IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO.AAU 079 of 2017
[High Court at Suva Criminal Case No. HAC 243 of 2014S]

BETWEEN : **DESHWAR KISHORE DUTT**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Appellant in person**
: **Ms. S. Tivao for the Respondent**

Date of Hearing : **18 May 2020**

Date of Ruling : **30 June 2020**

RULING

[1] The appellant had been indicted in the High Court on two counts of robbery contrary to section 311(1)(a) of the Crimes Decree committed with others on 20 July 2014 at Suva. The charges against the appellant were as follows.

FIRST COUNT

Statement of Offence

AGGRAVATED ROBBERY: *Contrary to section 311(1)(a) of the Crimes Act No. 44 of 2009.*

Particulars of Offence

DESHWAR KISHORE DUTT *with others on the 20th day of July 2014 at Suva in the Central Division robbed* ***KISHORE KUMAR*** *and stole cash totaling $108,000.00, HP Brand Laptop valued at $1,800.00, assorted jewelleries valued at $5,000.00, Lumix brand camera valued at $600.00, Fuji Film brand camera valued at $300.00, Phone in box valued at $449.00, a Nokia brand mobile phone valued at $49.00, a Casio brand wrist watch valued at $100.00, a Binoculars valued at $400.00, a rice cooker valued at $100.00, a sandwich maker valued at $50.00, a Toaster valued at $50.00, assorted clothes valued at $200.00 and vehicle registration number FK 102 valued at $45,000.00 all to the total value of $162,098.00 the properties of the said* ***KISHORE KUMAR****.*

SECOND COUNT

Statement of Offence

AGGRAVATED ROBBERY: *Contrary to section 311(1)(a) of the Crimes Act No. 44 of 2009.*

Particulars of Offence

DESHWAR KISHORE DUTT *with others on the 20th day of July 2014 at Suva in the Central Division robbed* ***DHARMENDRA RAJ*** *and stole cash totaling $3,600.00 and assorted clothes valued at $165.00 all to the total value of $3,765.00 the properties of the said* ***DHARMENDRA RAJ****.*

[2] After trial, the assessors had expressed a unanimous opinion against the appellant on 26 April 2017 and the learned High Court judge had found him guilty in his judgment dated 27 April 2017. The appellant was sentenced on 28 April 2017 *in abentia* as he had escaped from police custody prior to the delivery of the judgment, to imprisonments of 15 years with a non-parole period of 14 years on both counts to start running concurrently upon his arrest.

[3] The appellant had signed an appeal against conviction and sentence on 26 May 2017 received by the CA registry on 29 May 2017. The appellant's twenty grounds of appeal against conviction and a single ground of appeal against sentence (the same grounds of appeal had been again received by the CA registry on 20 June 2018) along with submissions had been received by the CA registry on 13 December 2017. The appellant had also filed an application for bail pending appeal on 04 February 2020 and submissions in support thereof. The state had filed its written submissions on 31 March

2020 and further submissions as advised by this court after the leave to appeal hearing on 25 May 2020.

[4] In terms of section 21(1)(b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence only with leave of court. The threshold test applicable is **'reasonable prospect of success'** to determine whether leave to appeal should be granted (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173 and **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87. This threshold is the same with timely leave to appeal applications against conviction as well as sentence.

[5] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled. In **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14 the Supreme Court following the decisions in **House v The King** [1936] HCA 40*;* (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011 set out the sentencing errors that could trigger the leave to appeal decision. The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of ***Kim Nam Bae's*** case. For a ground of appeal against sentence in a timely appeal to be considered arguable there must be a reasonable prospect of its success in appeal. The said guidelines are as follows.

> *(i) Acted upon a wrong principle;*
> *(ii) Allowed extraneous or irrelevant matters to guide or affect him;*
> *(iii) Mistook the facts;*
> *(iv) Failed to take into account some relevant consideration.*

Law relating to bail pending appeal

[6] In **Tiritiri v State** [2015] FJCA 95; AAU09.2011 (17 July 2015) the Court of Appeal reiterated the applicable legal provisions and principles in bail pending appeal applications as earlier set out in **Balaggan v The State** AAU 48 of 2012 (3 December

2012) [2012] FJCA 100 and repeated in **Zhong v The State** AAU 44 of 2013 (15 July 2014) as follows.

*'[5] There is also before the Court an application for **bail pending appeal** pursuant to section 33(2) of the Act. The power of the Court of Appeal to grant **bail pending appeal** may be exercised by a justice of appeal pursuant to section 35(1) of the Act.*

*[6] In **Zhong –v- The State** (AAU 44 of 2013; 15 July 2014) I made some observations in relation to the granting of **bail pending appeal**. It is appropriate to repeat those observations in this ruling:*

> *"[25] Whether **bail pending appeal** should be granted is a matter for the exercise of the Court's discretion. The words used in section 33 (2) are clear. The Court may, if it sees fit, admit an appellant to **bail pending appeal**. The discretion is to be exercised in accordance with established guidelines. Those guidelines are to be found in the earlier decisions of this court and other cases determining such applications. In addition, the discretion is subject to the provisions of the Bail Act 2002. The discretion must be exercised in a manner that is not inconsistent with the Bail Act.*
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> *[26] The starting point in considering an application for **bail pending appeal** is to recall the distinction between a person who has not been convicted and enjoys the presumption of innocence and a person who has been convicted and sentenced to a term of imprisonment. In the former case, under section 3(3) of the Bail Act there is a rebuttable presumption in favour of granting bail. In the latter case, under section 3(4) of the Bail Act, the presumption in favour of granting bail is displaced.*
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> *[27] Once it has been accepted that under the Bail Act there is no presumption in favour of bail for a convicted person appealing against conviction and/or sentence, it is necessary to consider the factors that are relevant to the exercise of the discretion. In the first instance these are set out in section 17 (3) of the Bail Act which states:*
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> > *"When a court is considering the granting of bail to a person who has appealed against conviction or sentence the court must take into account:*
> >
> > *(a) the likelihood of success in the appeal;*
> >
> > *(b) the likely time before the appeal hearing;*
> >
> > *(c) the proportion of the original sentence which will have been served by the appellant when the appeal is heard."*
>
> *[28] Although section 17 (3) imposes an obligation on the Court to take into account the three matters listed, the section does not preclude a court from taking into account any other matter which it considers to be relevant to the*

application. It has been well established by cases decided in Fiji that ***bail pending appeal*** *should only be granted where there are exceptional circumstances. In* ***Apisai Vuniyayawa Tora and Others –v- R*** *(1978) 24 FLR 28, the Court of Appeal emphasised the overriding importance of the exceptional circumstances requirement:*

"It has been a rule of practice for many years that where an accused person has been tried and convicted of an offence and sentenced to a term of imprisonment, only in exceptional circumstances will he be released on bail during the pending of an appeal."

[29] The requirement that an applicant establish exceptional circumstances is significant in two ways. First, exceptional circumstances may be viewed as a matter to be considered in addition to the three factors listed in section 17 (3) of the Bail Act. Thus, even if an applicant does not bring his application within section 17 (3), there may be exceptional circumstances which may be sufficient to justify a grant of ***bail pending appeal****. Secondly, exceptional circumstances should be viewed as a factor for the court to consider when determining the chances of success.*

[30] This second aspect of exceptional circumstances was discussed by Ward P in ***Ratu Jope Seniloli and Others –v- The State*** *(unreported criminal appeal No. 41 of 2004 delivered on 23 August 2004) at page 4:*

"The likelihood of success has always been a factor the court has considered in applications for ***bail pending appeal*** *and section 17 (3) now enacts that requirement. However it gives no indication that there has been any change in the manner in which the court determines the question and the courts in Fiji have long required a very high likelihood of success. It is not sufficient that the appeal raises arguable points and it is not for the single judge on an application for* ***bail pending appeal*** *to delve into the actual merits of the appeal. That as was pointed out in Koya's case (****Koya v The State*** *unreported AAU 11 of 1996 by Tikaram P) is the function of the Full Court after hearing full argument and with the advantage of having the trial record before it."*

[31] It follows that the long standing requirement that ***bail pending appeal*** *will only be granted in exceptional circumstances is the reason why "the chances of the appeal succeeding" factor in section 17 (3) has been interpreted by this Court to mean a very high likelihood of success."*

[7] In **Ratu Jope Seniloli & Ors. v The State** AAU 41 of 2004 (23 August 2004***)*** the Court of Appeal said that the likelihood of success must be addressed first, and the two remaining matters in S.17(3) of the Bail Act namely *"the likely time before the appeal hearing"* and *"the proportion of the original sentence which will have been served by the applicant when the appeal is heard"* are directly relevant *' only if the Court accepts*

there is a real likelihood of success' otherwise, those latter matters *'are otiose'* (See also **Ranigal v State** [2019] FJCA 81; AAU0093.2018 (31 May 2019)

[8] In **Kumar v State** [2013] FJCA 59; AAU16.2013 (17 June 2013) the Court of Appeal said *'This Court has applied section 17 (3) on the basis that the three matters listed in the section are mandatory but not the only matters that the Court may take into account.'*

[9] In **Qurai v State** [2012] FJCA 61; AAU36.2007 (1 October 2012) the Court of Appeal stated

> *'It would appear that exceptional circumstances is a matter that is considered after the matters listed in section 17 (3) have been considered. On the one hand exceptional circumstances may be relied upon even when the applicant falls short of establishing a reason to grant bail under section 17 (3).*
>
> *On the other hand exceptional circumstances is also relevant when considering each of the matters listed in section 17 (3).'*

[10] In ***Balaggan*** the Court of Appeal further said that *'The burden of satisfying the Court that the appeal has a very high likelihood of success rests with the Appellant'*

[11] In ***Qurai*** it was stated that:

> *"... The fact that the material raised arguable points that warranted the Court of Appeal hearing full argument with the benefit of the trial record does not by itself lead to the conclusion that there is a very high likelihood that the appeal will succeed...."*

[12] Justice Byrne in **Simon John Macartney v. The State** Cr. App. No. AAU0103 of 2008 in his Ruling regarding an application for bail pending appeal said with reference to arguments based on inadequacy of the summing up of the trial [Also see **Talala v State** [2017] FJCA 88; ABU155.2016 (4 July 2017)].

> *"[30].....All these matters referred to by the Appellant and his criticism of the trial Judge for allegedly not giving adequate directions to the assessors are not matters which I as a single Judge hearing an application for* ***bail pending appeal*** *should attempt even to comment on. They are matters for the Full Court ... ."*

[13] ***Qurai*** quoted **Seniloli and Others v The State** AAU 41 of 2004 (23 August 2004) where Ward P had said

> *'"The general restriction on granting* ***bail pending appeal*** *as established by cases by Fiji _ _ _ is that it may only be granted where there are exceptional circumstances. That is still the position and I do not accept that, in considering whether such circumstances exist, the Court cannot consider the applicant's character, personal circumstances and any other matters relevant to the determination. I also note that, in many of the cases where exceptional circumstances have been found to exist, they arose solely or principally from the applicant's personal circumstances such as extreme age and frailty or serious medical condition."*

[14] Therefore, the legal position appears to be that the appellant has the burden of satisfying the appellate court firstly of the existence of matters set out under section 17(3) of the Bail Act and thereafter, in addition the existence of exceptional circumstances. A very high likelihood of success of the appeal would be deemed to satisfy the requirement of exceptional circumstances. However, an appellant can even rely only on 'exceptional circumstances' including extremely adverse personal circumstances when he cannot satisfy court of the presence of matters under section 17(3) of the Bail Act.

[15] Out of the three factors listed under section 17(3) of the Bail Act 'likelihood of success' would be considered first and if the appeal has a 'very high likelihood of success' then the other two matters in section 17(3) need to be considered, for otherwise they have no practical purpose or result.

[16] Therefore, when this court considers leave to appeal or leave to appeal out of time (*i.e.* enlargement of time) and bail pending appeal together it is only logical to consider leave to appeal or enlargement of time first, for if the appellant cannot reach the threshold for either of them he cannot then obviously reach the much higher standard of 'very high likelihood of success' for bail pending appeal. If an appellant fails in that respect the court need not go onto consider the other two factors under section 17(3). However, the court would still see whether the appellant has shown other exceptional circumstances to warrant bail pending appeal independent of the requirement of 'very high likelihood of success'.

Grounds of appeal

[17] At the hearing the appellant stated that he would not pursue 5th, 9th, 10th, 12th, 13th, 14th and 15th grounds of appeal. All grounds of appeal cited by the appellant are as follows. Thus, only the 1st, 2nd, 3rd, 4th, 6th, 7th, 8th, 11th, 16th, 17th, 18th, 19th, 20th and 21st grounds were urged and considered for the leave ruling.

Against conviction

Ground 1

THAT The learned Trial Judge made an error of law when he rejected the evidence of the witness produced by the Appellant 'during voir dire' on the basis that, a) she was smiling, b) because the witness was my wife and might be compromised, c) that the witness failed to provide admissible medical report to substantiate her claim of witnessing visible injuries on the appellant (ref. to paragraph 9 of the Voir Dire ruling).

Ground 6

THAT the learned trial Judge made an error of law when he failed to properly evaluate PWS2's sworn evidence (During Voir Dire) and/or by failing to make an independent assessment on PW2's Sworn Evidence (sic).

Ground 2

THAT the Learned trial Judge made an error of law (During Ruling on Voir Dire) when he failed to consider (At all) the 'independent evidence' namely Valelevu P/S diary (where by injuries were noted upon arrival which also corroborated by my medical report, DW's evidence and later during trial proper was also corroborated by Dr. Susana) on the basis that its hearsay (sic).

Ground 3

That the Learned trial Judge made an error of law by rejecting the appellants version of events (during voir dire) and by accepting the prosecutions version and declaring it (caution interview) admissible evidence on the basis that the appellant failed to call the doctor to give evidence on my behalf. (Ref to para B of his Lordship ruling on Voir Dire) and (paragraph 10 of Ruling on Voire-Dire).

Ground 4

That the Learned trial Judge made an error of law when he:
a. Failed to consider and identify that the appellant's right was violated and breached during the course of the appellants illegal caution interview. (A

right which was violated by I.O during the alleged interview in particular section 13.1 (k) (i) of the 2013 Constitution); and
b. Failed to identify the weaknesses in the prosecution's case namely; Deprivation and / or denying the appellant the want of reliable corroboration especially when the same was requested by the Appellant.
c. Failed to reject the prosecutions version of events on the basis that the prosecution failed to prove that there was no violation of the appellants constitutional rights or the violation (if any) has not prejudiced the appellant.
d. Failed to identify and consider the manner in which the alleged caution interview was taken and that the alleged caution interview was therefore there was no violation of his right to have someone present for the interview.

Ground 20

That the learned trial judge made an error of law in ruling the confessional statements during voir dire as admissible (and charge statement) evidence; and failed to apply and adopt the burden and standard of proof when he ruled that the answers given in the alleged cautioned interview was given voluntarily. This is because the appellant had produced more than sufficient evidence via medical report and Valelevu police station diary, and PW2's sworn evidence during the voir dire to substantiate his claim of assaults.

Ground 7

That the Learned Trial Judge made an error of law when he:

a. Failed to direct at all to the assessors the dangers involved in convicting the appellant on confessional statements alone allegedly made whilst on police custody; and
b. Failed to direct attention and/or instruct the assessors on the fact that police witnesses are often practice witnesses and that it is not an easy matter to determine whether a practiced witness is telling the truth; and
c. Failed to put the defense case before the assessors accurately and fairly; and
d. Failed to give the assessors an adequate and proper directions on corroboration of evidence of an alleged disputed confessional statement; and
e. Failed to direct assessors on important facts which favoured the defense.

Ground 11

That the Learned trial Judge made an error of law when he failed in the summing up the defense in the appellant in a fair, objective and balanced manner, hence the sum-up was one sided (sic).

Ground 15

That the learned Trial Judge made an error of law when he:

a. Failed to direct and/or explain to the assessors (in the interests of justice and fairness) that the version of events given by the appellant is sufficient to establish a reasonable doubt in the prosecution's case and the benefit of doubt (if any) is to be given to the appellant; and
b. Failed to direct and/or explain the assessors at [31] the proposition after they accept the appellant's alleged confession.

Ground 5

That the learned trial judge made an error of law by misdirecting the assessors at paragraph two (2) of his summing-up (line 4-5

Ground 8

That the learned Trial Judge made an error of law when he misdirected the assessors at paragraph 26 and 29 of his summing up regarding defence exhibit no.3 and prosecution exhibit No.2 and further failed to evaluate accurately the exhibits and its value and directed the assessors on its (Exhibits) salient part.

Ground 9

That the learned Trial Judge made an error of law when he omitted to direct the assessors that they are to consider each counts separately; distinguished carefully between the evidence in each count and not to supplement the evidence.

Ground 10

That the Learned trial Judge made an error of law when he failed to direct an explain the assessors that they should Judge the case of the appellant alone and they and they 'alone must' make the decision on the guilt of the appellant (sic).

Ground 12

That the learned trial Judge made an error of law when he;

a. Omitted to explain which mental element and/or element of the offence has been satisfied or proven beyond reasonable doubt by the state; and
b. Omitted to explain how the state had proven beyond reasonable doubt the 7 or 8 elements of the charge of 'Aggravated Robbery' against the appellant, as per his directions to the assessors at para.9 of the summing up.

Ground 13

That the Learned trial Judge made an error of law when he failed to explain and/or direct the assessors that the appellant was entitled to the benefit of any reasonable doubt which the assessors may have in their minds; and

a. Omitted to explain the assessors that the appellant had an absolute right to have his case decided by the assessors which has been clearly to understand that he is to be acquitted if the state's case has not been proven beyond a reasonable doubt; and
b. Omitted to explain the assessors, what is precise definition of prove beyond reasonable doubt. This is because the assessors are lay-persons and do not have a fair idea of the operation of criminal justice system. (THOMAS v-THE QUEEN.102 CLR Pg 595 per KITTO, J).

Ground 14

That the learned Trial Judge made an error of law when he:

a. Failed to direct assessors adequately and properly on law and its principle on 'Complicity and Common Purpose'; and
b. Failed to direct the assessors how to deal with the principle of Complicity and Common Purpose' and the facts they must consider when dealing with the principles of Complicity and Common Purpose. This is since the prosecution appears to be relying on the concept of Complicity and Common Purpose. (Directions on Complicity and Common Purpose given by the learned trial Judge are found at [13] of his summing-up which the appellant believes is insufficient.

Ground 16

That the learned Trial Judge made an error of law when he convicted the appellant on a defective charge and information filed and relied by the prosecution, in that the offence were committed in Suva.

Ground 17

That the learned Trial Judge made an error of law when he;
a. Omitted to direct and/or failed to demonstrate an accurate evaluation of the appellant Medical Report Evidence and its impact on the voluntariness of the caution interview statements; and
b. Failed to consider the police medical report of the appellant confirming the appellant being assaulted while detained in police custody from the time of arrest and assaulted while interviewed and charged which resulted in the appellant signing the alleged interview; and
c. Failed to adequately assess the police medical report before agreeing with the unanimous opinion of the assessors (sic).

Ground 18

That the learned Trial Judge made an error of law when he based his finding substantially by taking irrelevant factors into account and by omitting to take relevant factors into account.

Ground 19

That the learned trial Judge made an error of law when he failed to direct and/or give guidance to the assessors of an intermediate position of doubt and to the way they are to treat the evidence should they found themselves in such a position (sic).

Against sentence

Ground 21

That the sentence passed is harsh and excessive and failed to pronounce a sentence that was proportionate to my alleged involvement constitutes an error.

[18] The learned judge had summarised the facts of the case as follows in the sentencing order as follows.

> *'4. The facts in this case was very disturbing. It was a home invasion type "aggravated robbery". The accused was 30 years old, married to one Shiwani Vikashni (DW2) and they had two young sons. The couple live at Waituri, Nausori. Ten years prior to the offending, the accused had 17 previous convictions. Eight were for driving types offences, four for burglaries and other type of offences. On 16 July 2014, he met a group of friends. They planned to rob the complainants in this case. They assigned him and he agreed to be the getaway driver.*
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> *5. On 19 July 2014, the accused again met his friends at Maqbool Road Nadera. Later they walked to the complainant's house. They were all dressed in black and armed with pinch bars. They waited near the complainant's house until it was 2am on 20 July 2014. They went and climbed over the complainant's fence, broke through the front door, and entered the house. They were four robbers, including the accused. They attacked Kishore Kumar (PW3) and Dharmendra Raj (PW2) with a pinch bar, and both were seriously injured. They repeatedly punched Shaleshni Devi (PW1) and threw her 3 year old baby against the bedroom wall. They ransacked the house and stole the items mentioned in the information. They later fled in PW3's pajero, which was driven by the accused.'*

1st and 6th grounds of appeal.

[19] Both relate to the *voir dire* inquiry. The appellant's complaint under these grounds of appeal is that when he was arrested at Nauva on 19 August 2014 he had no injuries except some bruises on his hands but while he was being taken from Nauva police station to Valelevu police station he was repeatedly assaulted and the assault continued inside Valelevu police station causing injuries to his mouth and knees. He had been

produced at Nasinu Magistrates court on 22 August 2014. The appellant contends that the learned trial judge had not evaluated the evidence of PW2 (the arresting officer) properly and unreasonably rejected the evidence of his own witness (DW2), *i.e.* his wife on several injuries seen by her on the appellant on different parts of the body at Nasinu police station on 20 August 2014 at the *voir dire* ruling where his cautioned statement was admitted.

[20] The learned trial judge had rejected the allegation of assault because (i) the medical report (Exhibit 1) was hearsay as the appellant did not call the doctor, (ii) DW2's exuberant demeanour while giving evidence of the appellant's injuries, (iii) she too did not provide admissible medical report despite her eyewitness account and the photographs (Exhibit 2) of the appellant's injuries and (iv) her close relationship to the appellant. Thus, the learned trial judge had concluded that there was no evidence of injuries suffered by the appellant while in police custody and accepted evidence of PW1 and PW2 that the appellant had not been assaulted and the defence evidence was not credible.

[21] Without *voir dire* proceedings and clear copies of all exhibits, I cannot examine the merits of the appellant's allegation of assault affecting the voluntariness of his cautioned interview and cannot determine the effect of those alleged injuries at the hands of the police on the success of the appellant's appeal. However, given the above reasoning by the learned trial judge this complaint should be carefully examined by the full court to determine its merits on the admissibility of the cautioned interview.

2nd, 3rd 4th and 20th grounds of appal

[22] These grounds also relate to the admissibility of the cautioned interview. The appellant's complaint in the 2nd appeal ground is that the learned trial judge had not considered Valelevu police station diary where some injuries on the appellant had been noted upon arrival there on 19 August 2014. There is no reference at all to Valelevu police station diary in the *voir dire* ruling. Dr. Susana who had examined the appellant on 20 August 2014 had not given evidence at the *voir dire* inquiry. Valelevu police station diary had recorded a cut on the mouth and swollen arms (L & R). As stated

earlier whether this diary was produced at the *voir dire* inquiry could be seen only from the *voir dire* proceedings. According to the appellant it was not allowed to be produced at the *voir dire* inquiry.

[23] Secondly, according to the judgment the learned trial judge had rejected the appellant's version of police assault whilst in police custody because he had told Dr. Susana (as per the medical report) that he had been assaulted at Nauva police station contrary to his evidence in court that he was assaulted at Valelevu police station. According to the medical report the appellant had displayed right eye haemorrhage, superficial laceration on right forearm and aberration and bruising on both knees. To examine these matters meaningfully the court should have the certified appeal record which would be available only to the full court. Similarly, whether the learned trial judge's rejection of the medical report completely on the basis that it was hearsay was correct could be examined by the full court as a matter of law in the light of decisions in **Singh v State** [1999] FJCA 33; AAU0012U.97s (14 May 1999), **Nacagilevu v State** [2016] FJSC 19; CAV 023.2015 (22 June 2016) and **Lata v. The State** [2000] FJHC 108; HAA00778j of 2000S (16 October 2000) for which leave to appeal is not required.

[24] The complaint under third grounds of appal has already been examined under appeal grounds one and six and needs no repetition. The decision in **Nacagi v State** [2015] FJCA 156; AAU49.2010 (3 December 2015) on the importance of medical evidence to determine the voluntariness of confession and in what circumstances an appellate court should disturb the findings of a trial judge will be of help to the full court to address the appellant's argument.

[25] Under the forth ground the appellant complains that his constitutional rights under section 13(1)(k)(i) of the Constitution have been violated in recording his cautioned interview. The state argues that according to questions 13-15 and answers of the cautioned interview, the appellant had wanted to see his wife but not desired her presence at the interview. Like previous complaints this issue could also be fully investigated with the full appeal record being made available to the full court. Further, a question of law that would arise is whether a mere violation of section13(1)(k)(i) of the Constitution by itself would render a cautioned interview inadmissible if it could be

otherwise held to be voluntarily given, which too need not have leave to appeal to go before the full court.

[26] 20th ground of appeal is once again concerned with the decision of the learned trial judge to admit the appellant's cautioned interview as being voluntarily made (and charge statement) disregarding the burden and standard of proof in the light of the medical report, Valelevu police station diary and PW2's evidence. This has been already addressed before. The decision in **Tuilagi v State** [2018] FJCA 3; CAV0013 of 2017 (26 April 2018) and **Sugu v State** [2016] FJCA 69; AAU44.2012 (27 May 2016) would be helpful to decide upon the effect of medical evidence to the voluntariness of a cautioned interview.

7th and 11th grounds of appeal

[27] These grounds of appeal relate to the summing-up arising from the fact that the only evidence upon which the conviction had been based was the appellant's cautioned interview. His complaints can be summarised as follows.

(i) No warning to the assessors the danger of convicting on a confessional statement alone without looking for corroboration.

(ii) Failure to put the defence case accurately, fairly, objectively and well-balanced manner and facts favourable to the appellant to the assessors.

[28] There seems to be some authority for the proposition advanced by the appellant in paragraph 26(i) above in **Kean v State** [2013] FJCA 117; AAU 95.2008 (13 November 2013) which is a question of law and no leave to appeal is required for the full court to take up the matter.

[29] Dealing with the complaint in paragraph 26(ii) above, it is clear that the learned trial judge had reminded the assessors of the prosecution case in paragraphs 14-17 and the defence case in paragraphs 18-20 of the summing-up. Having stated that the appellant and others had not been identified by the complainants the trial judge had proceeded to inform the assessors that the prosecution was relying on the alleged confession to establish the appellant's identity. In the same analysis of the evidence the trial judge

had informed the assessors that the appellant had not made a complaint of assault when produced in the Magistrates court of Nasinu in Criminal Case no.1094/14 (exhibit 2) (see paragraph 26 and 29 of the summing-up) in connection with this incident. However, it appears from the record of proceedings on 22 August 2014 in Nasinu Magistrates court (exhibit 3) that the appellant had informed the learned Magistrate that he had been assaulted by Police Intelligence Group and some officers at Valelevu police station. The warrant for his custody on that day shows at least three case numbers *i.e.* 1092/14, 1094/14 and 1096/14. Thus, if not in connection with case no.1094/14 the appellant appears to have in fact made a complaint of assault to the Magistrate on 22 August 2014. This matter too should be examined carefully by the full court with the aid of the certified appeal record and I refrained from making any further comments on this at this stage.

[30] The learned High Court judge had proceeded to address the assessors fully on the evidence of the appellant and that of Dr. Susana on the injuries which the appellant claims to have suffered at the hands of the police prior and during the cautioned interview (see paragraph 27, 28, 29, 32 and 29 of the summing-up and exhibit 4 – medical report and exhibit 5 - photographs). I do not think that there is any inadequacy in that respect. However, the trial judge had pointedly asked the assessors the question *'Was it because he was not assaulted at all at Valelevu police station?'* referring to two facts: firstly, in the medical report the appellant had told Dr. Susana that he was assaulted at Navua police station and secondly he had not complained in Nasinu Magistrates court Criminal Case no.1094/14 that he had been assaulted by the police. Whether the learned had trial almost directed the assessors to disbelieve the appellant and hold that he had not been subjected to a police assault in the manner and the context of the above directions should also be considered by the full court and also whether in that process the objectivity and balance of the summing-up was lost also should attract its attention. The decision in **Base v State** [2015] FJCA 21; AAU0067 of 2011 (27 February 2015) has useful comments about a similar situation. However, these matters could be properly assessed only with the availability of the full appeal record and I am not in a position to state anything more than this at this stage.

08th ground of appeal

[31] The appellant contends that the learned trial judge had misdirected the assessors in paragraphs 26 and 29 of the summing-up on defence exhibit 3 (Nasinu Magistrates court Criminal Case no.1092/14) and prosecution exhibit 2 (Nasinu Magistrates court Criminal Case no.1094/14). In the later the appellant does not appear to have complained of any police assault but in the former he had made a complaint to the Magistrate. The learned trial judge had directed the assessors on defence exhibit 3 (Nasinu Magistrates court Criminal Case no.1092/14) in paragraph 29 and told them that the appellant had made a compliant on another case but referring to exhibit 2 (Nasinu Magistrates court Criminal Case no.1094/14) he had told them that the appellant had not made a complaint of police assault. When the fact remained that on 22 August 2014 the appellant had in fact made a complaint of police assault, the effect of not highlighting that fact is worth being assessed by the full court if the appeal comes up before it.

16th ground of appeal

[32] The appellant complains that the charges were defective and prejudiced him. I do not think so. I have no doubt that the appellant knew exactly the charges faced by him and he seems to have been defended well in the High Court. In **Saukelea v State** [2019] FJSC 24; CAV0030.2018 (30 August 2019) the Supreme Court remarked:

> *'[36] The main consideration in situations similar to this where there is some infelicity or inaccuracy of drafting is whether the accused knew what charge or allegation he or she had to meet: **Koroivuki v The State** CAV 7 of 2017; [2017] FJSC 28. Secondly it was important that the accused and his counsel were not embarrassed or prejudiced in the way the defence case was to be conducted: **Skipper v Reginam** Cr. App. No. 70 of 1978 29th March 1979 [1979] FJCA 6. The Court of Appeal whilst not conceding merit in the point properly applied the proviso under section 23 of the Court of Appeal Act and dismissed the ground of appeal. Similarly in this Court, Ground 2 fails.'*

17th ground of appeal

[33] The appellant's complaint is similar to some of the grounds raised earlier on the impact of medical evidence on voluntariness of the cautioned interview. As pointed out before the learned trial judge may have failed to adequately direct the assessors and himself on this aspect except rejecting the appellant's allegation of police assault on the basis that the appellant had informed the doctor that he had been assaulted at Navua police station whereas his position at the trial had been that he was assaulted at Valelevu police station. As pointed out above the full court is the proper forum competent to examine this issue as well.

18th ground of appeal

[34] I have examined the judgment of the learned trial judge and the conclusion thereof in agreeing with the opinion of the assessors. The judgment has the same infirmity arising from inadequate or total absence of evaluation of the medical evidence on the allegation of police assault affecting the voluntariness of the cautioned interview as in the summing-up. This aspect has been dealt with before in this ruling and as I have stated earlier it is the full court that would be equipped to consider the whole scenario surrounding the alleged police assault with evidence at the *voir dire* and the trial proper and make a determination once the full appeal record is available.

19th ground of appeal

[35] The appellant argues that the learned trial judge had failed to address the assessors on the 'intermediary position' *i.e.* what stand they were to take should they find themselves in a situation of doubt about the appellant's position on the confessional statement. He relies on **State v Ram; Sami v State** [1998] FJCA 7; ABU0005U of 95S (12 February 1998) in support of his contention. In do not find any directions as to what the assessors should do if they neither believe nor disbelieve that the confession was voluntary. This is a pure question of law and need no leave to appeal to be taken up before the full court.

21st ground of appeal (against sentence)

[36] The appellant argues that the sentence is disproportionate to his involvement in the crime. In the sentencing order the learned trial judge had stated as follows.

> *6. "Aggravated Robbery", as a criminal offence, is viewed seriously by the law-makers of this country, and it carried a maximum sentence of 20 years imprisonment. For a spate of robberies, the tariff is a sentence between 10 to 16 years imprisonment: see **Livai Nawalu v The State** , Criminal Appeal No. CAV 0012 of 2012, Supreme Court of Fiji. With a single case of aggravated robbery, the tariff is now a sentence between 8 to 16 years imprisonment: see **Wallace Wise v The State** , Criminal Appeal No. CAV 0004 of 2015, Supreme Court of Fiji. The actual sentence will depend on the aggravating and mitigating factors.*
>
> *7. In **Wallace Wise v The State** (supra), the Hon. Chief Justice A. Gates said as follows, "...It is our duty to make clear these type of offences will be severely disapproved by the courts and be met with appropriately heavy terms of imprisonment. It is a fundamental requirement of a harmonious civilized and secure society that its inhabitants can sleep safely in their beds without fear of armed and violent intruders..."*
>
> *8. Furthermore, the Hon. Chief Justice, in the above case, commented as follows:*
>
> > *"...Sentences will be enhanced where additional aggravating factors are also present. Examples would be:*
> >
> > *(i) offence committed during a home invasion.*
> > *(ii) In the middle of the night when victims might be at home asleep.*
> > *(iii) carried out with premeditation, or some planning.*
> > *(iv) committed with frightening circumstances, such as the smashing of windows, damage to the house or property, or the robbers being masked.*
> > *(v) The weapons in their possession were used and inflicted injuries to the occupants or anyone else in their way*
> > *(vi) Injuries were caused which required hospital treatment, stitching and the like, or which come close to being serious as here where the knife entered the skin very close to the eye.*
> > *(vii) the victims frightened were elderly or vulnerable persons such as small children..."*
>
> *9. The aggravating factors in this case were as follows:*
> *(i) These offences were home invasion offences;*
> *(ii) The offences were carried out while the complainants were asleep at 2.00am on 20 July 2014;*

(iii) The offences were carried out with pre-planning by the accused and his friends;

(iv) The offences were committed in frightening circumstances where they broke open the front door, with four masked men dressed in black bursting into the house;

(v) They were armed with pinch bars and cane knife and the same were used on PW2 and PW3;

(vi) All the complainants were injured. PW3 was hit with a pinch bar on the head and he was severely injured. PW2 was also attacked with a pinch bar and cane knife and was knocked unconscious in a pool of blood. PW1, a woman, was repeatedly punched by the robbers. PW1's 3 year old baby was thrown against the bedroom wall.

(vii) The victims frightened were a mother and 3 year old child.

10. The mitigating factors is as follows:

(i) In your case, I can only find one mitigating factor, and that was you had been remanded in custody for approximately 8 months, that is, from 22 August 2014 to 20 April 2015. You were sentenced to 1 ½ years imprisonment on 20 April 2015 and since your release from prison, you had not attended court until 19 April 2017. Then you were remanded in custody for 9 days.

11. On count no. 1, I start with 11 years imprisonment. For the aggravating factors, I add 5 years, making a total of 16 years. I deduct 1 year for time spent in custody while in remand, leaving a balance of 15 years imprisonment.

12. For count no. 2, I repeat the above process and sentence.

13. In summary, your sentence are as follows:

(i) Count No. 1 : Aggravated robbery : 15 years imprisonment

(ii) Count No. 2 : Aggravated robbery : 15 years imprisonment

14. Because of the totality principle of sentencing, I direct that the above sentence be concurrent to each other, making a final sentence of 15 years imprisonment.

15. Because you have absconded from court, the above 15 years imprisonment will commence on the date you are arrested. You will serve a non-parole period of 14 years imprisonment.

16. Pursuant to section 4(1) of the Sentencing and Penalties Act 2009, the above sentence is designed to punish you in a manner that is just in all the circumstances, to protect the community, to deter other would-be offenders and to signify that the court and community denounce what you did to the complainants on 20 July 2014. Your role as getaway driver was just as bad as the ones who attacked the complaints in this case.

[37] I do not find a sentencing error here making this ground of appeal having a reasonable prospect of success in appeal. Nor does it have a 'high likelihood of success' to consider bail pending appeal.

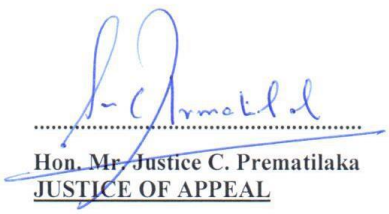
[38] Therefore, I would not grant leave to appeal as I cannot conclude that the appellant's appeal has a reasonable prospect of success without the essential material in the form of the certified copy of the appeal record and therefore the only logical conclusion arising therefrom is that his appeal cannot be said to have a very high likelihood of success as required for bail pending appeal at this stage.

[39] Nevertheless, the issues of law highlighted above could go before the full court without leave to appeal. However, since I have considered them in this ruling, I formally grant leave to appeal against conviction.

[40] The appellant has not submitted any other exceptional circumstances for this Court to consider his bail pending appeal application favourably.

Order

1. Leave to appeal against conviction is allowed.
2. Leave to appeal against sentence is refused.
3. Bail pending appeal is refused.



Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL