IN THE COURT OF APPEAL, FIJI
[ON APPEAL FROM THE HIGH COURT]

CRIMINAL APPEAL NO. AAU 0139 of 2014
(High Court HAC 035 of 2009)

BETWEEN : **ASESELA ROKODREU**

Appellant

AND : **THE STATE**

Respondent

Coram : **Gamalath, JA**
Prematilaka, JA
Bandara, JA

Counsel : **Mr M Fesaitu for the Appellant**
Mr S Babitu for the Respondent

Date of Hearing : **12 November, 2018**

Date of Judgment : **29 November, 2018**

JUDGMENT

Gamalath, JA

[1] The appellant Asesela Rokodreu , was indicted in the High Court at Lautoka ,along with two others, on two counts of robbery with violence and one count of unlawful use of a motor vehicle. The alleged offences had been committed on 19 March 2009, at Ba , against one Awand Chandra Prakash and his family ,who in their evidence at the trial in the High Court described how three intruders ,having forcibly entered into their house during the wee hours of 19 March 2009, robbed them of their belongings ,all to the total

value of $39,500 and got away in the Pajero that belonged to Aravind Chandra Prasad, the son of Awand Chandra Prasad. During the course of the robbery, Awand Chandra Prasad sustained injuries .None of the intruders could be identified, for whilst committing the crime they were wearing masks over their faces.

[2] A couple of hours after the alleged commission of the crime, at around 6 a.m., the police having been reported of the commission of the crime, arrested the appellant along with some others who were all engaged in a drinking spree. According to the evidence of the investigating offices, particularly the evidence of Inspector Iakobo Vaisewa, the appellant Asesela Rokodreu (who was the first accused in the trial in the High Court) , was found with having in his possession several lost items including gold jewelry ,which were later identified by the victims as their belongings.

[3] Accordingly, at the trial in the High Court, the main items of evidence against the appellant was based on the "recent possession" of robed valuables of Awand Chandra Prasad and his family. No caution statement was admitted in evidence against any of the accused. At the conclusion of the case for the prosecution the 2 and 3 accused were acquitted for want of evidence whereas, in the case of the appellant, it was the ruling of the learned trial Judge that a *prima facie* case has been established that warrants the calling for his defense.

[4] The appellant elected to give evidence based on a purported claim that he was in the company of his former employer one Narendra Michael at the material time to the incident, a defense of alibi, of which he had neither given prior notice in compliance with provisions of the Criminal Procedure Code (Decree), section 125 nor had he obtained permission at the trial to take up that defense. Nevertheless, the learned trial Judge had allowed the appellant to pursue the course that he had chosen to follow, owing most probably to the fact that at the trial he was appearing in person. In support of his evidence of alibi, he called the evidence of Narendra Michael with whom the appellant had been partaking of liquor till around 1a.m.Thereafter, the appellant had left Narendra

Michael's house and on the way he joined another group of friends and whilst he was in their company drinking beer, the police arrived at the place and arrested him.

[5] With regard to the items that were said to have been found in his possession, his explanation was a denial of the allegation, in the sense the police had introduced that evidence and thereby implicated him falsely.

[6] Having examined the totality of the evidence for the prosecution I am unable to pinpoint any particular issue with regard to the manner in which the evidence relating to the discovery of the robbed items has been led in the trial. That evidence came primarily through the investigating officers, who seemed to have taken prompt action to trigger the investigation on receiving the complaint on the robbery and at around 6a.m. the appellant had been arrested with the lost items.

[7] The evidence of Inspector Iakobo Vaisewa reveals the evidence with regard to the arrest of the appellant along with some of the robbed items. According to his evidence, upon receiving an information about a group of youth drinking at Kaleli settlement, he along with his group of investigating team had gone to that area, where the appellant and six others have been engaged in drinking .The appellant was wearing a gold chain with a pendant inscribed with the word Prakesh. Further, the appellant was holding on to a blue bag in which were found a number of items of jewelry. A search list was prepared and although the original of which was not available at the time he was giving evidence at the trial, subsequently it was traced and produced in evidence. The appellant had cross examined the witness and suggested that the whole issue of the recovery of the bag and jewellery was a fabrication.

[8] The ex-employer Narendra Michael who testified on behalf the appellant described how he had been drinking beer with employees including the appellant till around 2 a.m. that

night, before he retired to sleep. It was after a few months only he had met the appellant who wanted him to give evidence on his behalf at the trial.

Conviction and sentence

[9] On 27 October 2014, the appellant was sentenced to a total term of 13 years and 5 months imprisonment by the learned trial Judge, after having convicted him on all counts on the indictment. He lodged a timely application for leave to appeal against his conviction and sentence and the matter was heard on 1 August 2016.The learned single Judge refused to grant leave to appeal on any of the grounds on 5 August 2016.

The present grounds of appeal

[10] At the very outset of the hearing of the appeal the counsel for the appellant informed the Court that he is pursuing any of the original grounds of appeal no more. In place of the original grounds of appeal, he is now relying on a completely new set of grounds of appeal, which is obviously totally out of time.

[11] The new grounds of appeal are as follows;

> *"That the learned Trial Judge erred in principle and fact by lacking to provide a fair and balance Summing Up, in particular, to the following:*
>
> *(a) Inadequate and improper directions to the assessors on the principle of 'recent possession';*
> *(b) Failing to direct the assessors on the totality of the evidence regarding the original Search List; and*
> *(c) Misdirecting the assessors on the Appellant's Notice of Alibi;*
> *(d) Failing to direct the assessors on the inconsistencies of the State's evidence in totality;*
> *(e) Erring in principle by directing the assessors that "inferences of guilt is the only rational conclusion to be drawn from this evidence;*

That the learned trial Judge erred in convicting the Appellant without considering and assessing independently the totality of the evidence thereby causing a miscarriage of justice in fact and law, in particular, to the following:

a) Appellant did not give any Notice of Alibi, thereby agreeing and further rejecting the defense evidence as untrue;
b) Relying only on inescapable and irresistible inferences that Appellant was involved in the robbery."

[12] However, confining his submissions to the grounds (a), (b),(c),and (d) of ground one above, the counsel for the appellant informed the Court that the rest of the aforementioned grounds shall not be pursued any longer.

[13] Be that as it may, under this situation where the appellant is seeking the indulgence of this Court to permit him to rely on a completely new set of grounds of appeal, it behooves the Court to examine whether there is any procedure at the disposal of the Court to be adopted in allowing such a course, for the operational sphere of this Court is governed by the provisions contained within the pale of the Court of Appeal Act &Rules (Cap 12). This Court, insofar as its appellate powers over criminal appeals are concerned, does not exercise any inherent powers. Its procedural matrix is well defined and governed by the provisions contained in the Court of Appeal Act &Rules (Cap 12).

[14] The counsel for the appellant submitted to Court that he is relying on Rule 37 of the Court of Appeal Rules to pursue the appeal based on his new grounds. As can be understood with ease that that provision deals with the procedure relating to making "Amendment of appeal", which is not the case in this matter. In the circumstances, that section has no relevance or application to the situation posed by this appeal. As such , the question remained unanswered as to which provision or provisions of law would enable this Court to entertain an appeal that is based primarily on completely new grounds of

appeal that were never vetted in the backdrop of the relevant provisions of the procedural laws contained in the Court of Appeal Act &Rules (Cap 12).

[15] Not withstanding such obvious conundrum, and in adhering to the basic norms to be followed to ensure that no miscarriage justice would occur, I have in any event decided to divert my attention to the sustainability of the new grounds of appeal.

[16] In relation to the ground that the learned trial Judge's directions are inadequate and improper on the principle of "recent possession" the passage that deals with the subject reads as follows in the summing up;

> *"52. It is up to you to decide whether you could accept this evidence beyond reasonable doubt. If you accept this evidence beyond reasonable doubt there is evidence that the first accused was in recent possession of the jewelry items stolen from the complainant's house. You must be satisfied so as to feel sure that an inference that satisfies you beyond reasonable doubt that the accused committed the crime and that inference should be irresistible and inescapable."*

[17] I do not find anything objectionable in the said directions. As revealed through the evidence for the prosecution, the items of jewelry found in the possession of the appellant were very personal in nature and were identified by the victim with no room for any doubt. Further, in the summing up the learned Trial Judge had directed adequately how the assessors should be making an evaluation of circumstantial evidence that emanates from a case of this nature. See paragraphs [26], [27], [28] and [29]. In that context, the learned trial Judge's directions are very much in conformity with the dicta in the case of **Wainiqolo v. The State** [2006] FJCA 49; AAU0061.2005 [28 July 2006];

> *"[19] The principal ground relates to the so-called doctrine of recent possession which is that where property has been stolen and is found in the possession of the accused shortly after the theft, it is open to the Court to convict the person in whose possession the property is found of theft or receiving. It is really no more than a matter of common sense and a Court can expect assessors properly directed to look at all the*

surrounding circumstances shown on the evidence in reaching their decision. Clearly the type of circumstances which will be relevant are the length of time between the taking and the finding of the property with the accused, the nature of the property and the lack of any reasonable or credible explanation for the accused's possession of the property. What is recent in these terms is also to be measured against the surrounding evidence."

[18] In the light of what has been discussed above I do not find any miscarriage of justice caused to the appellant at the trial and therefore this ground of appeal is devoid of any merit.

[19] The next ground of appeal is in relation to the non-availability of the original search list. Although while testifying at the trial the witness, who prepared the original search list Inspector Iakobo Vaisewa, was unable to produce the original of the search list prepared by him which reflected all the items that were recovered from the possession of the appellant on his arrest, on the following day (15th of July 2013) he was able to submit to court the original search list that the appellant described as a one prepared subsequently to cover up the fact that the original search list has gone missing. That matter remains a mere suggestion by the appellant and nothing serious turns out of that fact ,which could vitiate the final outcome of the trial. However, the learned trial Judge has correctly pointed out to the issues relating to the search list and in paragraph 52 he had directed the assessors to consider the evidence relating to the search list as follows;

"[52] It is up to you to decide whether you could accept this evidence beyond reasonable doubt. If you accept this evidence beyond reasonable doubt there is evidence that the first accused was in recent possession of the jewelry items stolen from the complainant's house. You must be satisfied so as to feel sure that an inference of guilt is the only rational conclusion to be drawn from this evidence. It must be inference that satisfies you beyond reasonable doubt that the accused committed the crime and that inference should be irresistible and inescapable on the evidence."

[20] This passage of the summing up shows a well-balanced presentation of facts to be considered by the assessors. In the light of the contents of this summing up there is no merit to this ground of appeal as well.

[21] In relation to the misdirection of the assessors on appellant's notice of alibi it is the contention of the counsel for the appellant that as borne out by the court record, (see page 215 of the court record) that the appellant has tendered the prior notice relating to his defense of alibi as per section 125of the Criminal Procedure Decree. According to the journal entry, the tendering of this notice was on 30th of September 2014 and the voir dire (see page 216 of the High Court Record) on the caution statements had been commenced on 8th of October 2014. This would clearly show that the notice of alibi given by the appellant was not in conformity with the provisions of the law and in the circumstances the learned trial judge's directions to the assessors in para 63 and 64 of the summing up are factually accurate. In any event, the learned trial Judge had taken pains to explain to the assessors how they should be evaluating the totality of evidence in the backdrop of the evidence adduced by the appellant and has further correctly directed the assessors to accord the appellant with any benefit of doubt that would be perceived as arising out of the defense evidence. In the circumstances this ground is also without any merits.

[22] The other ground is in relation to the failure on the part of the learned High Court Judge to direct the assessors on the inconsistencies of the State's evidence in its totality. There is no substance on the face of the record to substantiate this ground of appeal. In the circumstances there is no miscarriage of justice caused to the appellant.

Conclusion

This appeal is devoid of any merit. New grounds of appeal are completely out of time and devoid of any merit.

Prematilaka, JA

[23] I have read in draft the judgment of Gamalath JA and agree that the new grounds of appeal are devoid of any merit and the appeal should be dismissed.

Bandara, JA

[24] I have read in draft the judgment of Gamalath JA and agree with the reasons and conclusions.

Order of Court:

Appeal dismissed.

Hon. Mr. Justice S. Gamalath
JUSTICE OF APPEAL

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL

Hon. Mr. Justice W. Bandara
JUSTICE OF APPEAL