

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

CRIMINAL APPEAL NO. AAU 0013 OF 2015  
(High Court Action No: HAC 115 OF 2015)

BETWEEN : JALESI BATIMUDRAMUDRA

*Appellant*

AND : THE STATE

*Respondent*

Coram : Chandra, RJA

Counsel : Mr T. Lee for the Appellant  
Ms P. Madanavosa for the Respondent

Date of Hearing : 22 January, 2019

Date of Ruling : 12 April, 2019

**RULING**

- [1] The Appellant was charged with one count of Aggravated Burglary and one count of Theft contrary to sections 313(1)(a) and 29(1) of the Crimes Act 2009.

- [2] The Appellant was convicted after trial on the learned Trial Judge concurring with the unanimous opinion of the Assessors and was sentenced on 3<sup>rd</sup> July 2015 to three years and eight months for both counts which were made to run consecutively. The ultimate sentence was seven years and four months imprisonment with a non-parole period of 6 years.
- [3] The Appellant applied for leave to appeal by sending a letter on 18<sup>th</sup> September 2015 and the appeal was therefore late by 47 days.
- [4] The Appellant filed further grounds of appeal together with an application for enlargement of time on 31<sup>st</sup> March 2016. On 12<sup>th</sup> June 2018 the Appellant filed an amended Notice of Appeal through Counsel against conviction and sentence.
- [5] In his amended notice of appeal the following grounds of appeal have been set out:
- Against Conviction:
1. The conviction entered on the charge of aggravated burglary cannot be supported by the totality of the evidence.
  2. The conviction entered on the charge of theft cannot be supported by the totality of the evidence.
  3. The Appellant is prejudiced by the learned trial judge informing the assessors in the summing up.
  4. The learned trial judge erred in law and in fact in not adequately directing the assessors on the weight to be attached to the confession contained in the caution interview.
  5. The learned trial Judge failed to direct the assessors on the doctrine of recent possession.
  6. The learned trial judge in the *voire dire* ruling did not carry out an adequate assessment in holding that the confession in the caution interview is admissible to the extent that:

- (a) The learned trial judge has a discretion to exclude the confession even if he found the confession to be voluntarily made;
- (b) The learned trial Judge failed to exercise such discretion.

#### Against Sentence

1. The final sentence imposed is harsh and excessive in the circumstances
- 
- [6] The Appellant's appeal was not timely and he had filed an application for enlargement of time and offered an explanation for the delay. The Respondent in their written submission had submitted that the explanation was reasonable and therefore the delay in filing the appeal was not unreasonable. In those circumstances the explanation is accepted and the grounds of appeal in the amended notice of appeal will be dealt with.
  - [7] The 1<sup>st</sup> and 2<sup>nd</sup> grounds are to the effect that the conviction for aggravated burglary and theft cannot be supported by the totality of the evidence.
  - [8] The Appellant had in his caution interview admitted breaking into the house with another from which several items had been taken and thereby confessed committing the offences. The caution interview was admitted as evidence.
  - [9] The items that had been taken from the house that was broken into had been identified by the owners subsequently.
  - [10] The learned trial Judge had adequately directed the Assessors regarding the evidence led by the prosecution.

- [11] In those circumstances, these two grounds are not arguable.
- [12] In support of ground 3 it has been submitted on behalf of the Appellant that the learned trial Judge by stating that a prima case has been found against the accused in his directions to the Assessors caused prejudice to the Appellant.
- [13] The learned trial Judge in his summing up when setting out the Accused's case stated at paragraph 19 –
- “When a prima facie case was found against him, at the end of the prosecution's case , wherein he was put to his defence, he chose to remain silent, and called no witness, in his defence.”*
- [14] It has been submitted by the Respondent that since the Judge is the final arbiter on both fact and law no prejudice was caused. Further that the learned trial Judge was not bound by the opinion of the Assessors.
- [15] The Assessors brought in a unanimous opinion regarding the guilt of the Appellant and they may have been influenced by the learned trial Judge's view that a prima facie case had been made out.
- [16] Even though the trial Judge was not bound by the opinion of the Assessors, it would be arguable that a direction by the learned trial Judge to the above effect would be prejudicial to the accused.
- [17] This ground is arguable and I would grant leave on same.

- [18] The fourth ground of appeal is regarding the failure of the learned trial Judge to adequately direct the Assessors in his summing up regarding the weight to be attached to the confession.
- [19] The learned trial Judge in his summing up to the Assessors set out the aspect of voluntariness of the maker and stated further that if they were satisfied beyond reasonable doubt that the accused gave those statements voluntarily and the same is the truth, that they would be entitled to rely on them for or against the accused.
- [20] Trial Judges adopt different ways in their summing up to the Assessors regarding the manner in which they should deal with confessional statements. What is necessary is to direct them adequately regarding their duty in dealing with such statements. In the present case, it is my view that the learned trial Judge has adequately directed the Assessors in his summing up and therefore this ground is not arguable.
- [21] The 5<sup>th</sup> ground of appeal is that the learned trial Judge had failed to direct the assessors on the doctrine of recent possession.
- [22] As sated earlier the Appellant had in his statement confessed that he had taken the items from the house that he had broken into which were the items that were found in his possession. The learned trial Judge in his summing up referred to circumstantial evidence led by the prosecution regarding the stolen items which were surrendered by the Appellant when the Police Officers came to his residence.
- [23] In those circumstances the absence of a specific direction on recent possession was not prejudicial to the Appellant and therefore this ground is not arguable.

- [24] The 6<sup>th</sup> Ground of Appeal is that the learned trial Judge had failed to exercise his discretion to exclude the confession even if he found the confession to be voluntarily made.
- [25] The learned trial Judge had decided that the caution interview statement given by the Appellant was admissible after the voir dire inquiry. This is set out in the judgment of the learned trial Judge where he stated at paragraph 4 that he had come to the conclusion that the Appellant had made his caution interview statement voluntarily after considering the evidence of the prosecution and defence witnesses.
- [26] The statement in paragraph 4 of the judgment establishes the fact that the learned trial Judge had exercise his discretion and therefore this ground is not arguable.
- [27] The ground of appeal against sentence is that the sentence is harsh and excessive.
- [28] The Respondent has in their submissions conceded that this ground is arguable as the combined effect of the ultimate sentence is above the tariff as the sentences for the two counts were made consecutive.
- [29] The learned trial Judge in making the sentences to run consecutively took into account the fact that the Appellant was a habitual offender.
- [30] The learned trial Judge sentenced the Appellant for the count of Aggravated Burglary to a term of 3 years and 8 months and for the count of Theft also gave the same sentence and made them to run consecutively.

[31] Sentencing the Appellant to a term of 3 years and 8 months for the count of theft when the tariff as stated by the learned Trial Judge was between 2 months to 3 years is arguable.

**Orders of Court:**

*(1) Leave to appeal against conviction is granted on ground 3;*

*(2) Leave to appeal against sentence is granted on ground 7.*



A handwritten signature in blue ink, appearing to read "Suresh Chandra".

**Hon. Justice Suresh Chandra**  
**RESIDENT JUSTICE OF APPEAL**