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

CRIMINAL APPEAL NO. AAU 092 OF 2019
AND AAU 113 OF 2019
[Suva High Court Criminal Action HAC 362 of 2017]

BETWEEN : **1. LIVAI DRIGITA**

2. ARVIND CHAND

Appellants

AND : **STATE**

Respondent

Coram : **Mataitoga, RJA**

: **Qetaki, JA**

: **Clark, JA**

Counsel : **Mr. S. Waqainabete for the 1st Appellant**

Mr. Y. Ali for the 2nd Appellant

Ms. S. Shameem for the Respondent

Date of Hearing : **8 February 2024**

Date of Judgment : **21 March 2024**

JUDGMENT

Mataitoga, RJA

1. I concur with reasons and conclusions in Clark, JA's judgment.

Qetaki, JA

2. I have read and considered the judgment of Clark, JA in draft and I agree with it, the reasoning and the orders.

Clark, JA

Introduction

3. A right to remain silent following arrest or detention is a fundamental right protected by the Constitution of the Republic of Fiji. Not only does every detained person have the right to remain silent they have a right to be so informed.

4. The police do not appear to use a consistent form of wording when they administer the right to silence. Sometimes the caution is given to an accused person in a qualified way rather than an unqualified way, as the law requires. Consequently, there are frequent challenges at trial to the admissibility of caution interviews. The trial judge is called upon to determine the legal issue of admissibility following a voir dire hearing. All of this, of course, extends the trial. And the issue does not necessarily end with the trial judge's ruling. Appellants are regularly appealing their convictions to the Court of Appeal on the ground that their right to silence has been compromised because they were not properly informed of their right.

5. One of the two appeals before us raises that very issue. When the police cautioned Livai Drigita (the first appellant) he was told of his right to silence but the police added that if he remained silent "*we may have to proceed further and prosecute you for the allegation with the evidence currently on hand".* The single Judge who gave leave

to appeal did so on the basis that the use of this phrase could affect the admissibility of a caution interview and the matter requires clarification by the full Court of Appeal.[1]

6. Two appeals are determined in this judgment. As the facts giving rise to the charges are the same for both appellants those facts will be set out next. Then each appeal will be discussed separately from the other.

Background Facts

7. Three accused were tried together: Livai Drigita, Arvind Chand and Jonetani Rokotuinasau. I summarise the brief facts which the trial Judge set out in his sentencing notes.[2]

8. In the early hours of the morning of 15 November 2017 three complainants' houses were raided by the three accused — and others. Rokotuinasau and Drigita went with another to three homes and stole: from Suruj Prasad a mobile phone and cash to the value of $110; from Uma Kumari Mishra, two mobile phones, a tablet and jewellery all to the value of $7,460; and from Rohini Nandan five pairs of canvas shoes valued at $700. Mr Prasad was attacked with a pinch bar and had a coffee table thrown at him.

9. The three complainants sequentially reported the three incidents to the Police over the period 2 a.m. to 4 a.m. A police vehicle and three officers were dispatched to the crime scenes. Sgt Adrian Choy saw Arvind Chand's motor vehicle speeding along Bau Road with a flat tyre. When he approached the vehicle he saw Chand and arrested him. Rokotuinasau and Drigita were also in the vehicle but fled when Chand was arrested.

10. The court found that Rokotuinasau and Drigita — and another — did the breaking in, attacking and stealing while Chand was "the transport man and getaway driver".

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1 *Livai Drigita v State* [2021] FJCA 71; AAU0092.2019 (15 March 2021).

2 *State v Chand, Rokotuinasau and Drigita* [2019] FJHC 677; HAC362.2017 (8 July 2019).

11. Rokotuinasau, Drigita and Chand were charged with:

(i) one count of aggravated robbery;[3]

(ii) one count of aggravated robbery;[4]

(iii) one count of aggravated burglary;[5] and

(iv) one count of theft.[6]

The trial

12. The prosecution led evidence from nine witnesses: the three complainants and six police officers. A seventh police officer gave evidence when offered for cross-examination. Prior to trial Chand submitted a statement of facts agreed with the prosecution. As a result, the prosecution waived its right to use Chand's caution interview statements in the trial as evidence against him.

13. Both Drigita and Chand were represented at trial. Chand elected to give evidence. Drigita elected to remain silent. Rokotuinasau was tried in absentia.

14. Ultimately, all three accused were convicted on all charges. At sentencing, having considered the period each had been detained on remand, the mitigating and aggravating factors and the principle of totality in sentencing, the Judge sentenced:

14.1 Arvind Chand to 12½ years' imprisonment with a non-parole period of 10 years;

14.2 Jonetani Rokotuinasau to 13 years two months' imprisonment with a non-parole period of 10 years; and

14.3 Livai Drigita to 13 years two months' imprisonment with a non-parole period of 10 years.

15. I turn now to deal sequentially with Drigita's, and then Chand's, appeals.

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3 Crimes Act 209, s 311(1)(b).
4 Crimes Act 209, s 311(1)(a).
5 Crimes Act 209, s 313(1)(a).
6 Crimes Act 209, s 291(1).

Drigita's appeal grounds

16. Drigita appeals his conviction on three grounds: that his constitutional rights, both to remain silent and to be informed of the right to remain silent have been breached thereby prejudicing his right to a fair trial. The second ground asserts error on the part of the trial Judge in admitting Drigita's caution statement when his right to remain silent had been breached. The third ground arises from reliance on the statement of facts that Chand agreed with the prosecution. All three of the breaches are said to have resulted in a miscarriage of justice.

17. It is convenient to consider the third ground first.

Prosecution's use of agreed facts by one accused to incriminate a co-accused

18. In a statement signed on 7 June 2019 the following facts were agreed between the prosecution and Chand:

> ...
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> ***11.*** ***THAT*** *Arvind Chand drove Livai Drigita and Jonetani Rokotuinasau after picking them from Bau Road around the early hours of 15 November 2017.*
>
> ***12.*** ***THAT*** *when they exited Bau road, one of the tyres of the vehicle JB 405 were punctured so they stopped the car to check.*
>
> ***13.*** ***THAT*** *when they were checking the tyres, the Police approached them and that was when Livai and Jonetani fled.*

19. Drigita complains that the trial Judge did not warn the assessors of the danger of relying on Chand's agreed facts to implicate him, Drigita. In the view of the single Judge who granted leave to appeal, the more important question raised by this ground of appeal is whether an agreed fact recorded by one accused can be used against another accused at trial and if so, whether there should be a cautionary warning.

20. For the prosecution Ms Shameem submitted that it "may have been unfair" for the agreed facts to have been used against Drigita. Counsel went on, however, to submit that there was sufficient evidence by way of admissions in Drigita's caution interview to support his conviction. I will return to the caution interview when dealing with the

next grounds of appeal. For the purpose of the immediate ground, it is sufficient to refer to the statements of principle set out in *Niume v State*.[7]

> [*16] .... It is well established law that, while a statement made in the absence of the accused person by one of his co-accused cannot be evidence against him, if a co-accused goes into the witness box and gives evidence in the course of a joint trial, then what he says becomes evidence for all the purposes of the case including the purpose of being evidence against his co-accused (Leonard Rudd (1948) 32 Cr App R 138, 140; Ram Asre v Reginam[1965] 11 FLR 214, 218).*
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> *[17] At trial, the appellants were represented by different counsel. Neither was there an application made for a separate trial, nor was the trial judge asked to rule on a mistrial when the 2nd appellant gave incriminating evidence against the 1st appellant.* ***Nevertheless, the trial judge properly warned the assessors to consider the 2nd appellant's evidence with caution because he may have an interest of his own purpose of saving himself.*** [Emphasis added.]

21. In this trial, Chand's agreed statement of facts was admitted when it contained facts that tended to incriminate Drigita who had elected at trial to exercise his right to remain silent. Drigita was, nevertheless, represented by counsel, Ms Mishra. Ms Mishra applied to use Chand's caution interview which, as mentioned above, the prosecution had elected not to use. Her purpose was to cross-examine Chand on inconsistencies in his evidence. The trial Judge refused the application: "you can move the agreed facts to counter this person or your client can choose an option to give evidence". So counsel's application to use Chand's previous inconsistent statement, that is his caution interview, was refused.

22. It may have been this particular development in the trial process that led Ms Shameem to submit the use of the agreed facts may have been unfair.

23. The use of agreed facts against a co-accused is not of itself objectionable. The objection arises where agreed facts are put in evidence but those who have agreed the facts with the prosecution do not go into the witness box to make themselves available for cross-examination on their evidence.

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7 *Niume v State* [2015] FJCA 132; AAU0106.2011 (2 October 2015).

24. Drigita's grievance under this ground of appeal is that, in his summing up, the learned trial Judge drew the assessors' attention to the evidence against Drigita in Chand's agreed facts but gave no warning about how to approach Chand's evidence.

25. The Judge should have warned the assessors to approach Chand's evidence with caution because, for example, he may have had a self-serving interest in agreeing the particular facts with the prosecution. Such a warning was of particular importance in this case where the only other evidence against Drigita was his caution interview, to which I now turn.

26. This, the third ground of appeal, succeeds.

Drigita's caution interview

27. The police conducted three caution interviews of Drigita:

(i) on 15 November 2017 (for aggravated robbery of first complainant) commencing 1530 and concluding at 1815 ;

(ii) on 16 November 2017 (for aggravated robbery of second complainant) commencing 1845 and concluding at 2120; and

(iii) on 15 November 2017 (for aggravated robbery of third complainant) commencing 1540 and concluding at 1345 on 16 November 2017.

28. On each occasion Drigita was informed of his right to remain silent in the following way:

> *Mr. Livai Drigita under the provisions of the Constitution, you have a right to remain silent but in that case we should not be able to get your side of the story and as such we may have to proceed further and prosecute you for the allegation with the evidence currently on hand. You shall feel free to make your choice now, are you willing to remain silent or will you make a statement?*

29. At the first interview Drigita responded: "I will answer your questions". Following the caution at the second and third interviews he said: "Both in some questions I will remain silent and some I will answer your questions."

30. In fact Drigita answered all questions and did not remain silent in relation to any.

31. Mr. Waqainabete cited *State v Fusi*[8] and *State v Matia*.[9] In both cases it was held that the right to remain silent was provided in a qualified and therefore impermissible way. In *State v Fusi* the accused was informed of his right to silence in this way:

> *Under the provisions of the constitution you have a right to remain silent but in that case we would not be able to get your side of the story and as such we may have to proceed further and prosecute you for the allegation with the evidence currently on hand. You shall feel free to make your choice now, are you willing to remain silent or will you make your statement now.*

32. His Honour Justice Rajasinghe held at [11]-[12], that this form of caution "compelled or rather forced the accused to make a statement". The right to remain silent was not properly explained to the accused and therefore he was not in a position to make an informed decision about his right to remain silent. The failure of the interviewing officer to properly explain to the accused his right to remain silent and the consequences of remaining silent as required under section 13 of the Constitution "created a reasonable doubt about whether the caution interview was conducted under fair and just circumstances".

33. In *State v Matia* the only incriminating evidence against the accused were his admissions made during his caution interview. The interview was conducted by a police officer with 30 years' experience. He informed the accused of his right to silence in the following terms:

> *For the purpose of the constitutional rights, you have the right to remain silent, do not wish [sic] to answer the questions, but if you won't answer, we won't be able to know your story, but on the other hand, you can be charged on the allegation. Are you willing to answer the questions or remained silent?*

34. His Honour Goundar J held that the qualifications placed on the right to remain silent were —

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8 *State v. Fusi* [2018] FJHC 1236; HBC 237.2017 (15 November 2018)
9 *State v. Matia* [2019] FJHC 188; HAC 260.2018 (13 March 2019)

> *[6]. ... inappropriate and objectionable. The qualifications breached the Accused's constitutional right against self-incrimination. For these reasons the admissions are disregarded and given no weight.*

35. In the case under appeal, His Honour Temo J held that the caution interviews were admissible. He gave his reasons in a considered and detailed 14-page Ruling during the course of which he referred to *State v Fusi* and *State v Matia* and then turned to the concept of "a right to remain silent". As this right was not defined, its meaning needed to be understood in context. That context included section 14 of the Constitution which sets out the rights of accused persons. His Honour continued at [12]:

> *Section 14 talks about the rights of accused persons. In a democratic society such as the Republic of Fiji, the task of protecting the public and policing the criminal laws of this country falls on the State via the police. Society has delegated the task of protecting itself and enforcing its criminal laws on the police; and if there is a national emergency, the police can call on the military; otherwise there would be anarchy and chaos in society. Fiji had experienced political and legal chaos in 1987, 2000, 2006, in 2009. Even now, crimes are committed daily against members of our society that created the appearance of anarchy and chaos. Anarchy and chaos are not values that underlie a democratic society based on human dignity, equality and freedom. It is in the above light that the wordings in section 13 and 14 of the 2013 Constitution must be considered when defining what constitutes "a right to remain silent".*
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> *...*
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> *A right to remain silent often connotes a right not to be compelled to give self-incriminating evidence". In other words, a person arrested or detained has a right not to be forced or pressured into admitting a crime.*

36. Temo J acknowledged the binding authority of *Ganga Ram & Shiu Charan v Reginam*[10] then turned to review the interview in its entirety before answering the question whether Drigita's right to remain silent had been violated. His Honour held that the words "as such we may have to proceed further and prosecute you for the allegation with the evidence currently on hand" could not be "regarded as a threat because it was simply a statement of fact". Police must have some evidence to provide grounds for arresting or detaining. Accordingly, the form of caution was not improper but fair and the statement was ruled admissible.

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10 *Ganga Ram & Shiu Charan v. Reginam* FJCA No. 46.1983 (13 July 1984) (unreported)

37. During the hearing of the appeal, Ms Shameem advised the Court that the police have stopped the practice of administering the right to silence in the way it was given to Drigita. That is as well because it is objectionable. The Court considers that rather than "fair" the form of caution may be seen as having a chilling effect on an accused.

38. Absent a statement from the accused, the prosecution may very well proceed to prosecute with the evidence it has on hand. That is a matter of prosecutorial discretion. But to articulate that possibility in the context of administering a right to silence is misplaced. More likely than not a caution given in such terms will lead to a conclusion that the accused's statement was not voluntary but procured by threat of prejudice or offer of some advantage; or that even if voluntariness is established there was unfairness in the way the police behaved.[11] .

39. Ms Shameem sought to rely on this Court's decision in *Khan v State.*[12] In that case Ms Khan gave a caution interview. Her right to silence was administered using the same form of wording the police used in cautioning Drigita. The trial Judge ruled the statement was admissible. On appeal, this Court upheld the ruling.

40. *Khan v State* does not assist the prosecution in this case. It was a decision reached in its particular factual context. First, Ms Khan did not challenge the voluntariness of her statement. The trial Judge had no difficulty accepting Ms Khan had given her answers voluntarily. Had it been otherwise "the statement should be ruled inadmissible".[13] In this case Drigita expressly challenged the voluntariness of his admissions. His counsel submitted that the State had been unable to establish the admissions were made voluntarily.

41. Secondly, even without Ms Khan's caution interview, there was sufficient evidence to support her conviction. By way of significant contrast, on this appeal Ms Shameem responsibly conceded that without the caution interview Drigita would have been

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11 To employ the language of *Gang Ram & Shiu Charan v Reginam* FJCA No. 46.1983 (13 July 1984) (unreported).

12 *Khan v State* [2023] FJCA 263; AAU 118.2019 (29 November 2023).

13 *Khan v State* at [24.3].

acquitted. Beyond the agreed facts which the State accepted it was unfair to use, there was no other compelling evidence against Drigita.

42. In the final analysis, what distinguishes the admissibility of the caution interview in *Khan v State* from the inadmissibility of Drigita's interview is that Ms Khan's confessional material was not pivotal to the sustainability of her conviction.[14] Its admissibility in Drigita's case was erroneous and has led to a miscarriage of justice.

43. The first and second grounds of appeal succeed.

44. The appeal against conviction is allowed. The appellant's conviction is quashed.

Arvind Chand's grounds of appeal

45. The second appellant, Arvind Chand, originally appealed both his conviction and sentence. On 10 March 2021, just prior to the hearing of his application for leave to appeal conviction, Chand tendered a notice of abandonment of his sentence appeal. On 15 March 2021 the Court of appeal refused leave to appeal against conviction.[15] Consequently his application for leave falls for determination by this Court under s 35(3) of the Court of Appeal Act 1949.

46. At the hearing before the full Court Mr Ali, counsel for Chand, confirmed his client sought to appeal against sentence notwithstanding the March 2021 notice of abandonment. The hearing on 8 February 2024 dealt only with the conviction appeal.

47. Chand's amended grounds of appeal filed 23 January 2024 advance six grounds of appeal, three of which are new. The Court entertained the amendments pursuant to r 37 of the Court of Appeal Rules.

48. The first, second and third grounds are formulated differently but common to each ground is a concern about the emergence of prior undisclosed evidence led by the prosecution, asserted deficiencies in the trial Judge's summing up on an agreed

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14 See for example *Dutt v State* [2023] FJSC 4; CAV0006.2022 (27 April 2023) at [41].
15 *Chand v State* [2021] FJCA 72; AAU113.2019 (15 March 2021).

statement of facts and deficiencies also in the Judge's directions to the assessors on the question of whether Chand knew of the stolen goods in his car.

49. On their face, the fourth, fifth and sixth grounds of appeal have no prospect of success. It is convenient, therefore, to dispose of these grounds before turning to grounds one, two and three.

Fourth ground of appeal

50. Under this ground the appellant simply asserts that the trial Judge erred in law and fact in omitting to take into consideration the previous inconsistent statements of the prosecution witnesses and failed to direct himself and the assessors on how to approach such inconsistent statements.

51. The grounds of appeal do not identify what statements are said to be inconsistent and they do not identify the prosecution witnesses who are said to have made them. Neither do the submissions throw any light on this necessary detail. It is not therefore possible for the Court to engage with this ground of appeal.

52. Accordingly, the fourth ground of appeal does not succeed.

Fifth ground of appeal

53. The appellant contends that the "fault elements of the offence [were] not established by the evidence".

54. Counsel cited authority for the proposition that *mens rea* is a constituent element of a crime. But again, there has been no identification of the offence at issue, no detail as to which fault elements were not established by the evidence and no legal arguments directed at the issue.

55. The fifth ground of appeal does not succeed.

Sixth ground of appeal

56. The appellant argues that the trial Judge erred in omitting to take into account ss 9(1)(e), 12(1), 13(3) and 14(2)(c), (e), (k) and (3) of the Constitution of Fiji.

57. Those sections have the effect of protecting personal liberty, protecting against unreasonable search and seizure, protecting the rights of arrested and detained persons and the rights of persons charged with an offence.

58. Beyond the citation of authority, the only argument advanced in support of this ground is an assertion the appellant's trial was conducted unfairly and these provisions of the Constitution were breached. Assertions of a breach, or many breaches of constitutional rights, is a serious concern. Once again however, the Court is unable to engage with the ground of appeal because of a complete lack of specificity about how the appellant's rights have been breached.

59. The sixth ground of appeal does not succeed

Grounds 1, 2 and 3

60. The first ground of appeal contends that the trial Judge erred in misdirecting the assessors that Chand was in a joint enterprise with his co-accused when there was no direct or compelling circumstantial linking Chand to the joint enterprise. The second ground argues the trial Judge erred in his directions on circumstantial evidence. The third ground is that the Judge erred in his interpretation of Agreed Facts. As the grounds overlap to a significant degree they are taken together.

61. Chand's uncontested position pre-trial and at trial, where he gave evidence, was that he drove his private vehicle for hire even though he was not licensed to do so. His defence was that the stolen items recovered from the back of his hatch-back hybrid vehicle must have been put there, without his knowledge, by his passengers when they entered his vehicle and left there when they fled.

62. The complexity at trial arose from a statement of facts agreed between the prosecution and Chand. The Agreed Facts are reproduced in full:

AGREED FACTS FOR ARVIND CHAND
THE FOLLOWING FACTS ARE BEING AGREED FACTS BETWEEN PROSECUTION AND DEFENCE UNDER THE PROVISION OF SECTION 135 OF THE CRIMINAL PROCEDURE DECREE NO. 44 OF 2009.

1. *THAT there are three complainants in this matter.*
2. *THAT the 1st complainant is Suruj Prasad, 2nd complainant is Uma Kumari and the 3rd complainant is Rohini Nandan and that they all reside in Bau Road.*
3. *THAT the accused in this matter is Arvind Chand.*
4. *THAT Arvind Chand was about 40 years old at the time of the alleged offence.*
5. *THAT the Complainants Uma Kumari came out of her room and saw three make person running through the front door.*
6. *THAT Suruj Prasad saw a iTaukei man in his room and tried to hit him with Pinch bar and he saved himself.*
7. *THAT iTaukei man threw the pinch bar at him to hit him. He saw two of them in the house.*
8. *THAT Sunita Ram saw one iTaukei man short and skinny with small hair small eye threw chair and coffee table at her husband.*
9. *THAT on 15/11/17 at 3 am Rohini Nandan heard car alarm and ran to the kitchen. She peeped from the window and saw three iTaukei boys standing outside the porch with plastic bags on their hands.*
10. *THAT Arvind Chand was driving his vehicle registered as JB 405 on 15th of November, 2017.*
11. *THAT Arvind Chand drove Livai Drigita and Jonetani Rokotuinasau after picking them from Bau Road around the early hours of 15th of November, 2017.*
12. *THAT when they exited Bau Road, one of the tyres of the vehicle JB 405 were punctured so they stopped the car to check.*
13. *THAT when they were checking the tyres, the Police approached them and that was when Livai and Jonetani fled.*
14. *THAT some alleged stolen items were recovered in JB 405 on the 15th of November, 2017 by the Investigating Officer, WDC 3585 Sisilia.*
15. *THAT the alleged stolen items recovered from Arvind Chand were:*
    i. *2 x Dell tablet;*
    ii. *1 x Nokia Phone;*
    iii. *1 x Alcatel phone;*
    iv. *1 x maroon jewellery box containing assorted jewelleries;*
    v. *1 x white small bag containing assorted jewelleries;*
    vi. *1 x Michael Chors watch;*
    vii. *1 x Geoffery Beene mens wrist watch;*
    viii. *1 x Quartz ladies watch;*
    ix. *1 x blue torch;*
    x. *1 x pen knife; and*
    xi. *1 x pillow case containing two pairs of canvas (Lotto Brand and Kit Canvas)*

*16. **THAT** all properties were identified by the Owners of the properties.*
*17. **THAT** the search list dated 15th of November, 2017 be tendered by consent.*

Dated at Suva this 7th day of June 2019

Signed by State Counsel Signed by Defence Counsel Signed by Accused

Signed by High Court Judge

63. The prosecution case against Chand was that he agreed the items in his vehicle were stolen. Secondly, jewellery was found in his underwear thus establishing his knowledge of the stolen goods. In closing submissions the prosecution outlined its case against Chand as follows:

> *As you can see in the agreed facts, paragraph 10 and paragraph 11 he mentioned he was in the company of Livai and Jonetani. You should not also forget **that he is also agree to the fact that whatever item were in his vehicle were stolen items** and that they were positively identified by the complainants and that on its own is retrieved on paragraph 17 of the agreed facts. Arvind Chand counsel on the other hand my learned friend Mr Singh argue that he did not have knowledge. It you have to look at the search list number 5 of the search list was assorted jewelry who had found them? Adrian and they were handed in over by or to the Investigating Officer, Sisilia. **This jewelry were said to be found in his underwear. That's enough knowledge**. Please be mindful that there was a silver and gold chain that was already taken by Uma Kumari early in her evidence and that too was part of the assorted jewelry in number 5 of the search list so just keep that in mind.*
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> [Emphasis added.]

64. I turn to each of these two limbs of the prosecution case — the agreed facts and whether Chand had knowledge of the stolen goods at the relevant time.

The Agreed Facts

65. In his summing up, the learned trial Judge construed several paragraphs in the agreed facts as containing "admissions" by Chand as to the stolen properties:

> *[29] As for Accused No 1 [Arvind Chand,] his case was very simple. On oath, he admitted he drove Accused No 2 and 3 to Bau Road Nausori, at the material time. In the Agreed Facts submitted to court, **he admitted that the stolen items** from [the complainants] **were found in his private***

> ***car****… However, he said he knew nothing about the alleged crimes against him. He said he was only driving his private car for hire to Accused No 2. He said, he was not a party to the alleged offendings by Accused No 2 and 3, and was therefore not guilty as charged on all counts.*
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> *…*
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> *[40] In paragraphs 14, 15, and 17 of Accused No 1's [Agreed Facts]* ***he admitted the properties were stolen*** *and [the complainants] identified the properties as theirs. It must be noted that stolen properties do not have legs. If the same had to travel from the house of their owners to Accused No 1's car, they had to be taken there by human beings. All three accused were present in the car when PW4 stopped them and arrested Accused No 1 while Accused No 2 and Accused No 3 fled the scene. What do these hard facts tell you? Stolen properties do not speak, but they implicate the persons who possess them, at the time the police (PW3) stopped them.*
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> *[41] Accused No 1 had submitted an Agreed Facts… Read it carefully. In the Agreed Facts Accused No 1 had* ***basically admitted that he was in physical possession of stolen goods in his car at the time Police arrested him****. Accused No 1 said he had no knowledge that the stolen properties were in his car at the material time. He said, he was only hiring out his vehicle to Accused No 2 for money. Note his car was neither a taxi nor a rental vehicle. The State asks you to disregard his excuse because according to them, he was part of the group and his role was to provide the transport for the thieves and the stolen goods, and also as the getaway vehicle.*

66. At various stages in his summing up the learned Judge has chosen to present the agreed fact at paragraph 15 of the agreed statement as an "admission" by Chand. This was both inaccurate and highly prejudicial.

67. The language used in the agreed fact is critical. Chand agreed at paragraph 15 "that the alleged stolen items recovered from Arvind Chand were [the 11 items listed]*"*. In other words, he agreed that the items listed were the alleged stolen goods recovered from his vehicle. That was no more than to state, or agree, the obvious.

68. There is a distinction between "admitting" and agreeing to or accepting a thing. An admission has connotations of reluctance or concession. To agree a matter has no such connotation. In *R v Hasan* one of the issues raised by the Crown appeal in the House of Lords was the meaning of "confession". Although the point arose in the

context of a defence of "duress" and in the context of s 76 of the UK Police and Criminal Evidence Act 1984, it is helpful to draw on Lord Bingham's consideration of "whether a wholly exculpatory or neutral statement can be a "confession".[16]

69. Chand's statement that the alleged stolen goods were recovered from him was not an "admission". His statement was neither inculpatory nor exculpatory. It was neutral. The statement did no more than reflect the result of the police search.

70. It was wrong of the Judge to proceed to interpret the agreed fact instead of simply repeating its content, even more so when the Judge's interpretation became damaging to Chand at trial. By summing up as he did the trial Judge represented Chand as admitting guilty knowledge thus implicating him in the joint enterprise in the absence of any evidence of a prior agreement or evidence that he had relevant knowledge. In this regard the Judge's summing up prejudiced Chand's right to a fair trial, a right protected by s 15(1) of the Constitution.

71. This emergent prejudice to Chand's fair trial rights was compounded by the prosecution's approach to the second element of its case against Chand namely, an asserted strip search from which it could be concluded, the Crown maintained, that Chand had knowledge of the stolen goods.

The prosecution evidence of a strip search

72. Sgt Adrian Choy was on duty when he received a call at 4.15 am from a complainant at Bau Road whose house had been broken into. He travelled with two other police officers to the area. Sgt Choy's evidence was that he saw what turned out to be Chand's hybrid vehicle speed past the police vehicle with a flat tyre. Having dropped off one of the police officers to a complainant's house, the police vehicle chased the hybrid and came across it five minutes later parked at the Nadali bus stop. Sgt Choy said he did not know Chand's name but recognised him. (Chand's evidence was that Sgt Choy had previously been a passenger in his vehicle although Sgt Choy could not recall that.)

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16 *R v Hasan* [2005] UKHL 22; [2005] 2 AC 467; 4 ALL ER 685; [2005] 2 WLR 709 at [50].

73. Sgt Choy asked Chand to step out of his car. As soon as he did so Sgt Choy saw three iTaukei men flee from the back of the vehicle. That aroused suspicion and Sgt Choy informed Chand he wanted to search the vehicle. He said Chand was cooperative and they walked to the rear of the car and opened the boot. Sgt Choy continued:

> *Upon opening the boot of the door, I noticed bags that were wet and jackets that were also wet. I looked inside the bags and found canvas, jewelries and mobile phones My Lord.*

74. Sgt Choy said he then arrested Chand and escorted him to the Nausori Police Station where he handed over "the properties" to the Orderly. Sgt Choy's evidence was that Chand "continued to plead with him that he did not know anything".

75. Sgt Choy's next piece of evidence came as a complete surprise. Sgt Choy said he had instructed Constable Caucau to search Chand. Sgt Choy was present, he said, when a strip search was carried out in a private room and "we discovered that in his undergarments, he had hidden a small pouch containing jewelries".

76. Mr Singh objected. This evidence was new and had never been disclosed. To the prosecution's response that these possessions were included as item 5 in the agreed statement of facts Mr Singh submitted:

> *We're not denying Sir. The property was recovered from the car, that we're not denying. But what is coming out today is in his underwear, coming in small bag which is not even in the list here…*

77. The Judge suggested to the prosecutor a "twist" in the prosecution case. His Honour said Sgt Choy's evidence should have been included in his witness statement —

> *…and not arise in this fashion. It tells me you're hiding things…these are important matters that go to possession.*

78. In cross-examination Sgt Choy accepted he was required to always carry a notebook, and that the matters concerning the strip search should be in his notebook but he did not have his notebook with him at trial. Sgt Choy further accepted that his statements would be copied from his notebook and that he completed this statement "when everything was fresh in [his] mind". Yet Sgt Choy "forgot" to include any reference

to his ostensible instruction to Constable Caucau to conduct a search. He further forgot to include in his statement that Constable Caucau located in Chand's underwear, a small pouch with jewellery and that he handed the white pouch to Sgt Choy.

79. Constable Caucau was then called but the prosecutor led no evidence from him concerning the strip search Sgt Choy said Constable Caucau completed during which a small pouch with jewellery was said to be found in Chand's underwear.

80. WDC Sisilia was made available for cross-examination. She was present during the search of Chand's vehicle and had signed the search list as the police officer in charge of the search.

81. WDC Sisilia's evidence conflicted with Sgt Choy's. His evidence was that the jewellery was found in bags recovered from the boot where there were also wet jackets. WDC Sisilia's evidence was that all 12 items in the search list were recovered in two pillow cases seized from the rear seat of the vehicle. She did not recover any jacket from the search.

82. Significantly, I note the search list records no jackets or bags and it records only one pillow case.

83. WDC Sisilia changed her evidence under further cross-examination to say item 5, the white pouch with assorted jewelleries was actually found on Chand during the strip search undertaken by Constable Caucau. However, the pouch was not exhibited with the jewelleries that it supposedly contained and she could not say where the pouch was. WDC Sisilia had only been "in the vicinity" when Constable Caucau conducted his search. She had only been handed jewellery said to be removed from the pouch, but not the pouch itself, and said she could not recall where the pouch was left when they conducted the search.

84. It transpired during further cross-examination of WDC Sisilia that Chand's vehicle had been searched twice: on the side of the road by Sgt Choy and then at the police station. WDC Sisilia's evidence changed again when Mr Singh asked her if she was

talking about a pouch or small white bag. The search list made no mention of a pouch but recorded a "white small bag containing assorted jewelleries".

85. As with Sgt Choy, this witness's statement was silent on the asserted strip search of Arvind Chand. Further, her evidence of what the strip search purportedly revealed was inadmissible hearsay.

86. When Mr Singh sought to explore the emergence of this evidence for the first time at trial, when statements had been disclosed to the defence one year and seven months earlier, the Judge asked: "what are we arguing about"?

> Mr Singh: Sir, about the pouch being found with the jewellery in his underwear which is not in the statement, Sir.
>
> Judge: I don't care whether it was in his underwear but you admitted it was found on him at paragraph 15 of your agreed facts. That the alleged stolen items recovered from Arvind Chand were 1 to …
>
> Mr Singh: We're not denying that Sir :
>
> …There's two different things My Lord. 1, whether it was found in his underwear or whether it was found in the car. We're not denying it was found in the car which the witness initially answered.
>
> Judge: To me, whether it was discovered in his underwear or in his car, is totally irrelevant to me.
>
> Mr Singh: **Sir, to us it is relevant. Because if it was in his underwear that means he has knowledge.** We're saying it was not, this is something that came out after, … created facts from the Prosecution Witnesses. Your Lordship has earlier said it has to be fair play, Sir. [Emphasis added.]
>
> Judge: To me it's neither here nor there. It was discovered from him full stop. Whether it was sitting on top of his head, in his pocket, in his underwear or even his back of his underwear, it's irrelevant to me. According to the terms of the Agreed Facts, it was recovered from him.

87. After the Judge summed up he asked counsel whether there were any re-directions. The prosecutor made a submission about "the principle of recent stolen possession" and His Honour instructed the assessors to "take on board what the prosecution said and be guided accordingly".

88. Mr Singh raised three omissions one of which concerned omissions and contradictions in the evidence. He elaborated: evidence had emerged for the first time and was not included in the police statements. And there were contradictions in the Police evidence. One version had items being taken from the boot. Another version had the goods taken from the rear seat. Mr Singh submitted that whether Chand had knowledge of the stolen items in his car was crucial. In response the Judge observed that there were two conflicting versions on the issue of knowledge: the prosecution's and Chand's. How to resolve the conflict was a matter for the assessors and the Judge. "So right at the moment I am expressing nothing here or there. I am waiting for their opinion."

Chand's evidence

89. Chand gave detailed evidence about his movements at the material time in November 2017. He said he understood when he picked up Rokotuinasau and three others to drop at Bau Road that they were going to drink grog. He did not see them carrying anything with them. He received a call around 4 am from Rokotuinasau asking Chand to pick them up. Chand said he could not because he was "taking one job 5 miles". Rokotuinasau told him to pick them up after the job. Chand agreed but said he would be a bit late. When Chand reached Nausori he received another call from Rokotuinasau who told him he had missed them and to turn around. Chand did so. When he picked them up Rokotuinasau sat in the front passenger seat. He said he did not see those who were in the back carrying anything. It was raining and dark. Chand decided to drive to a service station because he could feel his rear tyre needed pressure. A police vehicle appeared and Chand said he "saw my four passengers start running from there".

90. Chand said he was not searched at any time on 15 November 2017.

To summarise...

91. The Judge correctly summed up on joint enterprise in terms of s 46 of the Crimes Act:

> *...In considering each accused you will have to ask yourselves the following questions. Did each of them form a common intention with each other, to violently rob [PW1] of the properties mentioned in count no 1? If so did each of them acted together in violently robbing [PW1] and later burgled and stole from [PW3] house, and later violently robbed [PW2]. When PW2 and PW3 were offended against, were these episodes a probable consequence of them violently robbing PW1? If your answer to a particular accused was yes, and you are sure that the elements of the offences described in paragraphs 13 to 18 hereof are satisfied, the particular accused was guilty as charged. If it was otherwise, he was not guilty as charged.*

92. The only evidence potentially linking Chand to the joint enterprise was the presence of the stolen goods in his car following the flight of his co-accused. In order to be satisfied beyond reasonable doubt that Chand had been a party to the joint enterprise it was necessary to prove that he had knowledge of the nature and scope of the joint enterprise. The Judge effectively imputed that knowledge to Chand from the agreed facts. It was a material misdirection to tell the assessors that Chand had admitted to knowing the stolen goods were in his car when his statement went no further than to agree the *alleged* stolen items were recovered from him.

93. Given the prosecution case against Chand was founded on the agreed fact and the strip search it would not have been possible to invite an inference that he knew, or could have known of the activities at any of the three complainant's homes.

94. With respect to the learned Judge, the summing up was inaccurate as to the effect of paragraph 15 of the agreed facts and, in its inaccuracy, highly prejudicial to Chand. It was necessary to draw the assessors' attention to the fact that the only circumstantial evidence implicating Chand in a joint enterprise to enter private property and violently burgle and rob was the presence of the stolen goods in his car *after* his passengers — his co-accused — had fled.

95. Turning to the strip search, Sgt Chow's evidence at trial was tendered in breach of the prosecution's duty of disclosure. Chapter 10.1 of the Prosecution Code states:

> *Every accused has a right to fair trial. The prosecutor has, as an integral part of fair trial a positive and continuing duty to disclose during any part of the trial material that may assist the defence.*

96. It appears that at the point of the trial the prosecution sought to repair its lack of evidence about a key element in its case against Chand namely, his knowledge. In breach of the prosecution's duties to the defendant, to the court and to the public at large, the prosecution failed to present its case fairly. As the Court of Appeal observed in *Zafir Tarik Ali v The State*:[17]

> *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.*

97. Sgt Choy failed to include in his witness statement any mention of the strip search he purportedly required another police officer to conduct, which search purportedly resulted in the recovery of stolen items. His explanation was that he "forgot". The explanation is inexcusable. And the prosecutor's decision to lead such evidence was a serious lapse in judgment.

98. WDC Sisilia's evidence of the strip search was inadmissible hearsay. She explained that, being a woman, she was not in attendance during the search but was "just within the vicinity". Her evidence was that when the items were seized from Chand they were handed over to her by Constable Caucau who had "initially removed the items from inside the white bag and I only received the said items contained in that white bag". WDC Sisilia was impliedly asserting that Constable Caucau told her he had removed the items from inside a white bag recovered from his strip search of Chand. The evidence was put forward as proof that stolen items were recovered from Chand following a strip search. As such, the evidence did not come within the exceptions to

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17 *Zafir Tarik Ali v The State* [2011] FJCA 28,; AAU.0041 of 2010 (1 April 2011).

the exclusion of hearsay evidence — "exceptions permitted where common sense and the pursuit of truth demand it…"[18]

99. WDC Sisilia's evidence was neither clear nor reliable and its admission was highly likely to mislead the assessors in a case where a proven chain of evidence was critical.

Conclusion

100. The powers of this Court to intervene with a verdict of conviction are set out in section 23 of the Court of Appeal Act 1949. Section 23 (1) provides:

> *23-(1) The Court of Appeal*
>
> *(a) on any such appeal against conviction shall allow the appeal if they think that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal.*
>
> *...*
>
> *provided that the court may, notwithstanding that they are of the opinion that the point raised in the appeal against conviction or against acquittal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has occurred.*

101. Chand has established that his constitutional right to a fair trial has been breached. The Court is satisfied that the denial of fair trial rights in this case has led to a substantial miscarriage of justice. Chand's appeal against conviction succeeds.

Result

102. Arvind Chand's appeal against conviction is allowed.

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[18] As Lord Pearce put it in *Myers v Director of Public Prosecutions* [1965] AC 1001.

Orders

(i) *Livai Drigita's appeal against conviction is allowed, his conviction and sentence are quashed, and a verdict of acquittal is entered.*

(ii) *Arvind Chand's appeal against conviction is allowed, his conviction and sentence are quashed, and a verdict of acquittal is entered.*

Hon. Mr. Justice Isikeli Mataitoga
PRESIDENT JUSTICE OF APPEAL

COURT OF APPEAL
FIJI

Hon. Mr. Justice Alipate Qetaki
JUSTICE OF APPEAL

Hon. Madam. Justice Karen Clark
JUSTICE OF APPEAL