IN THE COURT OF APPEAL
APPELLATE JURISDICTION

CRIMINAL APPEAL NO: AAU0097 OF 2011
(H Ct Case No. HAC 094/09)

BETWEEN	:	**SEMI NATE**
		Applicant
AND	:	**THE STATE**
		Respondent
BEFORE	:	**Mr. Justice Daniel Goundar**
COUNSEL	:	**Mr. J. Savou for Applicant** **Ms. M. Fong for Respondent**
Date of Hearing	:	**20 November 2013**
Date of Ruling	:	**27 November 2013**

RULING

[1] The applicant seeks leave to appeal against his conviction and sentence pursuant to section 21(1) of the Court of Appeal Act.

[2] The applicant was convicted on three counts of robbery with violence after trial and sentenced to a term of seven years' imprisonment on each count, to be served concurrently. A non-parole period of five years was fixed on the total sentence. The victims were of Chinese origin operating a business in Raiwaqa, Suva. They were inside their office when four intruders armed with cane knife and bottles bombarded inside and robbed them of cash and mobile phones. A female victim was told that if she screamed, they will break a beer bottle on her.

[3] The principles governing an appeal under section 21 were recently explained by the Supreme Court in ***Simeli Naisau v The State*** Criminal Appeal No.CAV0010 of 2013. If a ground of appeal raises an arguable pure question of law, then the appeal may proceed as of right on that ground. With grounds containing mixed questions of law and fact, or fact alone, leave is required. The test for leave is whether the ground of appeal is arguable before the Full Court.

[4] The proposed grounds of appeal are:

1) The Learned Trial Judge erred in law and in fact when he failed to adequately consider the voluntariness of your petitioner's out of court admissions contained in the caution interview when the Learned Judge ruled that the caution interview statements were given voluntarily.

2) The Learned Trial Judge erred in law when he failed to direct the assessors during summing up to ignore any media or other publications on the case.

3) The Learned Trial Judge erred in law and in fact when he failed to properly direct the assessors during summing up on the possibility of consolidating all three (3) counts as per the Information when the alleged facts showed that the offences were committed in one transaction.

4) The Learned Trial Judge erred in law and in fact when he failed to properly direct the assessors during summing up on all the necessary elements of the offending which needed to be proved.

5) The Learned Trial Judge erred in law and in fact when he failed to consider in his Judgment that Prosecution had failed to prove beyond reasonable doubt the necessary elements required in finding that your petitioner was jointly culpable in terms of the issue of Joint Enterprise.

6) The Learned Trial Judge erred in law when he sentenced your petitioner to a term of 7 years and non-parole period of 5 years considering the facts of the offending.

[5] At the hearing of the application for leave, counsel for the applicant abandoned grounds 2, 3, 4 and 5 and pursued grounds 1 and 6 only. The applicant was asked to state for the record that it was his decision to abandon the said grounds and he did state so.

[6] The applicant's contention under ground 1 is that the learned judge failed to give cogent reasons for the finding that the applicant's confession under caution was made voluntarily. The applicant points out that the only assessment of the voluntariness of the confession is contained in the following paragraphs of the *voir dire* ruling:

> 15. Considering the nature of the statement of the 1st accused I am convinced that the police wouldn't have made up such a statement.
>
> 16. Considering all evidence before this court I am satisfied beyond reasonable doubt that there is no promise, threat on inducement used on the 1st and 2nd Accused to obtain their statement at the caution interview.

[7] The applicant was represented by counsel at trial. He took objection to the admissibility of his confession made to the police on the ground that he was assaulted after his arrest and during the caution interview. A *voir dire* was held to determine this objection and on 2 September 2011, the trial judge gave a written ruling admitting the confession in evidence. The ruling consists of four pages and seventeen paragraphs. In his ruling the trial judge sets out the ground for objection to the admissibility of the confession and the test for admissibility of confession together with the standard and burden of proof. The applicant takes no issue with the law in relation to the admissibility of a confession as directed by the trial judge. His only contention is that the trial judge's reasons as contained in paragraphs [15] and [16] are not cogent. In my judgment, paragraph [16] is the trial judge's conclusion on the issue of admissibility. The reasons for that conclusion are contained in paragraphs [1] to [15] of the ruling. A trial judge is not required to make detail findings on credibility of witnesses in a *voir dire* matter, when the substantive matter is pending for determination. In the present case, it was open on the evidence for the trial judge to conclude that the applicant's confession was made voluntarily and without any force. This ground is not arguable.

[8] The test for leave to appeal against sentence is whether the trial judge's sentencing discretion was flawed on any one of the following basis:

(i) Acted upon a wrong principle;

(ii) Allowed extraneous or irrelevant matters to guide or affect him;

(iii) Mistook the facts;

(iv) Failed to take into account some relevant consideration (***Naisua's*** case at [19]).

[9] The applicant received a total sentence of 7 years' imprisonment with a non-parole period of 5 years for three counts of robbery with violence. Apart from his personal circumstances, there was no other compelling mitigating factor present in the applicant's case. The applicant expressed no remorse for his offences. Although the victims were not physically injured, they must have been traumatised by the incident.

[10] The only point of contention by counsel for the applicant is that the starting point should have been commenced at 6 years and not 7 years as used by the trial judge. This submission is misconceived. There is no hard and fast rule regarding the selection of a starting point. The starting point is just a yardstick to arrive at a sentence that is within the tariff for that offence. Ultimately, every sentence must fit the crime that was committed. This is known as the proportionality principle in sentencing.

[11] The well established tariff for robbery with violence is 10 to 16 years imprisonment as pointed out by Calanchini P in ***Samuel Donald Sing v State*** Criminal Appeal No.AAU 015 and 016 of 2011. More recently, in ***Nawalu v State*** CAV0012/2012, Gates CJ said at [27]:

> So far as the head sentence is concerned, the court finds 13 years to be within the range set by recent authority for serious violent crime such as robbery with violence. Here the outstanding factors triggering a high penalty in the range 10-16 years were the spate of offending, the gravity of the anti-social behaviour with its menace to persons and property, the invasion of home and privacy, the violence proffered, and the need for very strong disapproval of such behaviour. With this type of offending, personal mitigation of the kind raised by the

Petitioner, that he is married and now has a small child, count for little.

[12] Given the above observations on sentencing of an offender for robbery with violence, the applicant is very fortunate to receive a sentence that is far below the tariff for a contested case of robbery with violence. If leave is granted the applicant runs the risk of having the sentence increased by the Full Court.

[13] For these reasons, leave to appeal against conviction and sentence is refused.

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DANIEL GOUNDAR
JUDGE

Solicitors:

Office of the Legal Aid Commission for Applicant.

Office of the Director of Public Prosecutions for Respondent.