IN THE COURT OF APPEAL, FIJI
Appellate Jurisdiction

CRIMINAL APPEAL NO. AAU 004 OF 2023
CRIMINAL APPEAL NO. AAU 011 OF 2023

BETWEEN: **PENIASI QALIBAU**

Appellant 1

KAMINIELI SAUKURU

Appellant 2

AND: **THE STATE**

Respondent

Coram: **Mataitoga, RJA**

Counsel: **Appellants in Person**

Baleilevuka L and Vosawale M for Respondent

Date of Hearing: **31 July 2024**

Date of Ruling: **19 August 2024**

RULING

1. The appellants Peniasi Qalibau and Kaminieli Saukuru with a Varisiko Adrole and another, were jointly charged by the Director of Public Prosecution for the following offence:

COUNT 1

Statement of Offence

AGGRAVATED ROBERRY: *Contrary to section 311 (1)(a) of the Crimes Act 2009*

Particulars of Offence

PENIASI QALIBAU, KAMINIELEI SAKURU and VARISIKO ADROLE *with Anor on the 23 February 2021, at Vatuwaqa in the Central Division, in the company of each other stole $3800 cash, assorted recharge cards, 3 packs of Joske Brew, 5 packs of Woodstock and 1 Samsung Galaxy A20 mobile phone from* ***SHARS EXY BUY*** *and immediately before committing the theft, used force on* ***FAIZAL SHAH*** *and* ***SHANDYNA NARAYAN.***

2. The trial in the High Court at Suva started on 22 November 2022. The charge against Varisiko Adrole was the subject of DPP's Nolle Prosequi due to his failure to turn up in Court on several time the case was called. The trial proceeded against the 2 appellants in this case.

3. Both appellants challenged the voluntariness of their caution interview records on the basis that they were not freely given by them and unfairness in the procedures followed in obtaining them. A Viore Dire Hearing was held and the trial judge in his RULING[1] ruled that the statements would be admitted after being satisfied on the evidence that were called by both prosecutions and the appellants.

4. After hearing the evidence adduced through witnesses called by both the appellants and the respondent the court found the appellants guilty as charged and convicted them both accordingly, in a judgement delivered on 8 December 2022. The appellants were sentenced on 9 December 2022 to 12 years and 3 months imprisonment with a non-parole period of 8 years and 3 months.

[1] **State v Peniasi Qalibau, Kaminieli Saukuru** Crim Case No: HAC 062 of 2021 [**Voir Dire Ruling]**

The Appeal

5. Both appellants filed Notice of Appeal against conviction and sentence dated 12 December 2022, which in the case of Appellant Kaminieli SAUKURU was received in the Court Registry on 20 December 2022 and in the case of Peniasi Qalibau on 3 January 2023. The appeal by the appellants were timely.

Relevant Legal Principle

6. The grounds of appeal below alleges errors of law and fact by the trial judge, therefore in terms of relevant provision of the Court of Appeal Act 2009, section 21 (1) (b) is relevant. Under this provision leave of the court is required to appeal.

7. For a timely appeal, the test for leave to appeal against conviction and sentence is **'reasonable prospect of success'**: **Caucau v State**[2], **Navuki v State**[3] and **Sadrugu v The State**[4]

8. The court will now assess the ground of appeal to determined its reasonable prospect of success on appeal to the Court of Appeal.

Grounds of Appeal

Peniasi QALIBAU A1 – AAU 004 of 2023

9. This appellant submits the following grounds of appeal against conviction:

(i) The trial judge erred in law and in fact in convicting the appellant of the charge of aggravated robbery when there direct or indirect evidence implicating the appellant;

[2] [2018] FJCA 171 (AAU 029 of 2016)
[3] [2018] FJCA 172 (AAU
[4] [2019] FJCA 87 (AAU 057 of 2015)

(ii) The trial judge erred in law and fact by finding the appellant guilty of the offence of aggravated robbery, when prosecution failed to prove beyond reasonable doubt the essential element of identify of the accused person for the charge;

(iii) The trial judge erred in law and fact in convicting the accuse solely on the evidence of PW3 for aggravated robbery;

(iv) The trial Judge erred in law and fact by shifting the burden of prosecution to the appellant as suggested at paragraph 46 to 51 of the judgement.

Kaminieli SAUKURU A2 – AAU 011 OF 2023

10. This appellant submitted the following grounds of appeal against conviction:

(i) The trial judge erred in law and fact in not excluding the appellant's cautioned interview when he knew that it was not from the appellant's free will;

(ii) The trial judge erred in law and fact in his voir dire ruling that the burden of proof paragraph 5, 6, and 7 at page 3 "if there has been a breach of any accused constitutional rights" when he forgot that in paragraph 13 at page 5 the right to remain silent was not given to the appellant and this is miscarriage of justice.";

(iii) The trial judge erred in law and fact when he stated at paragraph 14 page 5 that the appellant's demeanor was good and he did not appear to be frightened and he was communicating with other officers. He failed when he knew very well there is no witnessing officer and the trial judge should take extra precaution to enquire who is this officers present during the interrogation;

(iv) The trial judge erred in law and fact when he overlooked the Criminal Procedure Act the very important part of the law that is not having a witnessing officer and failed also and erred when he stated at paragraph 16 page 6 of Voire Dire, he stated that sometimes they do not having witnessing officers when he forgot that at paragraph 14 page 5 of voire dire ruling he stated that the appellant was communicating with officers;

(v) The trial judge erred in law and fact in his judgement when he ruled that the caution interview given by the appellant is voluntary when he knew well that it was no taken voluntarily because the police did not follow procedure of recording interviews.

(vi) The trial judge erred in law and fact when he did not exclude the caution interview of the appellant when he was convicted and knew very well at paragraph 24 page 8 of the Voire Dire Ruling when he stated that "the position suggested was that the officer did swear and threaten and he is minister of justice when he knew that this fact is not challenged, he is to fair and apply the law but failed to do so. This is a miscarriage of justice".

(vii) The trial judge erred in law and fact when he excluded the caution interview of the appellant when he convinced and knew very well at paragraph 31 page 10 of the Voir Dire Ruling when he stated that "it was suggested that the absence of the witnessing officer is a violation of the Judges Rules and of Fiji Police Guideline" and in the judges Rule (e) states, that non conformity of these rules may render answer and statement liable to be excluded in subsequent criminal proceedings. He failed to apply the law here and is miscarriage of justice.

Assessment of Grounds of Appeal

For Appellant A1 – Peniasi Qalibau

11. The submission of the appellant and the respondent have been carefully considered. Before I make brief comment on my assessment of each of the grounds, the conclusion is that none of grounds submitted has reasonable prospects of success.

12. As regards **ground 1 of this appellant's appeal**, he claimed that there were no direct or indirect evidence that implicates him to the offence charged. The trial judge at paragraph 43 stated:

"43. At the outset I will consider the available evidence against the 1st Accused. The only item of evidence against the 1st Accused Peniasi emanates from PW3 Ms. Masilina Vailagi on the 23rd February, 2021 she had been living at her house in Vatuwaqa which was abutting the mangrove swamp on the bank of the river. The Shahs Ezy Buy which was robbed that day had been across the river visible from the end of her land it is in close proximity she has seen around 1.00p.m she had been having her lunch when she heard certain footsteps from the mangrove and dogs barking from towards the mangrove. She had stepped out to look what it was. She had seen about four I-Taukei boys walking fast towards her back garden and they were led by Peniasi the 1st Accused. She had spontaneously asked what happened. She had asked so because she had observed one of them having a bleeding injury and also the manner in which they were rushing. The 1st Accused has been having a bucket hat however, she had been able to see his face. He had been within range of not more than 7 meters. 1st Accused Peniasi was known to her by the name Ben. After she had asked what it was, Ben had for a moment looked at her and then had proceeded. He had started to run thereafter. The 1st Accused had been in a grey t-shirt and a bucket hat.

44.This witness is an independent disinterested witness. She had been in this area and known the 1st Accused whom she calls Ben for almost 7 years. In cross-examination the 1st Accused suggested that he was not known to her and the Ben she saw was not him and it was someone similar. This witness was extremely confident and firm in her response and said that it was no one but the 1st Accused and she recognized his face clearly and she knows of no other like him. This witness's demeanour and consistency is extremely good. She certainly a credible and truthful witness. As to her reliability of recognition I would consider now. She had been living in Vatuwaqg for long time and the 1st Accused too had been living in this area. It is highly probable and extremely possible that Masilina certainly would have seen and known the 1st Accused for a long period prior to this day.

She had made a recognition of a previously known person as opposed to identification. It was during broad day-light at close proximity. She had the occasion and opportunity to observe the 1st Accused walking towards her house stopping and looking at her and proceeding thereafter. In these circumstances her recognition is reliable.

13. The above assessment of the evidence is direct and implicates the appellant Qalibau, as one of the offenders running past the house of Misilina [PW3]. In response to the above, this appellant claim he was farming in Ucunivanua, Verata on the time and day of the offence. His alibi evidence was so unreliable the court rejected it. After the court rejected the alibi there was other evidence.

14. PW 3 evidence placing the appellant Peniasi Qalibau at the vicinity of the offence is clearly set out in paragraph 17 and 18 of the Judgement. At paragraph 18 it states:

*"17. **PW3 Masilina** lives in the vicinity of this shop at Vatuwaqa. On the said 23 at 1.00 p.m. she had heard dogs barking and some footsteps coming across the mangrove then seen four boys running across passing her house. Amongst them she had seen the person whom she knew as 'Ben' leading the way. She identified the said person as being the 1st Accused. She so identified Peniasi in open court and said that she lives in that area and has known him for almost 7 years. When she saw Peniasi whom she referred to as Ben, she had asked him what had happened. She had asked so because they were running and had seen one of them having a bleeding injury. When she so inquired Peniasi had momentarily stopped and looked at and after seeing her started to run. He was wearing a grey t'shirt and a bucket hat and said that his bucket hat was lifted up from t6he front and she clearly saw his face. She knows Peniasi by the name Ben.*

18.She was cross examined by the 1st Accused and said that she saw Ben running and she believed that they were been chased by the police. It was suggested he is not the Ben that she saw but the witness pointed the 1st Accused who was defending himself and said that she is extremely sure that it was the 1st Accused himself who she saw that day. It was asked if it could be another, she responded and said that she had known the 1st Accused and she knows of no other who looks like him."

15. This ground of appeal is without merit.

16. **Grounds 2 and 3 of the Appellants Peniasi Qalibau's** raises the same complain in ground 1 with the added that the judge erred in law in that he convicted the appellant solely on the basis of PW3's evidence. As a matter of law an accused person may be found guilty on the evidence of one witness, provided there is lawful basis of accepting the evidence provided by that witness.

17. The trial judge was conscious of the danger of relying of PW3's evidence only as the basis of finding the appellant guilty as charged for the offence in this case. From paragraph 43, 44, 45 and 46 he carefully articulated the basis of his accepting the evidence of PW3. At paragraph 44

> *"This witness is an independent disinterested witness. She had been in this area and known the 1st Accused whom she calls Ben for almost 7 years. In cross-examination the 1st Accused suggested that he was not known to her and the Ben she saw was not him and it was someone similar. This witness was extremely confident and firm in her response and said that it was no one but the 1st Accused and she recognized his face clearly and she knows of no other like him. This witness's demeanour and consistency is extremely good. She certainly a credible and truthful witness. As to her reliability of recognition I would consider now. She had been living in Vatuwaqg for long time and the 1st Accused too had been living in this area. It is highly probable and extremely possible that Masilina certainly would have seen and known the 1st Accused for a long period prior to this day.*
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> *She had made a recognition of a previously known person as opposed to identification. It was during broad day-light at close proximity. She had the occasion and opportunity to observe the 1st Accused walking towards her house stopping and looking at her and proceeding thereafter. In these circumstances her recognition is reliable."*

18. These grounds are meritless.

19. As for ground 4 of the Appellant Peniasi Qalibau's, this is misconceived and is based on a misunderstanding that the trial judge had shifted the burden of proof to the appellant. This ground of appeal has no merit.

Re: Kaminieli SAUKURU – Appellant 2 [AAU 011 of 2023]

20. This appellant submitted 7 grounds of appeal against conviction. All these grounds claimed errors of law and fact by the trial judge in his Voir Dire Ruling before the trial proper of the appellant. This appellant challenged the admissibility of his cautioned interview on 4 grounds which are the basis of his first ground of appeal in this appeal. The trial judge made his ruling after evaluating the evidence of the 2 witnesses of the appellant and assessed them against that of the police officers who gave evidence for the prosecution.

21. The court concluded as follows:

> *"34. The evidence of the police officer who was involved in the arrest and detention and the recording of the caution interview statement of the accused, this court has accepted as true and credible. Upon considering the totality of the evidence the 2nd Accused person [Kaminieli SAUKURU] failed to create any reasonable doubt on the prosecution evidence. Thus, this court is satisfied beyond reasonable doubt that, the caution interview of the 2 Accused recorder on 23 and 24 March 2021 [exhibit VDPE 2(a) – handwritten and exhibit VDPE 2(b) – English version] was obtained freely and voluntarily with the informed consent of the 2nd Accused"*

22. This ground of appeal is without merit.

23. **Grounds 2 and 3 of the Appellants Peniasi Qalibau's** raises the same complain in ground 1 with the added claim that the trial judge erred in law in that he convicted the appellant solely on the basis of PW3's evidence. As a matter of law an accused person may be found guilty on the evidence of one witness, provided there is lawful basis of accepting the evidence provided by that witness.

24. The trial judge was conscious of the danger of relying of PW3's evidence only as the basis of finding the appellant guilty as charged for the offence in this case. From paragraph 43, 44, 45 and 46 he carefully articulated the basis of his accepting the evidence of PW3. At paragraph 44

> *"This witness is an independent disinterested witness. She had been in this area and known the 1st Accused whom she calls Ben for almost 7 years. In cross-examination the 1st Accused suggested that he was not known to her and the Ben she saw was not him and it was someone similar. This witness was extremely confident and firm in her response and said that it was no one but the 1st Accused and she recognized his face clearly and she knows of no other like him. This witness's demeanour and consistency is extremely good. She certainly a credible and truthful witness. As to her reliability of recognition I would consider now. She had been living in Vatuwaqa for long time and the 1st Accused too had been living in this area. It is highly probable and extremely possible that Masilina certainly would have seen and known the 1st Accused for a long period prior to this day.*
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> *She had made a recognition of a previously known person as opposed to identification. It was during broad day-light at close proximity. She had the occasion and opportunity to observe the 1st Accused walking towards her house stopping and looking at her and proceeding thereafter. In these circumstances her recognition is reliable."*

25. These grounds are meritless.

26. As for ground 4 of the Appellant Peniasi Qalibau's, this is misconceived and is based on a misunderstanding that the trial judge had shifted the burden of proof to the appellant. That was not done in this case. This ground of appeal has no merit.

Re: Kaminieli SAUKURU – Appellant 2 [AAU 011 of 2023]

27. This appellant submitted 7 grounds of appeal against conviction. All these grounds claimed errors of law and fact by the trial judge in his Voir Dire Ruling before the trial proper of the appellant. This appellant challenged the admissibility of his cautioned interview on 4 grounds which are the basis of his first ground of appeal in this appeal. The trial judge made his ruling

after evaluating the evidence of the 2 witnesses of the appellant and assessed them against that of the police officers who gave evidence for the prosecution.

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> *"34. The evidence of the police officer who was involved in the arrest and detention and the recording of the caution interview statement of the accused, this court has accepted as true and credible. Upon considering* ***the totality of the evidence*** *the 2nd Accused person [Kaminieli SAUKURU] failed to create any reasonable doubt on the prosecution evidence. Thus, this court is satisfied beyond reasonable doubt that, the caution interview of the 2 Accused recorder on 23 and 24 March 2021 [exhibit VDPE 2(a) – handwritten and exhibit VDPE 2(b) – English version] was obtained freely and voluntarily with the informed consent of the 2nd Accused"*

29. **Ground 2** alleged failure in the observation of right to remain silent during the caution interview. Paragraph 13 of Voir Dire ruling said that the appellant did not want to exercise his right that was explained to him. It was clear that he waived his right to remain silent because he agreed to be interviewed in English language. No merit to this ground.

30. **Ground 3, 4, 5 and 6** is misconceived in terms of elevating the violation of the judges' rules due to the lack of a witnessing officer for the interview and trial judge's deciding that it is not a miscarriage of justice, if a witnessing officer is not present or did not sign the caution interview statement. This lack of witnessing officer's signature, in the context of the assessment of the totality of the evidence in the case does not raise an issue of unfairness as to suggest that miscarriage of justice has occurred. No merit on this ground.

31. Having reviewed the Voir Dire Ruling (supra) in light of the issues raised by these grounds of appeal and it showed a lack of understanding what the trial judge was doing in the passages cited by the appellant. They were references to passaged where the trial judge was summarising the evidence in light of the appellant's claim. For example, the appellant refers to the failure of the trial judge in the Voir Dire ruling in not referring to the Criminal Procedure

Act 2009 [CPA] without particularising the section of that legislation that he relies and then somehow claim that it violates paragraph 16 of the Ruling as an error of law. Section 288 of CPA simply state that in some trial there will be a need to hold voir dire. The CPA does not provide any other directives or guidelines on the procedure and on how evidence may be recorded.

32. All those grounds are simply an attempt by the appellant to confuse what actually took place at the voir dire hearing and the ruling by the trial judge. These 4 grounds have no merit.

33. **Ground 7** suffers from the same confusion, inherent in the other grounds of appeal submitted, in that it lacks clarity of specific issues that he claimed are an error of law and fact by the trial judge. It is as if they expect that the court, will sort it out. This court will not. This ground is dismissed.

Conclusion

34. The grounds of appeal submitted by both appellants have been reviewed and they have no reasonable prospect of success on appeal.

ORDERS:

1. Application for Leave to Appeal against conviction by Peniasi QALIBAU is refused

2. Application for Leave to Appeal against conviction by Kaminieli SAUKURU is refused.

The Hon. Isikeli U Mataitoga

RESIDENT JUSTICE OF APPEAL