

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

CRIMINAL APPEAL NO. AAU 166 OF 2017
(High Court Action No: HAC 298 of 2016)

BETWEEN : MOSESE ULUICICIA
Appellant

AND : THE STATE
Respondent

Coram : Chandra, RJA

Counsel : Appellant
Ms S Kiran for the Respondent

Date of Hearing : 28 May, 2019

Date of Ruling : 14 June, 2019

RULING

[1] The Appellant was charged with one count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009.

- [2] The Appellant was convicted with the learned trial Judge concurring with the unanimous opinion of guilt of the Assessors.
- [3] The Appellant was sentenced on 9th November 2017 to ten years and nine months imprisonment with a non-parole term of eight years and 9 months imprisonment.
- [4] The Appellant filed a timely appeal setting out 4 grounds of appeal against conviction and three grounds of appeal against sentence. Subsequently, the notice of appeal was amended and the following grounds were relied on by the Appellant:

Against Conviction:

- 1) The learned trial Judge erred in law and in fact in not analyzing deeper each of the prosecution witness statement as it was tendered after the allegation, while it was still fresh in their minds;
- 2) The learned trial judge also ignored and mis-considered the evidence of finger prints given by the PW 12 and PW13 and the last PW14 Mosese Rokobera. It appears to be a work of Police fabrication against the appellant;
- 3) That further the learned trial judge erred in law and in fact in sharing assessors facts of how to refuse appellants evidence of alibi before the judgment of this trial;
- 4) That the learned trial judge was swayed and biased when failing to put weight or consider the evidence of the defence witnesses and appellants which was given under oath;
- 5) That further in the judgment of the matter, the learned trial judge did not highlight or explained in court during its ruling why he refused the defence witnesses testimony of the appellant's alibi.

Against Sentence

- 1) The sentence is harsh and excessive;
- 2) Failed to consider that appellant had no prior of aggravated robbery which may classify him as a habitual offender;
- 3) Sentence is biased and does not match or attract the aggravated factors.

- [5] It was alleged that the Appellant with another committed aggravated robbery at the residence of the first prosecution witness who was an elderly gentleman by using force who had a hearing impairment. The value of the items stolen was \$49,150. The victim was and his hands were tied at the back before the items were stolen.
- [6] In the first ground of appeal, though it is not very clear, the Appellant is urging that the learned trial Judge had failed to analyse out of Court statements.
- [7] The learned trial judge in his summing up directed the Assessors on how they should consider the evidence led at the trial. He had stated that out of court statements would not be considered as evidence. He had also dealt with inconsistencies and how the assessors should consider inconsistencies. However, there is no mention of any inconsistencies in the statements made to the Police by witnesses and the evidence given in Court. The Defence should have made use of such inconsistencies if there were any in the statements made to the Police and the evidence given in Court. The summing up is not clear as to whether there were such inconsistencies. That would be revealed only when the evidence that was led at the trial is considered.
- [8] In the above circumstances, I would consider this ground to be arguable.
- [9] In the second ground of appeal it has been urged the learned trial Judge had not considered the inconsistency between the evidence of the 12th prosecution witness and the 14th prosecution witness.
- [10] The learned trial judge had in his judgment at paragraph 14 dealt with this position and had taken the view that the inconsistency that was pointed out was not significant and not sufficient to cast a doubt on the credibility of the said witnesses.
- [11] What was necessary was a consideration of the finger report where the finger prints of the Appellant had been compared with the fingerprints uplifted from the scene of the crimes. The learned trial Judge had been satisfied with the report and had stated so in his judgment at paragraph 13.
- [12] This ground is not arguable.

- [13] The third ground of appeal is vague and appears to be dealing with the defense of alibi taken up by the Appellant and as to how the learned trial Judge had directed the Assessors regarding the said defence of alibi.
- [14] The learned trial Judge had in his summing up dealt with the defence of alibi and as to how the Assessors should consider same in detail in relation to the evidence placed before Court by the Appellant and his witnesses. It was emphasised that the burden of proof remains with the prosecution even when the defence of alibi is taken up by an accused.
- [15] The learned trial Judge had adequately dealt with the defence of alibi in his summing up. Therefore this ground is not arguable.
- [16] The 4th and 5th ground also deal with the defence of alibi and it has been urged that the learned trial Judge had not attached sufficient weight to the evidence of the defence witnesses who had given evidence under oath, and that in the judgment the learned Judge had not explained as to why he had refused to accept the defence of alibi.
- [17] The credibility of the evidence of a witness cannot be said to depend on whether the evidence is given on oath or not. The learned trial Judge had in his summing up to the Assessors and in his judgment dealt with the evidence of the Appellant and his witnesses.
- [18] The learned trial Judge in his judgment having summarized the evidence of the prosecution concluded that the evidence taken together led to the irresistible conclusion that the Appellant had committed the offence in the company of another. He specifically dealt with the evidence relating to the defence of alibi and had arrived at the conclusion that such evidence was not credible and reliable when the entirety of the evidence led in the case was considered.
- [19] These two grounds are not arguable.
- [20] Grounds 1 to 3 which have been urged against sentence to be arguable should satisfy the principles set out in Naisua v State [2013] FJSC 14; CAV0010.2013 (20 November 2013), namely whether the sentence is wrong in law. The errors to be considered are whether the trial Judge acted upon a wrong principle, allowed extraneous or irrelevant matters to guide or affect him, mistook the facts, and failed to take into account some relevant consideration.


[21] The learned trial Judge considered the decision in Wallace Wise v The State, Criminal Appeal No.CAV 0004 of 2015 (24 April 2015) which set the tariff for aggravated robbery between 8 to 16 years. The starting point chosen was 8 years, 4 years were added for aggravating factors and the period in remand was deducted from the head sentence. No discount was given for any mitigating factors as the factors urged did not come within mitigating factors. The aggravating factors considered by the trial Judge came within the factors set out in Wallace v Wise and therefore I see no error in the sentencing judgment of the learned trial Judge.

[22] The grounds of appeal against sentence are not arguable.

Orders of Court:

- (1) Leave to appeal is granted on ground 1 of the grounds of appeal.
- (2) Leave to appeal against sentence is refused.




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Hon. Justice Suresh Chandra
RESIDENT JUSTICE OF APPEAL