

**IN THE COURT OF APPEAL, FIJI**  
**ON APPEAL FROM THE HIGH COURT OF FIJI**

**CRIMINAL APPEAL AAU 0049 OF 2015**  
**(High Court HAC 111 of 2014 at Lautoka)**

**BETWEEN** : **SENIJELE BOILA**

***Appellant***

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

***Respondent***

**Coram** : **Calanchini P**

**Counsel** : **Mr S Waqainabete for the Appellant**  
**Mr S Vodokisolome for the Respondent**

**Date of Hearing** : **27 February 2018**

**Date of Ruling** : **27 April 2018**

**RULING**

[1] The Appellant was charged with one count of aggravated robbery contrary to section 311(1)(b) of the Crimes Act 2009. Following a trial in the High Court at Lautoka the

assessors returned unanimous opinions of guilty. The learned trial Judge agreed with the opinions of the assessors and convicted the Appellant accordingly. The Appellant was sentenced on 14 April 2015 to a term of imprisonment of 11 years and 4 months with a non-parole term of 9 years.

- [2] The Appellant subsequently filed a timely notice of appeal against conviction on 27 April 2015. By notice dated 1 February 2016 the Appellant filed amended grounds of appeal against conviction and a notice of appeal against sentence that was out of time by about 8 months. Further notices amending the grounds of appeal were subsequently filed by the Appellant. On 27 July 2017 the Legal Aid Commission filed an amended notice of appeal against conviction. In that notice there was no reference made to the appeal against sentence.
- [3] On 27 February 2018 the Appellant filed a signed notice of abandonment of appeal against sentence. The application to abandon the appeal against sentence will be listed for hearing before the Court of Appeal on a date to be fixed.
- [4] The appellant together with three others travelled by car and stopped at the front of the gate of the car park of City Forex Fiji Limited. Two of the group then ran towards two employees of City Forex Fiji Limited as they were about to board a vehicle with a bag containing \$50,000.00 cash to travel to their branch at the Nadi International Airport. One of the group was armed with a screw driver and another was armed with a cane knife. The two employees were forced to lie on the ground face down. The bag containing the \$50,000.00 cash was removed from their possession. The Appellant was found in possession of a bag containing the stolen cash while he was travelling to Suva in a minivan from Nadi a few hours after the robbery.
- [5] The grounds of appeal against conviction set out in the notice filed on 27 July 2017 are as follows:

- “1) *The learned trial Judge erred in law when he did not properly consider that there was no evidence led by the State to support the charge of aggravated robbery;*
- 2) *The learned trial judge erred in law and in fact when he did not properly consider the evidence of Cpl Semi under cross examination where he stated that another man had the black bag that contained the green bad that contained the stolen money;*
- 3) *The learned trial judge erred in law when he did not warn the assessors in the summing up about the unreliability of the dock identification without laying of the prior foundation either through an identification parade or through a photo identification unless if the appellant had refused to be subjected to an identification parade.*
- 4) *The learned trial judge erred in law when he did not direct the assessors on the Turnbull guideline directions regarding the identification evidence provided by the prosecutions witness thus resulted to substantial miscarriage of justice.*
- 5) *That the learned trial judge erred in law when he misdirected the assessors to the inappropriate elements of the offence of aggravated robbery in the summing up which resulted in an inappropriate summing up.*
- 6) *The learned trial judge erred in law and in fact when he did not properly direct the assessors in respect of the circumstantial evidence.*
- 7) *The learned trial judge erred in law he did not caution the assessors that they should dismiss all emotions, sympathy or prejudice against the Appellant when deciding the facts of the case.*
- 8) *The learned trial judge erred in law and in fact when he did not direct the assessors to disregard the evidence of bad character in the caution interview when determining the case.”*

[6] To the extent that some of the grounds of appeal involve questions of mixed law and fact leave to appeal is required under section 21(1)(b) of the Court of Appeal Act 1949 (the Act). Leave is not required in the case of a ground of appeal that involves a question of law alone: section 21(1)(a) of the Act.

- [7] In my judgment grounds 2, 3 and 4 involve questions of mixed law and fact. Ground 2 is concerned with the evidence given by one of the police witnesses under cross-examination. In paragraphs 46 and 47 of his summing up the learned judge has summarized the evidence given by the appellant. There is no issue as to that summary. The issue raised by the Appellant is that the judge has failed to give it proper consideration. However in his judgment the learned judge has set out cogent reasons why he has preferred the evidence given by four witnesses who were present when the appellant was apprehended in the minivan. In my opinion this ground is not arguable.
- [8] Grounds 3 and 4 relate to the directions or lack thereof relating to identification. However, as the learned trial judge explained in his judgment the prosecution case was founded on the principle of recent possession. There was no requirement under those circumstances for the assessors or the trial judge to consider issues of identification. These grounds are not arguable.
- [9] The remaining grounds purport to raise questions of law alone. At the outset it must be stated that it is not sufficient for the notice of appeal to describe a particular ground as involving a question of law alone. Before a right of appeal on a question of law can be asserted, a question of law alone must be shown at the appeal stage to have arisen and has remained undetermined: **R v Hinds** (1962) 46 Cr. App. R. 327.
- [10] Although leave is not required in the case of an appeal raising grounds of appeal involving questions of law alone, such an appeal has, as a matter of practice in this Court, been placed before a judge of the Court to determine first whether any of the grounds raises a question of law alone and secondly whether the judge should exercise the power given under section 35(2) of the Act which provides:

*"If on the filing of a notice of appeal or of an application for leave to appeal a judge of the Court determines that the appeal is vexatious or frivolous or is bound to fail because there is no right of appeal or no right to seek leave to appeal the judge may dismiss the appeal."*

- [11] The practice ensures that all appeals that come before the Court raise an arguable point when leave is required or raise a question of law alone that requires the consideration of the Court of Appeal when leave is not required.
- [12] Ground 1 alleges that there was no evidence to support the charge of aggravated robbery. It is a question of law whether the evidence led by the prosecution was sufficient for the judge to be satisfied beyond reasonable doubt that the Appellant was guilty as charged. In relation to this ground the appellant relies on paragraphs 25 – 28 of the summing up given by the learned Judge to the assessors and to himself. Those paragraphs summarise the evidence given by the two employees who were in possession of the bag containing the money and were in or near the company vehicle at the time of the offence. The appellant relies on the evidence relating to the two robbers being masked and the witnesses being unable to identify them. However the evidence also describes the circumstances of the offence and what happened at the commission of the offence. The evidence clearly established that a robbery had taken place in circumstances that rendered the offence aggravated robbery. The issue that remained was who had committed the offence. For that the prosecution relied on "*recent possession*" and not identification. This ground is not arguable.
- [13] Ground 5 claims that there were misdirections in the summing up on the elements of the offence of aggravated robbery that resulted in an unfair summing up. A misdirection on the elements of an offence involves a question of law alone. However this ground is vague in that the appellant does not identify the nature of the misdirection on the elements. In his judgment the learned Judge has correctly stated the elements of the offence of aggravated robbery as it applied in this case. There is no error of law and the appeal is dismissed on this ground under rule 35(2) of the Act.
- [14] Ground 6 claims that there was an error of law and of fact in directions given in relation to circumstantial evidence. The ground may be said to raise a question of law alone. Once again the Appellant does not specify the nature of the misdirection as is required by Rule 35(4) of the Rules. The directions given by the trial judge in paragraph 20 of his

summing up to the extent that circumstantial evidence was relevant to the prosecution case, were proper and consistent with the decision of this Court in Boila and Nainoka – v- The State (AAU 73 and 90 of 2005; 14 July 2006). There is no error of law and there is no risk of a miscarriage of justice. The appeal on this ground is dismissed under section 35(2) of the Act.

[15] Ground 7 raises a question of law alone when it alleges that the judge failed to caution the assessors and himself to dismiss all emotions, sympathy or prejudice against the Appellant. The Appellant did not make submissions on this ground. This ground is without any basis whatsoever since the learned Judge has expressly given the required directions in paragraph 7 of his summing up. The ground is vexatious and the appeal on this ground is dismissed under section 35(2) of the Act.

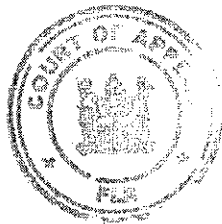
[16] Ground 8 suggests that the judge failed to direct the assessors to disregard any evidence of bad character in the caution interview. This raises a question of law and it is clear from the summing up that a copy of the caution interview was tendered by the prosecution as documentary evidence (paragraph 23 of the summing up). There was no further reference in the summing up to the exculpatory caution interview. Furthermore the caution interview was not mentioned by the trial Judge in his judgment in which he gave cogent and clear reasons for accepting the prosecution evidence and finding the appellant guilty. In my judgment this ground, for that reason and since the issue was not raised by counsel at the trial, is vexatious and the appeal is dismissed.

[17] In conclusion the application for leave to appeal against conviction on grounds 1 to 4 is refused. The appeal on grounds 5 to 8 is dismissed under section 35(2) of the Act.

Orders:

1. *Leave to appeal against conviction is refused on grounds 1 - 4.*
2. *Appeal against conviction is dismissed on grounds 5 – 8.*

3. *Application to abandon appeal against sentence is to be listed before the Full Court on a date to be fixed.*



*W. Calanchini*

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Hon Mr Justice W.D. Calanchini  
**PRESIDENT, COURT OF APPEAL**