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

CRIMINAL APPEAL NO. AAU0086 OF 2018
[Criminal Action No: HAC 172 of 2015]

BETWEEN : **KELEPI SALAUCA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Mataitoga, JA**
Qetaki, JA
Kumarage, JA

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

Date of Hearing : **9th May and 17th May, 2023**

Date of Judgement : **6th June, 2023**

JUDGEMENT

Mataitoga, JA

[1] I have read the judgement of Qetaki, JA and I agree with his reasons and conclusions.

Qetaki, JA

[2] The appellant was charged with two others by the Director of Public Prosecutions for aggravated robbery contrary to section 311 (1) of the Crimes Act. The following information was filed against them:

[3] **FIRST COURT**

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 **KAVITESH 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."*

[4] **The Facts**

In brief the facts are:

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.

[5] 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 issue before the learned trial Judge was whether the three accused persons were involved in the aggravated robbery under the circumstances laid in the police information or charges and particulars of offence. There were no eye witnesses who saw the accused at the scene of the crime or actually committing the robbery. The prosecution relied 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.

[7] At the joint trial the prosecution called fifteen (15) witnesses. The appellant (first named accused) gave evidence and called two witnesses. After the trial three assessors had returned with a unanimous opinion that all accused persons were guilty of one count of aggravated robbery. The learned High Court Judge agreed with the unanimous opinion of the assessors and convicted all the accused persons on the same count on 15 June 2018. They were sentenced on 10 July 2018 by the learned trial Judge at the Lautoka court. For his part in the commission of the offence the appellant (first named accused) was sentenced to 10 years 11 months and 7 days with a non-parole period of 9 years.

Leave to appeal application

[8] The appellant, lodged a timely application for leave to appeal on 30 July 2018 against conviction and sentence under section 21(1) of the Court of Appeal Act. For that appeal he also filed nine (9) amended grounds of appeal against conviction and

sentence filed on 21 May 2019, and he also filed two (2) additional grounds of appeal against conviction on 19 September 2019.The appellant filed written submissions on the grounds of appeal on 24 September 2019.At the leave to appeal hearing, the appellant abandoned his appeal against conviction. At the first call over of the appellant's (first name accused) application a learned Judge of appeal had directed that all three appeals, that is AAU 0086 of 2018; AAU 0084 of 2018 and AAU 0077 of 2018 be taken together for the leave to appeal hearing as they arise from one and the same High Court trial.

[9] Section 21 of the Act states:

> *"21. -(1) A person convicted on a trial held before the [High Court] may appeal under this Part to the Court of Appeal –*
>
> *(a) against his conviction on any ground of appeal which involves a question of law alone;*
>
> *(b) with the leave of the Court of Appeal or upon the certificate of the judge who tried him that it is a fit case for appeal against his conviction on any ground of appeal which involves a question of fact alone or a question of mixed law and fact or any other ground which appears to the Court to be a sufficient ground of appeal; and*
>
> *(c) with the leave of the Court of Appeal against the sentence passed on his conviction unless the sentence is one fixed by law.*
>
> *(2) The State on a trial held before the High Court may appeal under this Part to the Court of Appeal –*
>
> *(a) against the acquittal of any on any ground of appeal which involves a question of law alone;*
>
> *(b) with the leave of the Court of Appeal or upon the Certificate of the judge who tried the case that it is a fit case for appeal against the acquittal on any ground of appeal which involves a question of fact alone or a question of mixed law and fact or any other ground which appears to the Court to be a sufficient ground of appeal; and*
>
> *(c) with the leave of the Court of Appeal against the sentence passed on the conviction of any person unless the sentence is one fixed by law.*
>
> *(3) The Court of Appeal may, if it gives leave, entertain an appeal from the High Court against the grant or refusal of bail, including any*

conditions or limitations attached to a grant of bail upon the application of either the person granted or refused bail or of the Director of Public Prosecutions."

[10] The Court of Appeal had 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 **Caucau v State** AAU0029 of 2016; 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU 0038 of 2016; 4 October 2018[2018] FJCA 172, **State v Vakarau** AAU0052 of 2017; 4 October 2018 [2018]FJCA 173 and **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015; 6 June 2019 [2019] FJCA 87.

Grounds of Appeal on application for leave to appeal

[11] The grounds of appeal on the application for leave to appeal before a Single judge are set out below:

"1. That the trial Judge erred in law by accepting PW5 hearsay evidence whereas no reference nor caution was given to the Assessors in the summing up giving rise to a grave substantial miscarriage of justice.

2. That the trial Judge erred in law by contravening section 228(1) (2) and (3) of the Criminal Procedure Act of 2009, when he allowed PW (13) (Inspector Saimoni Qasi) to give evidence although he was not part of the briefs of evidence provided by the prosecution to the defence before the trial.

3. That the learned trial Judge Direction on the law regarding inconsistent evidence was inadequate giving rise to a substantial miscarriage of justice.

4. That the learned trial Judge erred in law and fact when he failed to explained to the Assessors not to draw any adverse inference on the Appellants right to remain silent during his caution interview. The direction given lacks fairness.

5. That the Appellant was seriously prejudiced when he was given (Additional Disclosures) pertaining search list after the witness (PW5) was cross-examined. The search list was a material issue supporting the discovery of unidentified canvas which linked the Appellant to this crime as charged. The search list should have been produced earlier in-order for the Appellant to prepare well for his defence. There is material irregularity in the making of the search list. The Appellant was seriously denied his right to fair trial.

6. *That the trial Judge had made an erroneous assessment of the evidence before affirming a verdict of guilty which was unsafe, unsatisfactory and unsupported give rise to a grave substantial miscarriage of justice.*
7. *That the doctrine of recent possession lack clarity on the circumstances in which the alleged canvas was discovered giving rise to a grave substantial miscarriage of justice.*

8. *That the Appellant was seriously prejudiced by prosecution technicality by proceeding the trial on "Recent Possession." The Appellant was not treated fairly when the Police did not question him regarding allegation of recent possession.*

9. *That the incriminating evidence produced by PW5 and PW8 was tainted by improper motive and there was no warning nor caution given by the trial judge causing a substantial miscarriage of justice."*

[12] The grounds for leave to appeal were consolidated into three (3) consolidated grounds on the hearing of the appellant's application for leave to appeal (see pages 5 to13 of Ruling delivered on 20 April 2020 at pages 117 to 127 of Record of the High Court of Fiji Vol.1 of Vol.11). After having carefully analysis and discussions on the consolidated grounds the learned Single Judge denied the appellant leave on all grounds as there is no reasonable prospects of the appellant succeeding under the 3 consolidated grounds in an appeal.

[13] The appellant filed his appeal against conviction on 30/5/19 (at pages 45- 47 Record of the High Court of Fiji Vol.1 of Vol.11); Submission for appeal grounds was filed on 24/9/ 19 (pages 48-74 Record as above). Submission for Proper Renewed Grounds and Bail in the Full Court of Appeal was filed on 9 May 2023; Submission for Fresh Evidence for Conviction Appeal was filed 9 May 2023 and Affidavit for Leave to Appeal Out of Time Against Conviction was filed on 9 May 2023.The hearing of the application for leave to appeal on this and the related two other cases on 9 May 2023 had to be adjourned due to the need for the appellant to file additional papers including the Renewed Grounds and Bail Appeal, Submission of Fresh Evidence For Conviction Appeal and Affidavit for Leave to Appeal out of Time to be filed by the appellant and to be served on the State, and provide ample time for the prosecution to reply .

Grounds of appeal to full court

[14] The fresh grounds of appeal filed by the appellant on 9 May 2023 are set out below:

"Ground 1- of appeal. Improper trial

(a) The trial proceeded on improper and irrelevant matters

(b) The evidence of PW5 on the allegation of a somewhat Confession should not be allowed to go to the mind of the assessors who were just layman and cannot understand or differentiate the legal meaning of confession which its trustworthiness has to be proved beyond reasonable doubt. The Law does not allow such evidence merely brought in nothing more than to poison the mind of the assessors to find me guilty.

Ground 2-That the incriminating evidence produced by PW5 (Manoa Dugulele) was tainted by improper motive and there was no warning nor caution given to the assessors in the summing up by the trial judge causing a grave substantial miscarriage of justice.

Ground 3- That the learned trial judge erred in law by convicting the Appellant on entirely uncorroborated evidence of PW5 Manoa Dugulele who is deemed to be found in possession of alleged Black SFIDA canvas and was also arrested as a suspect.

Ground 4- That the trial judge erred in law and in fact in failing to direct the assessors and himself to the dangers to accept sworn evidence which is in conflict with the statement made by the same witness and to give references to closest scrutiny where the evidence exists to be contradiction or omission thus result to grave substantial miscarriage of justice.

Ground 5- That the trial judge erred in law when he misdirected the assessors and himself in shifting the burden of proof to the Appellant at paragraph 25, 202 of the Summing Up and paragraphs 26.30 and 31 of the judgement by requiring the Appellant to create doubt in the prosecution case thus has result to grave substantial miscarriage of justice."

Ground 6- That the trial judge erred in law in misdirecting the assessors and himself that the stolen item (Canvas) was found in possession of the Appellant-reference paragraph 189 of Summing Up and paragraph 9 of the judgement.

Ground 7- "That the trial judge erred in law by misdirecting the assessors when his Lordship administered a Standard Judicial Warning and or remarks to the effect in paragraph 184 of the Summing UP (..' that an alibi is sometimes invented to bolster a genuine defence.." therefore by giving such warning in the Summing Up invariably displaces the burden of proof from the State to the Defence and such warning devalues the evidence of the defence."

Ground 8- That the court record provided by the Registry claimed to be audio transcript is inadequate, and most of the questions and answers is incomplete, Inconsistent and Insufficient record of what transpired during trial thus will affect the fairness assessment of the Appellant main complaint issue about arguments of evidence he has been ambushed with during trial.

Ground 9- That the court record provided by the court Registry claimed to be the Judges Note (Copy) is the true record of what the judge (Trial Judge noted) during trial, then no wonder the Appellant was found guilty of charge because of inadequate, incomplete and insufficient record in the Judges Note as some question and answer is incomplete, inconsistent and inadequate with what transpired during trial, thus resulted to grave substantial miscarriage of justice.

Ground 10- The Summing Up was unfair and unbalance."

[15] Although untimely filed, this court has accepted the renewal of application of grounds of appeal and the leave to appeal out of time against conviction. However, the Court has rejected the application for adducing fresh evidence before it. (I will deal with this aspect later in this judgement.) At the hearing on 17 May 2023 , after making oral submissions, the appellant informed the court that he relies on the written submissions filed on 9 May 2023.He was making reference to hand-written submissions filed in support of the grounds of appeal on 9 May 2023 which had been served on the prosecutions and replied to by the latter.. I now deal with all the grounds of appeal.

Analysis of ground of appeal

[16] **Ground 1(a)**

"It is alleged by the appellant that the trial proceeded on improper and irrelevant matters."

The ground and the particulars contained in the hand written Submission For Proper Renewal Grounds and Bail In The Full Court of Appeal (Fiji) filed on 9 May 2020 alleges misconduct, negligence, carelessness, unfairness, inconsistencies, misdirections, breaches of disclosures procedures and considerations of improper and irrelevant matters by the police, prosecutions and the learned trial Judge .The submissions raised issues on the conduct of the police, prosecution and the High Court during pre-trial proceedings and during the conduct of the trial.

[17] These issues have been raised previously in the grounds for leave to appeal before a single Judge who had adequately considered their prospects , but couched differently and with a different slant and approach to the same points and issues and their specifics-see Ground of Appeal (page116 to 117 of Record of High Court of Fiji Vol.1 of Vol.11).These have bearing on the evidence of prosecution witnesses PW5,

PW8,PW13 in particular, and in the approach taken by the prosecution to rely on the **doctrine of recent possession** and **circumstantial evidence** connected to the concept of a **Joint Enterprise,** as there were no eye witnesses who saw the appellant and the two others at the crime scene or saw them commit the act they have been charged for (aggravated robbery)

[18] In this ground the appellant expressed reliance in **Zafir Tarik Ali and Others v State** FJCA 28; AAU0041.2010 (1 April 2011), especially in the standards of conduct that promote the rule of law in the investigation, prosecution and trials in criminal cases. This case is referred to as **Ali's** case from now. The sentiments expressed by Hon. Justice William Marshall, Justice of Appeal are worthy to repeat given this ground of appeal and the other grounds in this appeal and the contentions and urgings of the appellant in his written submissions.

[19] From the outset it is observed that the facts in this case and **Ali's** are quite different and the latter has been described as **'an isolated and unique case'.** However, there are lessons to be learnt from the legal principles applicable to police investigators and others, prosecutors and judicial officers operating in our legal system and in our courts in the performance of their duties and role. In paragraph [3] of the Judgement, Hon. Justice William Marshall, Justice of Appeal, at page 2, stated with respect of safeguarding the rule of law in criminal cases**:**

> *"3. Now the three groups of citizens who have the greatest burden in applying the safeguards and maintaining the rule of law in criminal cases are the police who investigate crime, the prosecution service under the Director of Public Prosecutions who have the duty of prosecuting criminal cases in the courts of Fiji, and finally, the judiciary particularly in the High Court. The High Court judges who are assisted on the facts by the opinion of the assessors, must apply the rules relating to procedure to be followed at criminal trials with integrity and meticulously and make the rules necessary by applying principles of law without fear or favor in respect of either prosecutor o counsel for the defence. They have the burden to ensuring a fair trial in accordance with the rule of law."* [Underlining is mine]

[20] His Lordship further stated (page 4) with respect to police investigators, public prosecutors, and Judges

"11…. [T]he Police investigator serve the rule of law and the people of Fiji if he or she investigates thoroughly but notheless fairly and correctly in respect of gathering evidence, in respect of interrogating suspects and in respect of charging accused persons.

12. The Public prosecutor serves the rule of law and the people of Fiji, if he or she observes the rules and does not strive to obtain convictions on a number of unfair and unlawful practices such as trying to get new and inconsistent evidence admitted into evidence against the accused. If the prosecutor does that without giving notice to the Court and the defence counsel who are ambushed and taken by surprise, it is worse. If the Court and the defence are intentionally mislead that makes it much worse.

13. The judge of the High Court serves the rule of law and the people of Fiji if aware of all the rules of law he or she applies them and achieves a fair trial."

[Underlining is mine]

[21] Commenting on the facts in that case, His Lordship said earlier (at page 2):

"4. This case at one level is about four men of good character who together with a fifth (also of good character) went in search of a person who had broken, entered and stolen from one of their houses in the middle of the night. But it is at another level an enquiry into the conduct of a prosecutor who intentionally breached fundamental rules vital to the upholding of the rule of law in criminal cases. It is also about having a post mortem system of integrity.

6. Prosecution services under the DPP are usually carried out to a higher standard under the DPP.I have considered may appeals and read many files in criminal cases. In respect of prosecutors, I have always found that devotion to duty, to fairness and the rule of law in criminal cases is exemplary. Most unusually there are criticisms of the prosecutor who conducted the case for the State in the Court below. However, it is an isolated and unique case; an exceptional case like this does not cause any loss of public confidence in the conduct of prosecutions…."

[Underlining is mine]

[22] I endorse the above quoted comments, I also support the principles raised in the cases cited below on, the trial of a person for a criminal offences not being a contest of private interest in which the rights of parties can be waived at pleasure ; conduct of prosecutor toward jury(not to exhort the jury) ; prosecutors to regard themselves as minister of justice not to struggle for a conviction, as articulated in the cases discussed in pages 2 and 3 of the said Judgement, namely: **Lee Kun v R** Crim. Appeal A.R. 293

at 300;**R v Banks**[1916] 2KB 621; In **Gonez** [1999] All ER(D) 674;**Reg v Rudland** (1865) 4 F & F,495; **Reg v Puddick**(1865) 4F & F,497.

[23] That being said, the trial in this case being the subject of this appeal is not one which the prosecutor's conduct fell to the low standards of **Ali's** case which is '**an isolated and unique case; an exceptional case'** The respondent in its written submissions dated 16 May 2023 refuted the assertions of prosecutorial misconduct or judicial bias at the trial. It submits that it is clear from the evidence, and admitted by the prosecution that there was late disclosure midst trial of the search list (Signed by PW 8 and PW5 at pages 665 and 666 of the Supplementary Record of the High Court Vol 111 of 111) which relate to the recovered SFIDA canvas. However, an examination of the records (disclosures) reveals that the appellant has had reasonable notice of the available evidence against him by the statement of PW8 Siteri Levers (PW8 typed handwritten statement dated 12/10/15 at pages 266 to 269 of the Record of the High Court Vol 11 of 11.) with respect to recovered SFIDA canvas .The appellant also had reasonable notice of what PW 5 Manoa Dugulele would say about his alleged confession to him as per his statement.(PW5 typed and written statement dated 12/10/15 at pages 260-265 of the Record of the High Court Vol 11 of 11) .Contrary to the assertion that PW13 IP Saimoni Qasi's statement had not been disclosed , the disclosures speak otherwise-(PW13 typed statement dated v 14/ 10/15 at page 220 of the Record of the High Court Vol,2 of 11).

Procedural document, disclosures, search list

[24] In its response the prosecution submitted that procedural documents like a search list are memory tools and there was no actual prejudice to the appellant where there had been an inexplicable late disclosure of the search list that caused any embarrassment to his defences of denial and alibi where such raised defences were fairly before the assessors and trial judge to properly consider. That it is inescapable that prosecution my not have been as diligent in its pre-trial disclosures duties but it cannot be reasonably seen as prosecutorial misconduct as the appellant has reasonable notice of the potential evidence against him prior to trial in the form of witness statements. Also, an examination of the transcripts reveals a wholly fair judicial approach to the appellant. For example, when looking at, inter alia, issues raised by the appellant at the trial preparation, the trial court went to fair lengths at ensuring he was assisted in

preparing for trial when examining pages 79 to 102 of the transcripts in the Supplementary Record of the High Court Vol 1 of 11.

Recent Possession

[25] In relation to recent possession, I agree with the prosecution that the appellant seeks to cast doubt on the recovered SFIDA canvas as identified by PW1 Kavitesh Kirit Prasad due to the mentioning of it being particularized as "*black SFIDA*" but said to be *"black and white SFIDA"* .However , PW1 clarified in cross examination that the recovered SFIDA canvas was generally black (99% black)(PW1 complete evidence at pages 110 to 128 of the transcripts , particularly cross-examination at page 126, in the Supplementary record of the High Court Vol 1nof 11.).Therefore there was no actual doubt as regards the nature of the recovered SFIDA canvas. Similarly, when PW8 Siteri Levers (PW8 complete evidence at pages 168 to 176 of the transcripts in the Supplementary record at the High Court Vol 1 of 11) was shown the subject SFIDA canvas as exhibited she confirmed it as having the same black canvas with a white mark, She had handed it to the police, the appellant having left the canvas at their home.

[26] The prosecution also submitted that the learned trial Judge had been nothing but fair prior to and during trial and had, in a balanced manner, turned the assessors and his mind to raise inconsistencies between prosecution's adduced evidence before deciding to accept prosecution's evidence as truthful as the inconsistencies were not actually material. Nothing irrelevant or prejudicial (*the appellant being known to Police)* was considered when the trial Court had found prosecution's evidence as truthful which in turn pointed to the undeniable guilt of the appellant, and there is no reasonable basis to say that there was any judicial bias or any improper trial. The trial proceeded with both the prosecution and defence fully participating in accordance with the Rules of the High Court and its procedures. The offence was aggravated damages which the prosecution was perusing in line with the **doctrine of recent possession** and **circumstantial evidence** in a **Joint Enterprise**. Reliance on **Ali's** case has limited value for the appellant. The conduct of the trial by the learned trial Judge, and the conduct of the prosecution were in accord with the normal standards required in a trial of a serious offence. They were carrying out their respective duties in accordance with the rule of law. The evidence sought and given were in accordance

with the normal trial in a charge of aggravated robbery where there were no eye witnesses to identify the accused persons or saw them in carrying out the act. There was nothing improper on the conduct of the trial nor the matters that were at the heart of the trial . This ground overall is misconceived. It is dismissed.

[27] **Ground 1(b) and Ground 2**

"An objection to the evidence of PW5 in which the witness testifies to the appellant confessing his involvement in the Sigatoka robbery, being included in the direction to the assessors." Ground 2 challenges the evidence of PW5 and alleges *'improper motive'* on his part.

The ground challenges the learned trial Judge's decision to include PW5s evidence pertaining to the appellant's admission or revelation or 'confession' to him (PW5) of the appellant's participation in the aggravated robbery incident in Sigatoka, in the Summing Up. And that it was being done without warning or caution, leaving the assessors open to influence and 'poison' to find the accused guilty. The appellant denies that piece of evidence at the trial, and he has alleged that PW5 had an improper motive to tarnish the appellant's standing and image as PW5 was a suspect and had been arrested. That PW5 was released from custody only after he had implicated the appellant in his caution statement. The ground is unarguable.

[28] That there is no evidence adduced at the trial against PW5 in having taken part directly or indirectly in offending linked to the crime alleged to have been committed, in the principal offending of aggravated robbery (PW5 complete evidence at pages 142 to 153 of the transcripts in the Supplementary Record of the High Vol 1 of 11.) The learned trial Judge was correct to have noted in his judgement at paragraph 25 (page 166 Record, Vol 1 of Vol11.) that prosecution witnesses had no motive to implicate the accused persons.

> *"25. There is no evidence before the court that the prosecution witnesses had a motivation to implicate the accused persons. I therefore reject the defence suggestions that the prosecution witnesses had a motivation to fabricate a story against the first accused to implicate him."*

[29] The respondent submitted that the appellant's spontaneous confession or admission was direct evidence from PW5 against the appellant. PW5 was clearly tested robustly

in this regard by the appellant and he remained entirely forthright and credible. The appellant did not deny meeting PW5. There had simply been no doubt about PW5's evidence against the appellant and the Honorable trial Judge was mindful of the inconsistencies relating to the passage of time and reminded the assessors during Summing Up. At paragraph 23 of the judgement, the learned trial Judge stated:

> *"23 I accept the evidence of the prosecution witnesses as truthful and reliable. There is no doubt that there was a robbery at the house of the complainant. The witnesses were able to recall what had happened some three years ago and they were able to withstand cross examination and were not discredited on the other hand the witnesses were forthright and had expressed themselves clearly. There were some inconsistencies due to passage of time between what the witnesses told the court and what was stated in their police statements, however, the inconsistencies were not significant which did not adversely affect the credibility and reliability of their evidence."*

The appellant had the opportunity to ask for a redirection but did not. There is no merit in ground 1(b) and 2 collectively. It is dismissed.

[30] **Ground 3**

"*No corroboration of PW5 Manoa Dugulele's evidence. That the learned judge erred in law and in fact by convicting the appellant on evidence that is entirely uncorroborated. It alleges that PW5's evidence was found in possession of the black SFIDA canvas and PW5 was also arrested as a suspect."*

The appellant asserts that PW5 was deemed to have been in possession of the received SFIDA canvas however the evidence was clear from PW8, irrespective of her being PW5's wife, that the appellant had left the subject SFIDA canvas at his home. The prosecution in its reply says that, under this ground the appellant appears to paint a picture of his cousin brother and sister-in-law as having been sinister in their respective testimonies but considering the best evidence rule (orally is dominant), having seen and heard the witnesses at the trial, certainly the Honorable trial court does not appear to have made any factual error in finding prosecution witnesses, against appellant, as truthful.

[31] On the evidence at the trial, PW5 was not a receiver of stolen properties nor were he or PW8 ever charged as such.PW5 was not remotely close as being seen as accomplice based on the adduced evidence and there was no corroboration required of PW5's evidence on this ground. The learned trial Judge was neither biased nor prejudicially selective in assessing the entirety of the adduced evidence as is judicially reflected in the fair and balanced Summing Up. There is no merit in this ground. It is dismissed

[32] **Ground 4**

"States that the Learned High Court Judge erred in law and in fact in failing to direct the assessors and himself on the dangers to accept sworn conflicting evidence by the same witness as it results in grave substantial miscarriage of justice. Alleges a lack of direction on the dangers of sworn evidence vis a vis witness sworn statement."

The conduct of the trial was in line with the High Court Rules and the appellant as accused representing himself at the trial was at liberty to ask for a redirection after the summing up. He did not. Any concerns raised here was addressed in the trial Judge's summing up which was fair, equally applicable and adequate on the prosecution as with the defence. There was no evidence of improper motive on PW 5. He was not a suspect and not charged for an offence. There was no inconsistency in evidence as alleged in this ground. If there were inconsistencies, they were addressed adequately in the summing up. No miscarriage of justice resulted or occurred. This ground is misconceived. It is dismissed.

[33] **Ground 5**

"That the trial judge erred in law when he misdirected himself and shifting the burden of proof to the Appellant at paragraphs 25, 202 of the Summing Up and paragraphs 26, 30 and 31 of the judgement by requiring the Appellant to create doubt in the prosecution case thus results in grave substantial miscarriage of justice. Shifting of burden of proof."

There was no misdirection resulting in a shifting of the burden of proof to the accused person see paragraphs [8] and [9] of summing up and paragraphs [25] and [202] below, of summing up:

"25. The burden on the accused persons is to give a reasonable explanation of possession of stolen properties.

202 .You will evaluate all the evidence and apply the law as I explained it to you when you consider the 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 own evidence or with his or her previous statement or with other witnesses who gave evidence. It does not matter whether the evidence4 was called for the prosecution or the defence. You must apply the same test and standards in applying that."

[34] The learned trial judge correctly directed on the **doctrine of recent possession** in summing up in paragraphs [21] to [25]. In his Judgement he affirmed the status of the prosecution witnesses:

"24 I have no doubt in my mind that the prosecution witnesses told the truth in court their demeanor was consistent with their honesty. The prosecution had disproved the defence of alibi beyond reasonable doubt. "

[35] The learned trial Judge found the accused persons as not forthright and rejected their evidence,

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

30. The witness also did not tell the truth in court his demeanor was not consistent with honesty.

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."

Considering the above, and the totality of evidence adduced at the trial, here was no shifting in the burden of proof to the accused persons due to a misdirection by the trial judge. There was no misdirection. The defence witnesses were found to be unreliable and untruthful. The ground is misconceived. It is dismissed.

[36] **Ground 6**

"That the Learned Trial Judge had erred in law in misdirecting himself that the stolen item (SFIDA pair of canvas) was found in possession of the Appellant. See paragraph 189 of the Summing Up and paragraph 9 of the judgement."

This ground relates to PW8's evidenc.The trial judge assessed her evidence as reliable and honest as with other prosecution witnesses. The direction in paragraph of the summing up was factually correct based on the evidence:

> *"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."*

[37] PW8's evidence was clear and did not change despite the robust cross-examination by the appellant on the seizure of the recovered SFIDA canvas:

> *"190. The accused Kelepi Salauca was seen wearing a SFIDA black canvas when he visited the house of Siteri Levers (PW8) on 11 October. After he was lent a pair of flip flops by Siteri he left the canvas at the house of this witness."*

There had been no motive for the appellant's sister-in-law (PW8) to frame up the appellant. There is no evidence that she was a suspect or had been arrested aand charged and her evidence was clear that it was the appellant who had left the subject SFIDA canvas at their home when he arrived. She had given to her father-in-law and handed them over to police. There was no break in the chain of evidence in this regard relating to the recent possession of the recovered SFIDA canvas. There is no merit on this ground. It is dismissed.

[38] **Ground 7**

"That the Learned Trial Judge misdirected the assessors when his lordship a standard judicial warning or remarks to that effect in paragraph 184 of Summing Up. "That an alibi is sometimes invented to bolster a genuine defence" that has the effect of displacing the burden of proof from the State to the defence and such warning devalues the evidence of the defence. Alibi directions."

The prosecution in its reply sated that term '***to bolster a genuine defence*** 'had no prejudicial effect against the defence as the assessors were simply directed that an alibi could be invented to bolster even a genuine defence (a plain interpretation meaning, to support a true defence**)** while there were proper directions, that it is the prosecution

that must disprove alibi, where guilt must not simply be inferred upon rejection of the alibi.

[39] The summing up in paragraph [184] appear to be proper and without any prejudice to the appellant.

> *"184 Defence of alibi' The first and third accused persons have put forward a defence of alibi. They say that they were not at the scene of crime when it was committed. As the prosecution has to prove their guilt so that you are sure of it, they do not have to prove they were elsewhere at the time. Even if you conclude that the alibi was false, that does not by itself entitle you to convict the accused.it is a matter which you may take into account, but you should bear in mind that an alibi is sometimes invented to bolster a genuine defence"* [Underlining is mine.]

The term '*bolster a genuine defence* 'in context of the trial in this case, had no prejudicial effect on the defence and the appellant's position in particular considering the totality of the evidence , and that the assessors were simply directed that an alibi could be invented to bolster, prop up or support a genuine or true defence. There is no merit in this ground. It is dismissed.

[40] **Ground 8**

"That the court record provided by the Registry claimed to be transcript is inadequate, most of the questions and answers are incomplete, inconsistent and insufficient record of what transpired during the trial, thus will affect the fairness assessment of the Appelant's main complain issue about arguments of evidence he has been ambushed with during the trial."

This ground is to connected to ground 9.The appellant states that having heard the recordings and the transcripts of the proceedings they are inadequate, while the person who prepared the recording has manipulated the recording to the appellant's detriment. He indicated the next step to take should his appeal fail. Paragraph [8.3] of his submission on this ground states:

> *"Therefore, on this ground, I wish to respectfully submit in this Court that I wish to reserve the ground for Supreme Court determination if this appeal will not in my favor in the full Court hearing"*

While this issue will be drawn to the notice of the Office of the Chief Registrar given its nature, it is observed that the other co-appellant who could have raised this issue - (Tui Lesi Bula AAU 0077 of 2018) had, for some reason not done so. I venture to observe on this point that criminal trials are held in open court and to assert something sinister against those who keep and maintain records of criminal proceedings is a serious matter. This court will decide on the record available to it from the Records of the High Court of Fiji. The appellant has not assisted this court by not divulging in detail what evidence he had in relation to the allegation of manipulation of the record in the form of tapes and transcripts if he were serious about the allegations. This ground is dismissed; On the totality of the evidence no miscarriage of justice occurred. This ground is unarguable.

[41] **Ground 9**

That if the court record provided by the court registry claimed to be judges Note (copy) is the true record of what the Trial judge noted during trial then, it affected the decision to find Appellant guilty. Because of inadequate, incomplete and insufficient record in the Judges Note (*some questions and answers are incomplete*, *inconsistent and inadequate, which resulted in grave substantial miscarriage of justice.)*

The appellant had not been specific on what he claimed to be inadequate, incomplete and insufficient that affected the unanimous verdict of the assessors. He was at the trial and at liberty to participate fully. According to the record he was assisted by the trial judge earlier on in the trial in the preparation stage of his case. It is submitted by the prosecution and also my understanding that the Judges Notes are a summation of the adduced evidence and need not be verbatim. The appellant had indicated his intention to reserve this ground for the Supreme Court should his appeal fail. The appellant had submitted that grounds 8 and 9 be dealt with after an inspection is carried out. This court is concerned to make a determination on the evidence at the trial and any other evidence lawfully before it. It cannot speculate on what is not before it. This court has dealt with the other grounds of appeal on the basis of the Record of the High Court of Fiji and evidence. On the totality of the evidence this ground is dismissed. No miscarriage of justice occurred. The ground is unarguable.

[42] **Ground 10**

That the summing up was unfair and unbalance.

This ground alleges unfairness and unbalanced summing up leading to the appellants conviction. The appellant also submits that the summing up was inadequate, contained flaws and irregularities, and selective. To the contrary the prosecution submitted in response that the summing up is tailored for lay assessors where evidence, which remains fresh in assessor's minds is summerised for practicality together with relevant and proper directions. Legalistic terms are avoided as far as possible and such concepts are reduced into simple language for ease of understanding. The prosecution asserts that no portion of 215 paragraphs Summing Up in the case can reasonably be considered in isolation while considering the entirety of the Summing Up, within context. It states that the only conclusion is that Summing Up is fair and wholly balanced *vis a vis* the 15 prosecution witnesses and tendered exhibits and a total of 4 defence witnesses. Ground is unarguable.

[43] Having gone through the Summing Up, it was comprehensive, and comprehensible being communicated to the target audience the assessors in simple and plain English language. It is extensive covering 215 paragraphs and divided into major and relevant areas of concern in a criminal trial. It covers the following parts: Role of Judge and Assessors (paragraphs [2] to [7]; Burden of Proof and Standard of Proof (paragraphs [8] to[14]); Information (paragraphs [15] to [20]); Recent Possession (paragraphs [21] to [25]; Circumstantial Evidence (paragraphs [26] to32]; Joint Enterprise (paragraphs [33] to [37]; Prosecution Case (paragraphs[38] to [141]; Defence Case (paragraphs 142 to [187);Analysis (paragraphs [188] to [198], and Conclusion (paragraphs [199] to [215].The part of the Summing Up that relate to the appellant (First accused) are in paragraphs [149] to [174].

[44] The summing up was fair and balanced. In my view it reflects the level of attention and analysis that the learned trial Judge had invested in ensuring that the assessors are effectively empowered to consider the evidence and make their own decisions on the guilt or otherwise of the accused persons. This ground has no merit. It is dismissed.

[45] **Ground 12 Application to adduce fresh evidence**

In this ground: *The appellant seeks for the full court to consider his cautioned interview, charge statement and statement of his defector wife to show that there was a miscarriage of justice and prove his innocence*.

The materials referred to in this ground are certainly available to appellant at trial and are not fresh. The respondent submits that in fairness to the appellant, the court may consider these in its overall Supervisory duty. The respondent submitted that the conviction cannot be assailed. The appellant had filed a Notice of Application for Leave to Adduce New Evidence on Appeal against conviction on 9 May 2023 the date of hearing of this appeal. Prior to filing the court had verbally indicated its stand on the matter. The hearing of the appeal was held on 17 May 2023 to accommodate the filing by the appellant of new grounds of appeal. The appellant had filed his Submission for Proper Renewal Grounds and Bail which is extensive covering 82 pages of handwritten submissions.

[46] The grounds covered in this appeal had been covered previously before in the hearing before a Single Judge of the application for leave to appeal. I have perused the Submission for fresh evidence with the Affidavit accompanying it. In my view the documentation filed does not point to any "*fresh*" new evidence not already before the Court and dealt with appropriately. The court has already indicated to the appellant on the first day of the hearing before it was adjourned to another day to enable the appellant file his grounds of appeal, that the court will not accept fresh evidence. In the circumstances, and considering the totality of the evidence, no substantial miscarriage of justice occurs in denying an application to admit fresh evidence. Section 23(1) requires that a decision made under it should be made if it is considered there is 'no substantial miscarriage of justice.' Given the circumstances of this case and the totality of the evidence, I consider that denial of admission of fresh evidence does not result in substantial miscarriage of justice. This ground has no merit. It is dismissed.

[47] I have considered all the grounds of appeal for leave to appeal filed on 9 May 2023. I have dismissed all the grounds. In the process I have also considered the merits of the appeal against conviction. The appeal against conviction is dismissed. Conviction is affirmed.

Kumarage, JA

[48] I have had the opportunity to go through the draft Judgment of Justice Qetaki, I share his view that the appeal should be dismissed and the conviction should be affirmed.

Order of the Court

1.Appeal is dismissed.

2.Conviction affirmed.

Hon. Justice Isikeli Mataitoga
JUSTICE OF APPEAL

Hon. Justice Alipate Qetaki
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

Hon. Justice Thushara Kumarage
JUSTICE OF APPEAL