (21 May 2019) the Supreme Court in dealing with bad character evidence stated as follows:

21. *This is evidence of bad character. It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been involved of criminal acts other than those covered by the indictment.*

22. *It is important to stress that since the prosecution relied entirely on the caution interview statement to establish the identity of the appellants it was imperative that no prejudicial material showing a previous bad character of the appellants should have been allowed as evidence. The learned High Court Judge not only failed to address this issue in his summing up but also, failed to disregard this evidence in his judgment. Due to this prejudicial inadmissible evidence of bad character pertaining to both the appellants was included. This has caused a miscarriage of justice in this case.*

23. *However there was ample evidence in this case on all elements of the offence which could have led reasonable assessors to convict the Appellants.*

24. *I hold that although there was a miscarriage of justice by the inclusion of bad character evidence, when considering the totality of the evidence in the case it cannot be considered as a substantial miscarriage of justice. Therefore I hold that this falls within the proviso to Section 23(1)(a) of the Court of Appeal Act. Hence I uphold the conviction."*

[21] Unlike the factual situation in **King v State** [supra] in this case the trial judge did address the bad character evidence given by DC Leone Vurakania and the circumstances pertaining to it, in the judgment. He had also warned the assessors about the danger of convicting the accused if they are not sure of his identity: paragraph 27 to 29 Judgment at pages 283-284 Court Record.

[22] In the consideration of the evidence and apart from the bad character reference, the totality of the evidence is such that no substantial miscarriage of justice had occurred and is saved by section 23(1) proviso Court of Appeal Act applies. This ground is dismissed.

Admissibility of CCTV Footage

Poor Quality CCTV Footage & Recognition

[23] This ground of appeal was submitted by the appellant, as he claimed that the footage was of poor quality, being a copy and no expert was called to produce it. The appellant objected to the CCTV Footage being shown to the assessors and for DC Leone Vurakania's evidence based on his recognition of him as one of the robbers who was at the shop on the night of the robbery, to be shown to the assessors. These objections by the appellant, were the subject of ruling of the trial judge on 25 May 2016: **State v Peni Yalibula & 4 Others** Crim Case No: HAC 47 of 2014.

[24] It is not necessary to restate the trial judges ruling on these issues now raised again in the Court of Appeal, suffice to say that we endorse the specific findings and conclusions made there. This Court endorse the trial judge's determination paragraphs 31 to 33 of the High Court judgement at page 285 of the Court Record.

"31. At the end of the trial, the assessors were satisfied, by watching the CCTV footage for themselves and evaluating DC Leone's evidence on it, that Prosecution was able to establish the identity of 5th Accused (Tevita Qaqanivalu). I also watched the CCTV very attentively. I agree with the finding of the assessors.

32. The 5th Accused also took up the defence of alibi. He said that he was with his girlfriend at her house in Nadi at the time of the robbery. He did not call his girlfriend as alibi witness. He had not given prior alibi notice to police to check his alibi. Although he had no burden to prove alibi, he failed to create any doubt in the prosecution case

33. I find DC Leone to be truthful witness and he had positively identified the 5th accused on the CCTV Footage."

[25] This ground has no merit

Use of copy

[26] As regards, the appellant's claim regarding the use of a copy of CCTV Footage the relevant parts of the summing up is paragraphs 41 to 45 [Page 20-21 Vol 1. Court Record]. The trial Judge was mindful of the poor quality of the CCTV footage and that DC Leone Vurakania was not present at the scene of the offence and he addressed this in the judgement. The Judge had said that:

"6. *Four eye witnesses were called by the prosecution. In addition to that, a CCTV footage obtained from eight surveillance cameras that been installed at the crime scene was also relied upon by the prosecution to prove the identity of the accused. It is the Prosecutions's case that accused were the people to be seen in the film. The quality of the film was not the best. I cautioned the assessors in line with Turnbull rules of identification.*

7. *Mani Ram and Nausad were inside the shop at the time of the robbery. They said that they clearly identified the 3rd and 2nd accused respectively. Jone Toga who happened to be at the crime scene and received injuries in the incident said that he identified 1st and 4th accused. DC Leone said that he identified the 5th accused while watching the CCTV footage. Defence rigorously contested the identification evidence.*

... ..

33. *I find DC Leone to be a truthful witness and he has positively identified the 5th accused (Tevita Qaqanivalu)"*

[27] These grounds of appeal have no merit and are dismissed.

[28] In conclusion all the grounds urged upon the Court for this review hearing are discussed above and found to be meritless. They are all dismissed

Oetaki, JA

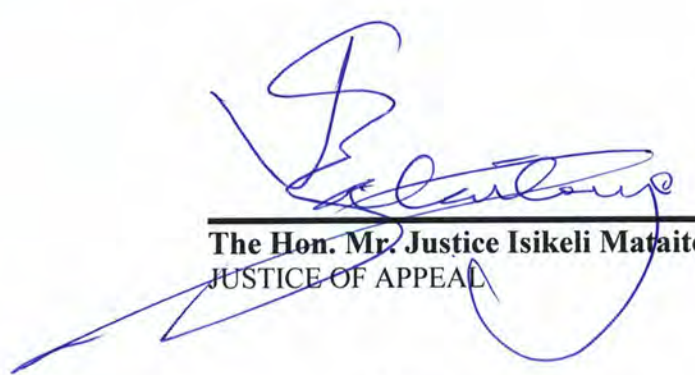
[29] I am in agreement with the judgment, the reasoning and the Orders.

Morgan, JA


[30] I concur with the reasons and conclusion of Mataitoga J.

ORDERS:

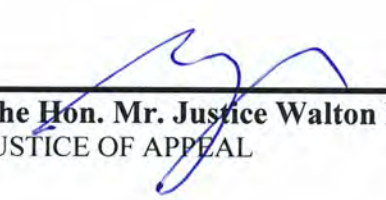
1. *Appeal is dismissed*
2. *Conviction and Sentence in the High Court is affirmed.*



The Hon. Mr. Justice Isikeli Maitoga
JUSTICE OF APPEAL



The Hon. Mr. Justice Alipate Qetaki
JUSTICE OF APPEAL



The Hon. Mr. Justice Walton Morgan
JUSTICE OF APPEAL

SOLICITORS:

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