

**IN THE COURT OF APPEAL  
AT SUVA**

**APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO. AAU 0048 OF 2011**

**BETWEEN** : **SACHINDRA NAND SHARMA**

**APPLICANT**

**AND** : **THE STATE**

**RESPONDENT**

**COUNSEL** : **Mr. A. Singh for Applicant**

**Mr. M. Korovou for Respondent**

**Date of Hearing** : **27 June 2013**

**Date of Ruling** : **2 July 2013**

**RULING**

[1] Following a trial in the High Court at Suva, the applicant was convicted on one count each of attempted murder, act with intent to cause grievous harm and arson. All charges were brought under the Penal Code (now repealed). The victims were the applicant's de-facto

partner, her brother and her elderly father. On 27 April 2011, the applicant was sentenced to 16 years' imprisonment for attempted murder, 6 years' imprisonment for act with intent and 6 years' imprisonment for arson. All three terms were made concurrent. The total sentence was 16 years' imprisonment. At the trial, the applicant was represented by counsel. A different counsel is now acting for him on this appeal.

- [2] This is an application for leave to appeal against conviction and sentence pursuant to section 21 of the Court of Appeal Act. Section 21 provides:

21-(1) A person convicted on a trial before the High Court may appeal under this Part to the Court of Appeal –

- (a) Against his conviction on any ground of appeal which involves a question of law alone;
- (b) With the leave of the Court of Appeal or upon the certificate of the judge who tried him that it is a fit case for appeal against his conviction on any ground of appeal which involves a question of fact alone or a question of mixed law and fact or any other ground which appears to the Court to be a sufficient ground of appeal; and
- (c) With the leave of the Court of Appeal against the sentence passed on his conviction unless the sentence is one fixed by law.

- [3] After raising concerns with counsel for the applicant regarding the manner in which the grounds of appeal were drafted and presented in the Notice of Appeal, the hearing proceeded on the basis that the

grounds of appeal would be perfected and filed by 28 June 2013. On 28 June 2013, Mr Singh filed the following amended grounds of appeal:

1. The Learned Trial Judge had a duty in Law to give directions as to the ingredients of the offences charged and to identify what the prosecution had to prove and he failed to do so, as a result causing the trial to miscarry, causing a miscarriage of Justice.

2. The Learned Trial Judge gave an erroneous direction in law in paragraph 14 and 5 of his (summary) (sic) up when he directed “the only ingredient to be proved is that the accused Sachin Nand Sharma committed the offences” thereby causing a grave miscarriage of Justice and a mistrial.

3. The Learned Trial Judge mis-directed the Assessors on the defence of alibi when he should have given the following directions in Laws;

a. Where the appellant states that he was somewhere else at the time, the burden of proof is on the prosecution to disprove the alibi and not the Appellant to prove it.

b. Should the Assessors conclude the alibi is false they should not for that reason alone convict the Appellant.

c. Where a late alibi is set up (eg. at trial) it is open to the trial judge to comment that the State was deprived of the opportunity of investigating and testing the Alibi.

4. The Learned Trial Judge failed to give proper directions on the Law relating to identification as per the guidelines in RV Turnbull [1977] QB 224 and failed to warn the Assessors of the weakness in the identification evidence.

5. The Learned Trial Judge erred in Law in failing to direct the Assessors on the failure of Prosecution to call a material witness and failed to direct the Assessors, that failure to call a material witness cannot supply or make up a deficiency in the prosecution's case thereby causing a miscarriage of Justice.

6. The Learned Trial Judge failed to direct the Assessors in the context that the Appellant bears no onus of proof or have any obligation to call evidence, consistent with the presumption of innocence, thereby causing a miscarriage of Justice.

7. The Learned Trial Judge omitted to give directions on Law in regards to corroboration as the circumstances of this case called for such direction and a warning as to the danger of convicting on uncorroborated evidence when identification and an alibi were live issues at the trial, thereby causing a miscarriage of Justice.

8. The Learned Trial Judge failed to take into account good character of the Appellant and should have directed the Assessors as follows:

a. To bear in mind the Appellants good character when considering the questions of the Applicants guilt.

b. That the Assessors should consider good character as a factor affecting the likelihood of the Appellant committing the Crime charge.

c. The Good character of the Appellant should also be considered in assessing the credibility of the explanations offered by the Appellant and in the case where the Appellant gave evidence, the credibility of the Appellant as a witness, thereby causing a miscarriage of Justice.

[4] Since the grounds of appeal raise questions of mixed law and fact, leave is required. The trial commenced on 28 March 2011 and the evidence was concluded on 6 April 2011. The learned judge delivered his summing-up on 15 April 2011. The summing-up consists of sixteen pages and forty one paragraphs. The first nine paragraphs deal with the standard directions on the roles of the assessors, and burden and standard of proof. In the tenth paragraph, the learned judge sets out the charges as contained in the Information. Paragraphs eleven to thirteen set out the definition of murder, act with intent and arson using the exact terms contained in the Penal Code.

[5] In paragraph 14, the learned judge states:

It is agreed between State and accused that all ingredients need not be proved except the identity of the Accused. The only ingredient to be proved is that the accused Sachindra Nand Sharma had committed the offences.

[6] Thereafter, the summing up contains no directions on the elements of the charged offences. In the remaining paragraphs the learned judge deals with the evidence in terms of what each witness said in court.

[7] The defence of alibi is dealt in paragraph 34 as follows:

The Defence of Alibi, that means he was elsewhere at the time of the incident is taken 1<sup>st</sup> time in this court in March 2011. Further this was not informed to Police investigators at the time of investigations. You may consider the fact with the

explanation given by the accused that he waited till the matter to be taken up in court.

- [8] Immediately after the above directions, in paragraph 35 the learned judge reminded the assessors on the burden of proof as follows:

Once again I wish to remind you that it is the duty of the Prosecution to prove the case beyond reasonable doubt. It never shifts to accused at anytime.

- [9] In *Hussein v State* [2000] FJCA 1;AU18.2000 and AAU20.2000 the Full Court addressed the contents of a summing-up by quoting the passage from *R v Lawrence* [1982] AC 510, 519 where Lord Hailsham said:

A direction to a jury is not best achieved by a disquisition on jurisprudence or philosophy or a universally applicable circular tour round the area of law affected by the case. The search for universally applicable definitions is often productive of more obscurity than light. A direction is seldom improved and may be considerably damaged by copious recitations from the total content of a judge's notebook. A direction to a jury should be custom-built to make the jury understand their task in relation to a particular case. Of course it must include references to the burden of proof and the respective roles of jury and judge. But it should also include a succinct but accurate summary of the issues of fact as to which a decision is required, a correct but concise summary of the evidence and arguments on both sides and a correct statement of the inferences which the jury are entitled to draw from their particular conclusions about the primary facts.

- [10] Later in *Silatolu v The State* [2006] FJCA 13; AAU0024.2003S (10 March 2006), the Full Court reiterated the principles regarding the content of a summing-up at paragraph 13:

When summing up to a jury or to assessors, the judge's directions should be tailored to the particular case and should include a succinct but accurate summary of the issues of fact as to which decision is required, a correct but concise summary of the evidence and of the arguments of both sides and a correct statement of the inferences which the jury is entitled to draw from their particular conclusions about the primary facts; ... It should be an orderly, objective and balanced analysis of the case.

- [11] When an accused raises alibi as his defence, in addition to the general direction on the burden of proof, the jury should be directed that the prosecution must disprove the alibi and that even if they conclude that the alibi was false, that does not by itself entitle them to convict the accused (*R v Anderson* [1991] Crim. LR 361, CA; *R v Baillie* [1995] 2 Cr App R 31; *R v Lesley* [1996] 1 Cr App R 39; *R v Harron* [1996] 2 Cr App R 457). It is clear that these directions were not given to the assessors in this case.

- [12] Furthermore, when the issue turns on evidence of visual identification, as was the case here, the summing-up must not only contain a warning but expose the assessors the weaknesses and dangers of identification evidence both in general and in the

circumstances of the particular case (*R v Turnbull* 63 Cr App R 132; *Johnson v State* [2013] FJCA 45; AAU90.2010 (30 May 2013)).

[13] In the present case, the summing-up contains no directions on the identification evidence, prosecution's failure to call a witness and good character evidence of the applicant. It is unclear why corroboration direction was required for witnesses who were not accomplices. Just because the victims are related to each other is not a legal basis to give a corroboration direction on their evidence. For these reasons, I grant leave to appeal against conviction on grounds 1-6 and 8. I refuse leave on ground 7.

[14] The sole ground of appeal against sentence is:

The Sentencing imposed by the Learned Trial Judge was manifestly excessive having regards to all the circumstances of the case.

[15] The total sentence of 16 years' imprisonment is no doubt the lengthiest term that has ever been imposed for attempted murder in Fiji (see *State v Ledua* [2003] HAC 003/04 (24 June 2004); *State v Swamy* [2007] FJHC 78; HAC 029S.06 (29 November 2007); *Prasad v State* [2008] FJSC 48; AAU 111.2007S (8 August 2008) ; *Waqanivalu v State* [2008] FJSC 44; CAV 0005.2007 (27 February 2008); *State v Sharma* [2009] FJHC 62; HAC045.2008 (4 March 2009)). Whether the sentence is manifestly excessive in the circumstances of the case is a matter I think should be considered by the Full Court and not in this leave application. Leave is granted to appeal against sentence.



[16] Except for ground 7, leave to appeal is granted.

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**DANIEL GOUNDAR**  
**JUDGE**

Solicitors:

Anil J Singh Lawyers for Applicant  
Office of the Director of Public Prosecutions for Respondent.