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

CRIMINAL APPEAL NO. AAU 0030 of 2024
[Lautoka High Court Case No: HAM 154(B)/2019]

BETWEEN : **SAVENACA VUNISA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Mataitoga, P**

Counsel : **Appellant in Person**
: **Kumar R for the Respondent [ODPP]**

Date of Hearing : **11 March, 2025**

Date of Ruling : **26 March, 2025**

RULING

[1] The appellant [Savenaca Vunisa] with another were charged as follows in the High Court at Lautoka:

FIRST COUNT

Statement of Offence

AGGRAVATED ROBBERY: Contrary to section 311(1) (a) and (b) of the Crimes Act 2009.

Particulars of Offence

DESHWAR KISHORE DUTT, SAVENACA VUNISA and another between the 29th day of December 2019 and 30th day of December 2017 stole one Alcatel one touch mobile phone valued $49.00 and one torch valued $60.00, properties of BHAGUTY PRASAD, all to the total value of approximately FJD $109.00 and at the time of such theft, the said DESHWAR KISHORE DUTT, SAVENACA VUNISA and another were armed with a kitchen knife, axe and pinch bar and had also applied force on the said BHAGUTY PRASAD.

SECOND COUNT

Statement of Offence

AGGRAVATED ROBBERY: Contrary to Section 311(1) (a) and (b) of the Crimes Act 2009.

Particulars of Offence

DESHWAR KISHORE DUTT, SAVENACA VUNISA and another between the 29th day of December, 2019 and 30th day of December 2017 stole, $10,000 cash in Fijian and US currencies, Samsung J7 brand mobile phone valued $250USD and Samsung one brand mobile phone valued $350USD, 1 Vido brand mobile phone valued $100FJD, 1 Former brand Mobile phone valued $100FJD and a Toyota Prius motor vehicle registration number JC 367 valued $17,000, properties of JAI REDDY, all to the total value of approximately FJD$28,400.00 and at the time of such theft, the said DESHWAR KISHORE DUTT, SAVENACA VUNISA and another were armed with a kitchen knife, axe and pinch bar and had also applied force on the said JAI REDDY.

THIRD COUNT

Statement of Offence

AGGRAVATED ROBBERY: Contrary to section 311(1) (a) and (b) of the Crimes Act 2009.

Particulars of Offence

DESHWAR KISHORE DUTT, SAVENACA VUNISA and another between the 29th day of December 2019 and 30th day of December 2019 stole about 50 assorted jewelleries' and watches valued approximately USD$102,000,$2000 cash in Fijian and US currencies, ELIZABETH ARDEN RED DOOR perfume valued at USD$79.00, the properties of MUNI LAKSHMI REDDY, all to the total value of

approximately FJD$206,160.00 and at the time of such theft, the said DESHWAR KISHORE DUTT, SAVENACA VUNISA and another were armed with a kitchen knife, axe and pinch bar and had also applied on the said MUNI LAKSHMI REDDY.

FOURTH COUNT

Statement of Offence

AGGRAVATED ROBBERY: Contrary to section 311(1) (a) and (b) of the Crimes Act 2009.

Particulars of Offence

DESHWAR KISHORE DUTT, SAVENACA VUNISA and another between the 29th day of December 2017 and 30th day of December 2017 stole a gold Samsung J7 brand mobile phone valued $250USD, USD $100 cash, Adidas backpack valued $80USD, OLD SPICE brand deodorant valued $10USD, TOMMY BAHAMA brand body spray valued $20USD and a white mobile phone charger valued at $10USD, the properties of BRANDON REDDY, all to the total value of approximately FJD$940.00 and at the time of such theft, the said DESHWAR KISHORE DUTT, SAVENACA VUNISA and another were armed with a kitchen knife, axe and pinch bar and had also applied force on the said BRANDON REDDY.

[2] Following the trial for the above charges, the appellant was found guilty and convicted. On 30 January 2024 the appellant was sentenced to 12 years imprisonment with a non-parole period of 11 years imprisonment. The appellant had 30 days to appeal. A timely appeal had to be filed before or on 1 March 2024.

The Appeal

[3] On 4 June 2024 an Application for Appeal from the appellant was received in the court registry. The head note states: Notice of Grounds of Appeal against conviction and sentence and application of enlargement of time. This application for enlargement of time of time to appeal is untimely by 3 months 4 days. When this appeal was mentioned in court on 7 October 2024, the appellant was informed that he must file an application seeking leave to appeal out of time. On the same day the appellant submitted Amended Ground of conviction and sentence appeal.

[4] The appellant has not filed an affidavit or statement in support of his application for enlargement of time to explain the reasons for the delay in submitting a timely appeal.

[5] The court will approach this application as an enlargement of time to appeal, given the clear grounds articulated by the appellant in his submissions.

[6] Grounds of appeal submitted by the appellant are as follows;

i) The trial judge erred in law and fact in convicting the appellant based on principle of recent possession, without considering the full proof of the limbs or the evidence that elements the prosecution needs to satisfy which link the appellant to the wrist watch, the adidas bag and its contents

ii) The trial Judge erred in law when in paragraph 124 of the judgement shifted the burden of proof from the state to the appellant

iii) The trial judge erred in law in convicting the appellant on a defective charge.

Legal principles and Assessment

[7] In **Rasaku v State [2019] FJSC 4**, the Supreme Court held:

> *"[18] The enlargement of time for filing a belated application for leave to appeal is not automatic but involves the exercise of the discretion of Court for the specific purpose of excusing a litigant for his non-compliance with a rule of court that has fixed a specific period for lodging his application. As the Judicial Committee of the Privy Council emphasised in* ***Ratnam v Cumarasamy [1964] 3 AC 933*** *at 935 at 93 at 935:*
>
> > *The rules of court must prima facie be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material upon which the court can exercise its discretion."*

[8] In **Waqamailau v State [2012] FJCA 90**, the Court of Appeal stated as follows:

> *"[12] The practice of courts to accept delays of up to three months are excusable where the appellant has been in prison and if there is merit. Leave to appeal one month out of time is refused because the proposed*

appeal on rape of girl friend has no merit as the court considered guilty plead, and is bound to fail: per Powel JA in Isimeli Seresere v State [2008] AAU 92/2008 (5 November 2008), State v. Ramesh Patel [2002] AAU 2/2002 (15 November 2002), Milio Nakoroluvu v. State [2007] AAU1 58/05(25 June 2007). The appellant must demonstrate that there is a good reason why he should be granted leave to appeal out of time. Appeal 4 months out of time was refused in Veretariki Vetaukula v State [2008] AAU 17/2008 (29 May.2008) An appeal received 2½ months out of time was refused in Opeti Delana Koro v State [2007] AAU 28/2008 (14 May 2008), Shakir Buksh, Jitoko Metui & Are Amea v State [2008] AAU 59/2006 (4 November 2008)."

[9] The delay in this case may be excusable because it is due to the appellant's incarceration at Lautoka Corrections Centre. It will be necessary to review the grounds of appeal submitted by the appellant to determine if there is a ground that merits consideration by the full court and which has reasonable prospect of success.

[10] The factors that should be taken into consideration when dealing with enlargement of time were summarised by this Court in its judgment in **Kamalesh Kumar v State; Sinu v State [2012] FJSC 17**; CAV0001.2009 (21 August 2012). They are:

(i) The reason for the failure to file within time ;(ii) The length of the delay; (iii) Whether there is a ground of merit justifying the appellate court's consideration; (iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed? (v) If time is enlarged, will the Respondent be unfairly prejudiced?

[11] These factors may not be necessarily exhaustive, but they are certainly convenient yardsticks to assess the merit of an application for enlargement of time. Ultimately, it is for the court to uphold its own rules, while always endeavouring to avoid or redress any grave injustice that might result from the strict application of these rules.

Assessment of Grounds of Appeal

[12] Before the hearing of the Leave to Appeal, the appellant raised issues of fairness in the manner in which the respondent dealt with identification evidence and the fact that the two complainants' [Jai Reddy and Lakshna Reddy] were not called as witnesses and the appellant claim that in respect of count 2 and 4 charges their evidence would

be critical in establishing ownership of the stolen properties. The appellant was also denied the opportunity to cross-examine them for the evidence they may have given. This was unfair and cause injustice.

[13] The delay in appealing is 3 months 4 days. There were no clear reasons articulated by the appellant to explain whether the delay was reasonable in the circumstances of the case. What can be established from court record is that at the trial the appellant was not represented by counsel. The opportunity to advice counsel if there was one, if the appellant was convicted, is not applicable. It can be reasonably assumed that soon after the judgement he was taken to prison and by the time he was able to submit any appeal, the 30 days for appeal would have exhausted.

Merit of the Appeal

In reviewing the judgement, ground 1 dealing with application of recent possession in linking the appellant to the commission of the crime charged in counts 1 to 4 is the only ground having merit and with reasonable prospect of success, if the submission made by the appellant are substantiated when the full court records are available. The second ground of appeal submitted by the appellant are unlikely to succeed on appeal because it is misconceived. The 3rd ground of appeal raises the claim of defective charge.

Recent possession

[14] The case for the appellant [accused 2] is that in the absence of identification evidence, the only evidence available to the prosecution to implicate the appellant, if they are proven to required standard, is through the application of the principle of recent possession that the accused.

[15] In **Baleilevuka v State [2019] FJCA 209 (AAU 058 of2015)** the court stated:

> *"[16] One of the fundamental principles that applies before drawing an inference of guilt from recent possession, as correctly stated by the Trial Judge at paragraph 65 of his summing up, is that there must be clear evidence that the articles recovered from the Appellants*

were in fact those stolen from the house of the complainant. It is clear that the cash and the tabua had no special identifying marks on them. The tabua according to the complainant had no initials engraved on them. It is not possible to make an identification of cash on the basis of the complainant's evidence that the cash that the police handed back to the complainant were bundled in the way he normally bundles them. No one leaves a large amount of currency notes in loose leaves and always keeps them in bundles. Although there is room for suspicion that the said cash and tabua alleged to have been seized from the 1st and 4th Appellants, belong to the complainant, suspicion alone does not suffice to come to a finding against the 1st and 4th Appellants on the basis of recent possession. One may argue as to how come the 1st and 4th Appellants were in possession of such a large amount of cash and tabua at the place and time they were found. Proof that the said cash and articles seized are in fact stolen property from somewhere does not suffice. A link needs to be established between the cash and the tabua recovered from the Appellants and those stolen from the complainant. The cane knife found with the 4th Appellant has not been identified by the complainants as the one which one of the Assailants had, and rightly so, as argued by Counsel for the 4th Appellant many a villager do carry cane knives with them."

[16] The appellant submits that the goods i.e. ladies KORS watch and black bag were the only goods found in his possession. Both items were not identified by the owners, even though listed as items that was stolen from the residence Jai Reddy and Muni Lakshmi Reddy].

[17] In dealing with the second accused, now appellant, the judge stated the following:

"77. The 2nd Accused admitted that PE1 (b) [Ladies Michael Kors watch] was recovered from his possession upon his arrest on 30 December 2017. According to PW 3 (Cpl. Silio), PE 5 to PE 10 had also been recovered on 30 December 2017 for which a search list (PE11) was prepared. The search list signed by the mother of the 2nd Accused - Maraiwai (PW6) is dated 30 December 2017. The PW 6 does not deny that a police team visited her house and a black knapsack was recovered from a cassava patch although she denied that it was an Adidas bag and that it contained items listed in the search list. (I shall analyse her evidence to test her credibility under the heading 'Exclusive Possession'). I am satisfied that PE1 (b) and PE 5- PE10 were recovered by police on 30 December 2017 just within a day after the robbery. According to Meli (PE 4), PE 2 and PE 3 were retrieved on 2 January 2018 from a sugarcane field in Vuda just two days after the robbery.

'Exclusive' Possession
(2nd Accused)

78. *Cpl. Josua (PW3) said that PE 1(b) was retrieved from the front pocket of the 2nd Accused. There is no dispute that PE1(b) was in the exclusive possession of the 2nd Accused. The 2nd Accused however disputes that PE 5- PE 10 were recovered from his possession. Cpl. Silio (PE 5) indeed admitted that those items were not recovered from the physical custody or possession of the 2nd Accused. Possession is an elusive concept in law and includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person (Section 4 of the Crimes Act).*

79. *In light of the Crimes Act definition, I shall now endeavour to see if the items PE5-PE10 were in the exclusive possession of the 2nd Accused. In this regard, I find the evidence of Cpl. Silio (PE 3), Maraiwai (PE6) and that of the 2nd Accused to be important.*

80. *According to Cpl. Silio, Maraiwai had informed him that the 2nd Accused threw the bag into the cassava patch beside the house. He had picked up a black Adidas knapsack from 5 to 7 meters away from the 2nd Accused's residence. He had opened the bag in front of Maraiwai and the items contained therein were displayed to her for which a search list (PE11) was prepared and the same was signed by Maraiwai.*

81. *PW 5 (Clp. Silio) agreed that the fact that the 2nd Accused brought that bag home is not recorded in his witness statement. It is an important omission. <u>However, the 2nd Accused in his evidence admitted that he had a black Adidas knapsack. Maraiwai (PW 6) had seen the 2nd Accused coming outside the house with a black knapsack when the police officers were escorting him into a police vehicle. Upon PE 5 being shown, Maraiwai however denied that it was the same bag that the 2nd Accused had brought home on 30 December 2017. She said it did not have Adidas written on it. However, in her witness statement, Maraiwai had specifically mentioned that the knapsack was Adidas and that, upon one compartment being checked, she had seen a brownish box and that she threw the bag into the bush out of fear and that it was later recovered by the police officers.</u>*

82. *Maraiwai's evidence is consistent with that of Cpl. Silio who said that a black knapsack was recovered from a cassava patch upon being pointed out by Maraiwai. Maraiwai confirmed later that her signature appears on the search list (PE 11) but she denied its contents because it was not read over to her. She denied having seen*

a brownish jewellery box despite her witness statement stating otherwise.

83. Maraiwai was declared hostile to the Prosecution. She is the mother of the 2nd Accused and her presence in Court was not secured easily. It was natural for her to concoct her evidence to support her son's defence. She obviously contradicted her own version given to the police soon after the recovery of PE 5. Having first denied the signature on the search list (PE11), Maraiwai later admitted that it was her signature. I am unable to accept that she signed PW11 without knowing its content. I would reject her evidence that PE 5 was not the knapsack that was recovered from the cassava patch and that she was not aware of its content that included the brownish jewellery box.

84. I accept the evidence of Cpl. Silio that PE 5 was recovered from the cassava patch 4-5 metres away from the 2nd Accused's house, upon being pointed out by Maraiwai. I accept that Maraiwai had informed Cpl. Silio that PE 5 was brought home by the 2nd Accused on 30 December 2017 when he returned home after him having gone missing from home since 27 December 2017 and that it contained stolen items PE 6 to PE 10. I am satisfied that the 2nd Accused knew where PE 5 was and it was under his control although it was not recovered from his physical custody. The Prosecution established that PE 5 and its contents (PE 6-PE10) were in the possession of the 2nd Accused soon after the robbery."

[18] The following was not adequately covered by the analysis of the trial judge: is the ladies KORS Wrist watch the same watch stolen, not the same brand of that which was allegedly stolen from the house of the complainants: **Baleilevuka** (supra). The owner of the watch was available in court to give that evidence would require that she refer to some identification mark etc. She was not produced by the prosecution. Instead, they relied on evidence that were hearsay testified in court by police officers investigating the case. In this context the reliance by the trial judge on the divisibility of credibility evidence as regards the evidence of Marawai's evidence needs to be reviewed by the full court with the advantage of the records.

[19] The possibility that on the circumstances of this case, the nature of the appellant being found in possession of the items allegedly stolen is that of a receiver of stolen goods or a possessor of good stolen from third party. This was not considered at the trial. It seems to me reasonable to expect the trial judge should have considered these aspects

of the evidence. Because, if the nature of the appellants in possession of the goods was that of a receiver of stolen property, then the charges are defective and it is also relevant to the sentence. The evidence at the trial, from the discussion in the judgement suggest that the appellant was not present at the time of the offence. If that is so, why is he jointly charged with accused 1and another for aggravated robbery counts. This may also impact the claim of defective charge by the appellant.

[20] In **Balemudramudra v State [2021] FJCA 96 t**he court stated:

"*[27] The 'doctrine of recent possession' may be applied in appropriate cases [see **David Kio v R** [Unreported Criminal Appeal Case No. 11 of 1977; Davis CJ; at page 3]. In **Trainer v R** [1906] HCA 50; (1906) 4 CLR 126 Griffith CJ explained the 'doctrine of recent possession' at page 132:*

> *'It is a well-known rule that recent possession of stolen property is evidence either that the person in possession of it stole the property or received it knowing it to have been stolen according to the circumstances of the case. Prima facie the presumption is that he stole it himself, but if the circumstances are such as to show it to be impossible that he stole it, it may be inferred that he received it knowing that someone else had stolen it.' (emphasis added)'*

*[28] **R v Langmead** [1864] EngR 47; (1864) Le & Ca 427; 169 ER 1459 Blackburn J stated at pages 441 and 1464 respectively:*

> *'I do not agree ... that recent possession is not as vehement evidence of receiving as of stealing. When it has been shown that the property has been stolen, and has been found recently after its loss in the possession of the prisoner, he is called upon to account for having it, and, on his failing to do so, the jury may very well infer that his possession was dishonest, and that he was either the thief or the receiver according to the circumstances.'*

*[29] Dickson C.J. and McIntyre, Le Dain and La Forest JJ. said in **R v Kowlyk** [1988] 2 SCR 59:*

> *'The doctrine of recent possession may be succinctly stated. Upon proof of the unexplained possession of recently stolen property, the trier of fact may--but not must--draw an inference of guilt of theft or of offences incidental thereto. This inference can be drawn even if there is no other evidence connecting the accused to the more serious offence. Where the circumstances are such that a question could arise as to whether the accused was a thief or merely a possessor, it will be for the trier of fact upon a consideration of all the*

circumstances to decide which, if either, inference should be drawn. The doctrine will not apply when an explanation is offered which might reasonably be true even if the trier of fact is not satisfied of its truth."

*[30] In **Beumazi Ndoro Chaila** – Appellant **and Republic** – Respondent [2016] eKLR the Court of Appeal at Mombasa (Kenya) summarised the following principles relating to 'recent possession':*

'.....The inference is drawn from possession of recently stolen property rather than recently taking possession of stolen property.

*[31] However, before the court can draw the inference from the accused's possession of recently stolen property, it must be satisfied of five matters: **i**. That the accused was in possession of the property; **ii**. That the property was positively identified by the complainant; **iii**. That the property was recently stolen; **iv**. That the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and the circumstances of the case, recent; **v.** That there are no co-existing circumstances, which point to any other person as having been in possession and;*

[32] The doctrine being a rebuttal presumption of facts is rebuttable with an accused being called upon to offer an explanation, which if he fails to do an inference is drawn that he either stole or is guilty receiver.

[33] In proving possession, the prosecution must establish that the accused had possession of the property in question, i.e. had custody of or control over that property and intended to have custody or exercise control over it. The fact that a third party has physical possession of the property does not mean it could not have been possessed by the accused. In this regard, the prosecution does not need to prove that the accused was actually caught with the property in his or her possession. It is sufficient to prove that the accused possessed the property at the relevant time."

[21] I am satisfied that the appellant has raised sufficient basis for leave to appeal be granted leave to the full court to review the claim of the appellants in light of the issues briefly referred to above.

Defective Charge

[22] The appellant alleged that the trial judge erred in law and fact in finding him guilty on a defective charge.

[23] The appellant submits the charges laid against him were that of Aggravated Robbery contrary to section 311(1)(a) of the Crimes Act 2009. However, the evidence at the trial does not prove that the accused participated in the alleged robbery, rather the evidence led was that he was found in possession of some of the items that may have been stolen from residence of the Reddys. He further claims that the nature of his involvement, if at all criminal, would be that of receiving stolen property, because that was nature of his possession of the items found under his control. The appellant refers to court's judgement in **Baleilevuka** (supra) paragraphs 30 to 33 as relevant authority for his claim. The court did not consider this possibility at all at the trial.

[24] This ground of appeal has merit and should be considered by the full court in light of the full court records.

Appeal against sentence

[25] On the appeal against sentence the one ground submitted relates to the non-parole period of the sentence. In reviewing the appellant's submission I find there is no merit in the arguments advanced and is misconceived.

Conclusions

[26] In conclusion of this application are that Enlargement of time to appeal is allowed and leave to appeal against conviction be granted. The leave application is granted for the grounds based on recent possession discussed above and the claim that the charge is defective.

ORDERS:

1. Application for Enlargement of time to Appeal allowed.
2. Leave to appeal on the ground dealing with principle of recent possession and claim of defective charge, discussed in the ruling is allowed.

COURT OF APPEAL FIJI

Hon. Justice Isikeli U. Mataitoga
PRESIDENT, COURT OF APPEAL