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

CRIMINAL APPEAL NO.AAU 086 of 2018
[High Court Criminal Case No. HAC 172 of 2015]

BETWEEN

: **KELEPI SALAUCA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Appellant in Person**
: **Mr. S. Babitu for the Respondent**

Date of Hearing : **18 March 2020**

Date of Ruling : **20 April 2020**

RULING

[1] The appellant had been charged together with the two appellants in AAU 0084 of 2018 and AAU 077 of 2018 and another in the High Court of Lautoka for having committed aggravated robbery contrary to section 311(1)(a) of the Crimes Act. The charge was as follows.

'***FIRST COUNT***

Statement of Offence

AGGRAVATED ROBBERY: *Contrary to section 311 (1) (a) of the Crimes Act, 2009.*

Particulars of Offence

KELEPI SALAUCA , VERETI WAQA & TUI LESI BULA in the company of another *on the 11th October, 2015 at Sigatoka in the Western Division robbed* ***KAVITESH KIRIT PRASAD*** *of the following items: Nissan Navara (Registration HA 448) valued at $60,000.00, $300.00 cash, Assorted cards namely Westpac, Westpac Debit Card, Australian Master Card, Australian Drivers Licence, Joint FNPF/FIRCA, Black SFIDA pair of canvas, Gym Gloves, White iPod, Nokia Lumia Phone, Euphoria Calvin Klein Perfume, Encounter Fresh Calvin Klein perfume, Mangal Sutra valued at $10, 000.00, Bangles valued at $6,000.00, Hair set valued at $9,000.00, Bracelet valued at $2,000.00, Ear ring valued at $3,000.00, Bedstone Necklace valued at $900.00, Wedding Ring (Female) valued at $2,000.00, Wedding Ring (Male) valued at $1,200.00, Gold Chain (22 carat) valued at $1,200.00, Wrist Watch (Fossil-Citizen) valued at $800.00, Ladies Watch (Pulsar) valued at $300.00, Black Label (x 15 bottles) valued at $1,350.00, Bombay Sapphire (x 5 bottles) valued at $400.00, Galaxy Samsung S5(x2) valued at $2,400.00, ITB Hardware (x2) valued at $1,000.00, 1 Flash Drive valued at $500.00, 1 Toshiba laptop valued at $1,800.00 and assorted branded BLK Clothing valued at $80.00 all to the* ***Total Value of Approximately $93, 930.00.***

[2] After full trial, the assessors had expressed a unanimous opinion that all the accused were guilty of the single count of aggravated robbery. The Learned High Court Judge had agreed with the unanimous opinion of the assessors and convicted the appellant of the same count on 15 June 2018 and sentenced him on 10 July 2018. He was sentenced to 10 years 11 months and 7 days imprisonment with a non-parole period of 9 years.

[3] At the first call over of the 01st appellant's appeal a judge of the Court had directed that all three appeals including those of the other two appellants in AAU 0084 of 2018 and AAU 077 of 2018 be taken up together and similar orders had been made in those appeals as well. Therefore, all three appeals were taken for leave to appeal hearing together as they arise from one and the same High Court trial. I shall now deal with the appellant's appeal.

[4] The appellant had filed a timely appeal on 30 July 2018 against conviction and sentence. Amended grounds of appeal against conviction (09) had been tendered by the appellant on 21 May 2019. He had also filed 02 additional grounds of appeal

against conviction on 19 September 2019. The appellant had tendered written submissions on those 11 grounds of appeal against conviction on 24 September 2019.

[5] At the leave to appeal hearing, the appellant filed Form 3 under Court of Appeal Rule 39 seeking to abandon his appeal against sentence which will be considered by the Court on a future date. The State had tendered its written submissions on 04 December 2019. On the day of the leave to appeal hearing, the appellant tendered to court another hand written submission where he claimed to have consolidated all 11 grounds of appeal against conviction under three grounds of appeal. The counsel for the State agreed to proceed with the hearing though he had not received the said written submissions in advance as the appellant had only consolidated the previous grounds of appeal.

[6] The facts are briefly as follows. On 11 October, 2015 the complainant and his wife (husband and wife) were asleep in their house at Malaqereqere, Sigatoka. At about 2.00 a.m. they were awoken by the sound of someone breaking into their bedroom. Three persons of *i*-Taukei origin in the company of each other and another had broken into the house of the victims. The victims were asked to cooperate so that no one was harmed, blankets were thrown over them, curtains drawn and the lights in the house turned on. The victims were questioned regarding the whereabouts of their valuables in the house. The pregnant wife of the complainant was grabbed by her hair and dragged from one room to the other so that she could show them where the valuables were. The house was searched for about an hour and the intruders fled from the scene having stolen the following properties belonging to the victims namely Nissan Navara vehicle (registration no. HA 448), mobile phone, assorted jewellery, assorted liquor, wallet with cash of $300.00, credit cards, perfumes, laptops, BLK clothes, shoes, black and white SFIDA canvas, watches etc. all to the value of about $93,000.00. Upon police investigation the accused were found to be in possession of most of the items stolen from the complainants. They were arrested and charged.

[7] The Court of Appeal has rightly raised the bar in timely leave to appeal applications by applying the test of **'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.

Grounds of appeal

[8]

'1. *That the trial Judge erred in law by accepting PW5 hearsay evidence whereas no reference nor caution was given to the Assessors in the summing up giving rise to a grave substantial miscarriage of justice.*

2. *That the trial Judge erred in law by contravening section 228(1) (2) and (3) of the Criminal Procedure Act of 2009. when he allowed PW(13) (Inspector Saimoni Qasi) to give evidence although he was not part of the briefs of evidence provided by the prosecution to the defence before the trial.*

3. *That the learned trial Judge Direction on the law regarding inconsistent evidence was inadequate giving rise to a substantial miscarriage of justice.*

4. *That the learned trial Judge erred in law and fact when he failed to explained to the Assessors not to draw any adverse inference on the Appellants right to remain silent during his caution interview. The direction given lacks fairness.*

5. *That the Appellant was seriously prejudiced when he was given (Additional Disclosures) pertaining search list after the witness (PW5) was cross-examined. The search list was a material issue supporting the discovery of unidentified canvas which linked the Appellant to this crime as charged. The search list should have been produced earlier in-order for the Appellant to prepare well for his defence. There is material irregularity in the making of the search list. The Appellant was seriously denied his right to fair trial.*

6. *That the trial Judge had made an erroneous assessment of the evidence before affirming a verdict of guilty which was unsafe, unsatisfactory and unsupported give rise to a grave substantial miscarriage of justice.*

7. *That the doctrine of recent possession lack clarity on the circumstances in which the alleged canvas was discovered giving rise to a grave substantial miscarriage of justice.*

8. *That the Appellant was seriously prejudiced by prosecution technicality by proceeding the trial on "Recent Possession." The Appellant was not treated fairly when the Police did not question him regarding allegation of recent possession.*

9. *That the incriminating evidence produced by PW5 and PW8 was tainted by improper motive and there was no warning nor caution given by the trial judge causing a substantial miscarriage of justice.*

Additional grounds of appeal

10. *That the learned trial Judge erred in law in failing to direct the Assessors the first limb of alibi directions, in that once they accept the alibi put forward to be reasonably true, they would be obliged to acquit, particularly where the defence relied wholly on alibi (R v Amyouni NSW cc 18, 1988) (R v Mohammed [2011] 112 SASR 17 2011).*

11. *That the learned trial Judge erred in law in misdirection himself as to the burden of proof where have stated in paragraph (31) of the summing up that ". . . . the defence have not been able to create any doubt in the prosecution case."*

Consolidated ground 01(grounds of appeal 2, 4,5,7,8, 11 and 6)

[9] Under consolidated ground 01, the appellant had included 01st and 09th grounds of appeal where his complaint relates to the evidence of prosecution witness No.5 (PW5) being hearsay and the evidence of PW5 and prosecution witness No.8 (PW8) allegedly being tainted by improper motive and the failure of the learned High Court judge to give a warning or caution to the assessors regarding the evidence of PW5 and PW8.

[10] PW5 is one Manoa Dugulele and a cousin brother of the appellant. PW8 is Manoa's wife Siteri Levers. The appellant has specifically drawn the attention of this court to paragraphs 62 and 191 of the summing-up dealing with the evidence of PW5 to buttress his argument based on 'hearsay evidence'. They are as follows

> *'62.After a while Kelepi came to the place where the witness was grazing his cattle and whilst having conversation Kelepi informed the witness that they did a robbery in Sigatoka. The Indo-Fijian husband and wife were tied at their house and they took their Red Nissan Navara vehicle which had been abandoned on a road. The witness did not know the name of the place where it was abandoned but it was before Naocobau Village.'*
>
> *'191.Furthermore the first accused had confessed to Manoa Dugulele (PW 5) that he had committed a robbery in Sigatoka involving an Indo-Fijian couple*

and they had come to Rakiraki in the stolen vehicle and that this vehicle had been abandoned.'

[11] Obviously, what Manoa had said in evidence as stated in paragraph 62 and 191 is not hearsay evidence. The witness had simply narrated in court what the appellant had told him. In fact according to paragraph 63 of the summing-up, the appellant had further told Manoa how the group involved in the robbery was transported from Namarai to Nabukadra after the robbed vehicle was abandoned. There is no merit in this argument.

[12] The 01st appellant's second complaint under the first consolidated ground of appeal is that because PW5 and PW8 are husband and wife there should have been a warning about the reliability of their evidence in the summing-up. His position seems to be that the evidence of such witnesses is potentially unreliable requiring a warning by the trial judge to avoid a risk of miscarriage of justice. He argues that when the prejudice that might be caused to the accused by such evidence outweighs its probative value the court should exclude such evidence or at least give a general warning.

[13] I do not agree. In my view the evidence of both PW5 and PW8 was properly admitted and there was no need or requirement in law to give any specific direction or warning to the assessors on the reliability of their evidence simply because they happened to be husband and wife. The learned trial judge had in paragraphs 199-202 given adequate directions on the evaluation of all evidence.

[14] The appellant also argues that the evidence of PW5 was tainted by improper motive in that he had implicated the appellant to avoid his complicity in the crime as PW5 too had been arrested by the police.

[15] It is clear from the summing-up that PW5 had not been part of the group of people who committed the robbery in the early hours of 11 October 2015. He had seen three men carrying bags along with the appellant who was carrying a bolt cuter warped in a black jacket around 7.00 am trying to cross the river in front of his house at Nabukadra village. The appellant had called them and later been told by the appellant of the robbery the group had committed in the night and then all had started drinking

liquor around 10.00 am. In the afternoon all of them tried to leave the village in a boat but incepted by another boat with police officers on board. PW5 had been asked to join the group in the boat journey by the 01st appellant. The appellant took charge of the boat and steered it towards the shore in an obvious attempt to escape from the police where the appellant and another had run inside the bush. PW5 had gone home and the 03rd appellant had arrived at his house around 7.00 pm where they had sat down to have dinner. The police had arrived and arrested both.

[16] The learned trial judge had dealt with these matters in paragraphs 60-77 of the summing-up and it is clear that PW5 was not involved in the robbery and his arrest was due to his company with the appellant in AAU 077/2018 and he has been later released and called as a prosecution witness as there was no evidence at all to implicate PW5 with the robbery whereas there was ample circumstantial evidence against the appellant in AAU 077/2018. There was no basis to make the appellant in AAU 077/2018 a State witness as argued by the appellant.

[17] The appellant has also complains that PW5 was in possession of a black SFIDA canvass (exhibit No.1) identified as one of the items robbed from the complainant's house as proved by the search list signed by him as a sign of his involvement of the crime. According to PW8, it is the appellant who had been wearing the said pair of shoes and come to their house and left it outside the house. On the following day she had given it to the police and signed the search list marked as exhibit No.12. PW13 had confirmed this position in his evidence (see paragraphs 127 & 128 of the summing-up). The learned trial judge had addressed the assessors of some contradictions in her evidence in this regard at paragraphs 101-103 of the summing-up. Thus, the 01st appellant's contention has no basis to succeed.

[18] The 01st appellant's contention that he was ambushed by the prosecution by not furnishing the additional disclosures including the search list allegedly signed by PW5 before PW6 gave evidence has unfairly affected his defence cannot be sustained for the reason that no search list signed by PW5 had been produced by the prosecution and secondly, the appellant had been in possession of the additional disclosures before

PW8 gave evidence who had signed exhibit No.12 regarding the black SFIDA canvass and before PW13 who took charge of the item gave evidence.

[19] The appellant questions as to why PW5 had not been charged for having received stolen property, theft or a similar offence. The evidence as summed-up by the Learned trial judge does not show any evidence which is sufficient to charge PW5 with the commission of such an offence.

[20] The judicial authorities cited by the appellant in support of his arguments relating to the alleged failure of the trial judge to caution or warn the assessors regarding the evidence of PW5 and PW8 should be viewed in the light of the unique position in Fiji as stipulated in section 237 of the Criminal Procedure Act, 2009 and judicial pronouncements.

[21] In Fiji, the assessors are not the sole judges of fact. The judge is the sole judge of fact in respect of guilt and the assessors are there only to offer their opinions based on their views of the facts (vide **Rokonabete v The State** [2006] FJCA 85; AAU0048.2005S (22 March 2006) and **Naisua v State** [2016] FJCA 24; AAU0088.2011 AAU0096.2011 AAU0057.2011 (26 February 2016). Therefore, what matters ultimately is whether the trial judge is satisfied with the evidence of the prosecution witnesses.

[22] The Learned trial judge having again given his mind to the evidence of the prosecution witnesses had said in paragraphs 23-25 of his judgment dated 15 June 2018 that he accepted their evidence as truthful and reliable and their demeanor was consistent with their honesty. The trial judge had further said that there was no evidence of any sinister motive on the part of the prosecution witnesses to falsely implicate the appellants.

[23] Accordingly, the consolidated 01st ground of appeal of the appellant fails and does not reach the threshold of having a reasonable prospect of success.

Consolidated ground 2 (grounds of appeal 2, 4,5,7,8, 11 and 6)

[24] The appellant under consolidated ground 2 argues that the application of the principle of recent possession against him was wrong in as much as that evidence in the form of PW13 - Detective Inspector Samoni Quase was led by the prosecution without complying with provisions of section 228(1), (2) and (3) of the Criminal Procedure Act.

[25] The prosecution has relied on evidence of recent possession and other circumstantial evidence to prove its case against the appellant. The learned trial Judge in paragraph 21-25 and 196 of the summing-up has given directions as to what recent possession is and the inferences that could be drawn. The primary evidence of recent possession against the appellant came from PW8 who had seen the appellant wearing a SFIDA black canvass (exhibit No.1) when he visited her house on 11 October, the day of the robbery. The complainant (PW1) had identified this pair of shoes as one of the items robbed from his household. PW13 had taken charge of this pair of shoes from PW8 who had signed the search list (exhibit No.12).

[26] The 01st appellant's complaint is that the statement of PW13 was not included in the disclosures given to him prior to the trial and he was served a copy of it only after PW13's examination-in-chief was over. However, the appellant admits that the search list containing exhibit No.12 was given to him after the evidence of PW6 was concluded *i.e.* before PW8 and PW13 testified in court. He also complains that he was not confronted with that piece of evidence when cautioned by the police.

[27] Section 228. — (1) of the Criminal Procedure Act states that no witness whose evidence has not been included in the briefs of evidence provided by the prosecution to the defence before the trial shall be called by the prosecution at any trial, unless the accused person has received reasonable notice in writing of the intention to call the witness. Sub section (2) states that the said notice must state the witness's name and address and the substance of the evidence which the witness intends to give. Sub section (3) stipulates that the court shall determine what notice is reasonable, having regard to the time when and the circumstances under which the prosecution became

acquainted with the nature of the witness's evidence, and determined to call the witness.

[28] It can be safely assumed that the learned trial judge had determined that the appellant had reasonable notice of both exhibit No.12 and the statement of PW13 and the fact that the appellant had cross-examined both PW8 and PW13 in detail is evidence of his having had reasonable notice of the relevant search list and the statement of PW13. His complaint that he was not confronted with exhibit No.12 when cautioned by the police does not carry much weight as his cautioned statement was not led in evidence at the trial by the prosecution. There was no difficulty on the part of the appellant to lead his cautioned statement as part of his defense and for reasons best known to him he had failed to do so.

[29] The learned trial judge has addressed the assessors on PW8's evidence in paragraphs 96-104 including the contradictions and paragraph 190 and the evidence of PW13 has been dealt with in paragraphs 127-130 of the summing-up.

[30] The appellant criticizes the summing-up on the basis that the learned trial judge had failed to direct the assessors on the burden of proof and his right to remain silent and finds fault with paragraph 202 of the summing-up and paragraph 31 of the judgment as shifting the burden of proof. Paragraphs 8, 9, 35, 145, 186, 204, 206, 209 and 212 of the summing-up contains accurate and sufficient directions on burden of proof and no criticism could be levelled on that score. Paragraph 202 of the summing-up and paragraph 31 of the judgment cannot be considered in isolation but as part of the whole of the summing-up and the judgment and the trial judge has not erred in shifting burden of proof on the appellant. The fact that no specific reference has been made of the appellant's right to remain silent cannot prejudice him as he had chosen to given evidence and call witnesses on his behalf.

[31] The appellant also has a complaint of what the trial judge had said in paragraph 140 of the summing-up on his having not offered an explanation on the SFIDA canvass he was seen wearing after the robbery by PW8. He also refers to paragraphs 189 and 196 of the summing-up and paragraph 9 of the judgment. The appellant states that he was not confronted with that allegation. However, PW13 appears to have given evidence

to the contrary (see paragraph 136-140 of the summing-up). If the appellant's contention is true then he could have led his caution interview in evidence as part of his case to prove his allegation which he had not done.

[32] In any event, given that exhibit No.1 and 12 were not the only evidence against the 01st appellant, given that the appellant had cross-examined both PW8 and PW13 despite the search list allegedly not having been included in the first set of disclosures and the PW13's statement allegedly not having been served on him in advance, given that the appellant had taken up an *alibi*, there is no reasonable prospect of success at all of his complaints under the consolidated ground 2 succeeding in appeal.

[33] The rest of the evidence except evidence of recent possession of a robbed article available against the appellant can be itemized as follows and with that evidence against the appellant this appeal has no reasonable prospect of success.

(i) Seen holding a bolt-cutter wrapped in a black jacket around 7.00 am on the day of the robbery.

(ii) Admission of robbery to PW5 within a few hours.

(ii) Trying to escape from police upon seeing the boat carrying police officers by steering it to the shore and the running into the bush.

(iii) Fleeing Nabukadra village and arrested in Suva.

[34] In addition, the trial judge has specifically commented on the demeanor of the appellant as follows in the judgment in finding the appellant guilty.

> '*26. Both the accused persons were not forthright in their evidence from their demeanour it was obvious that they did not tell the truth in court. It was noted in cross examination that they very cautious in choosing their words and were not forthright in answering the questions asked they were obviously not telling the truth.*
>
> *31.I reject the evidence of both the accused persons and their witnesses as unreliable and untruthful. The defence has not been able to create any doubt in the prosecution case.*'

[35] In **Sahib v State** AAU0018u of 87s: 27 November 1992 [1992] FJCA 24 the Court of Appeal stated with regard to the approach the appellate court should adopt in an appeal in the light of section 23 of the Court of Appeal Act in the following words

> *'It has been stated many times that the trial Court has the considerable advantage of having seen and heard the witnesses. It was in a better position to assess credibility and weight and we should not lightly interfere. There was undoubtedly evidence before the Court that, if accepted, would support such verdicts.*
>
> *We are not able to usurp the functions of the lower Court and substitute our own opinion.'*

Consolidated ground 03 (grounds of appeal 3 and 10)

[36] The appellant's main contention is that the learned trial judge has not addressed the assessors on the first limb of *alibi* and particularly refers to paragraph 184 of the summing-up. It is as follows.

> *'The first and third accused persons have put forward the defence of alibi. They say that they were not at the scene of crime when it was committed. As the prosecution has to prove their guilt so that you are sure of it, they do not have to prove they were elsewhere at the time. On the contrary, the prosecution must disprove the alibi. Even if you conclude that the alibi was false, that does not by itself entitle you to convict the accused. It is a matter which you may take into account, but you should bear in mind that an alibi is sometimes invented to bolster a genuine defence'*

[37] The learned trial judge has said something similar in paragraph 186 of the summing-up too. The appellant therefore argues that the learned trial Judge erred in law in failing to direct the assessors of the first limb of *alibi* directions, in that, once they accept the *alibi* put forward to be reasonably true, they would be obliged to acquit, particularly where the defence relied wholly on *alibi*. However, when one examines the summing-up, it becomes clear that the trial judge has in deed directed the assessors in paragraph 204 and 209 that if they accept the version of the defense they must find the appellants not guilty which is the first limb of the *alibi* direction because the appellant's only defense was one of alibi. The learned trial judge on the other hand has given sufficient reasons as to why he did not believe the alibi. There is no reasonable prospect of the appellant succeeding on this consolidated ground as well.

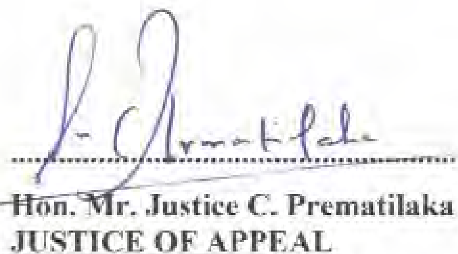
[38] Addressing the last concern of the appellant that the learned trial judge had not given adequate directions on inconsistent evidence suffice it to say that in paragraphs 101-103 the trial judge had dealt with such inconsistencies quite satisfactorily.

[39] There is no reasonable prospect of the appellant succeeding under consolidated ground 3 as well.

[40] Accordingly, leave to appeal is refused.

Order

1. Leave to appeal against conviction is refused.



Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL