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

CRIMINAL APPEAL NO.AAU 93 of 2019
[In the Magistrates' Court at Tailevu Case No. 207/2013]

BETWEEN	**:**	**TIMOCI SEREWAI**
		Appellant
AND	**:**	**STATE**
		Respondent
Coram	**:**	**Prematilaka, ARJA**
Counsel	**:**	**Mr. S. Waqainabete for the Appellant**
	:	**Mr. Y. Prasad for the Respondent**
Date of Hearing	**:**	**01 October 2021**
Date of Ruling	**:**	**08 October 2021**

RULING

[1] The appellant (01st accused in the Magistrates' Court) had been charged with another in the Magistrates' Court at Tailevu under extended jurisdiction on a single count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009 committed on 20 October 2013 at Kings Road, Tailevu in the Central Division.

[2] The information read as follows:

Particulars of Offence:

> ***TIMOCI SEREWAI, ANARE BICILO AND PENI TANIVULAVULA*** *on the 20th day of October, 2013 at Kings Road, Tailevu in the Central Division, assaulted and robbed* ***RAVINDRA SINGH*** *of $260.00 cash, 1 x Apple Touch Mobile valued at $300.00, 1 pair Nike Canvas valued at $229.00, 1 pair gum*

*boot valued at $60.00, 1 bag valued at $30.00, 2 pair socks valued at $12.00 all the total value of $891.00 from the said **RAVINDRA SINGH.***

[3] After trial the learned Magistrate had found the appellant guilty as charged in his judgment dated 16 May 2019 and convicted him accordingly. He had been sentenced on 07 June 2019 to 03 years and 11 months of imprisonment with a non-parole period of 02 years and 11 months.

[4] The appellant being dissatisfied with the conviction had in person lodged a timely appeal against conviction followed up with amended grounds of appeal. The Legal Aid commission had tendered an amended notice for leave to appeal and written submissions on 29 September 2020. The appellant in person had tendered additional two grounds of appeal on 07 April 2021. The respondent's written submissions had been tendered on 01 April 2021 and 27 September 2021. Both counsel had agreed to have a ruling without a hearing *via* Skype.

[5] In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. The test for leave to appeal is **'reasonable prospect of success'** (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, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019) in order to distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 and **Naisua v State** [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.

[6] Grounds of appeal on conviction urged by the appellant are as follows:

'Ground 1

THAT the Learned Magistrate may have erred in fact and law to unreasonably convict the Appellant without independently assessing and considering the

totality of the evidence to convict the Appellant on the principle of joint enterprise, thereby causing a substantial miscarriage of justice.

Ground 2

THAT the Learned Magistrate may have erred in fact and law to unreasonably convict the Appellant without independently assessing and considering the totality of the evidence to convict the Appellant on the doctrine of recent possession, thereby causing a substantial miscarriage of justice.

Ground 3

THAT the Learned Magistrate may have erred in fact and law to unreasonably convict the Appellant without independently assessing and considering the totality of the evidence to convict the Appellant when the identification of the Appellant was not established, thereby causing a substantial miscarriage of justice.

Additional grounds

Ground 1

THAT The Learned Magistrate erred in law and fact upon drawing adverse inference at 49 of its judgment by rejecting reasonable explanation as to how the complainant properties came to his possession and the court failure to apply common sense on the competing evidence of both parties.

Ground 2

THAT The Learned Trial Magistrate reliance on the principle of joint enterprise as a basis of conviction cannot be sustained on the overall evidence adduced hence the Magistrate finding was effected by a serious error.'

[7] The evidence of the case had been summarised very briefly by the learned Magistrate as follows in the sentencing order.

> *'2. During the hearing it was proved that on 20th of October 2013 you both robbed the complainant of his boots, bag, money and the phone. The complainant was going home after meeting with his friends and in the night he was dragged into a van where he was assaulted by group of people which included both of you and his items were stolen. When a person came to help after hearing the shouts of the victim at Nayaru, he was also assaulted and when the police stopped the van at the police post victim managed to escape.'*

01st ground of appeal

[8] The appellant contends that the Magistrate was wrong to have inferred a common intention and concluded that he was part of a joint enterprise.

[9] The Court of Appeal in **Rokete v State** [2019] FJCA 49; AAU0009 of 2014 (07 March 2019) considered in detail the principles relating to criminal liability under section 46 of the Crimes Act, 2009.

[10] Under the principle of joint enterprise in terms of section 46 of the Crimes Act, 2009 (earlier section 22 of the Penal Code), the first question is whether the appellants had formed a common intention to prosecute an unlawful purpose [see also **Vasuitoga v State** [2016] FJSC1; CAV001 of 2013 (29 January 2016)]. Common intention could be proved by inference from conduct alone without words but that inference should be sufficiently strong to satisfy the high degree of certainty which criminal law requires [vide **Henrich v State** [2019] FJCA 41; AAU0029 of 2017 (07 March 2019)].

[11] The second limb of 'joint enterprise' is that there should be proof that in the prosecution of the unlawful purpose an offence has been committed which is of such a nature that its commission is a probable consequence of the prosecution of such purpose.

[12] **Gillard v The Queen** [2003] HCA 64; 219 CLR 1; 78 ALJR 64; 202 ALR 202; 139 A Crim R 100 (2003) 219 also elaborates the operation of the doctrine of joint criminal enterprise as follows:

> *'110. In its simplest application, the doctrine of joint criminal enterprise means that, if a person reaches an understanding or arrangement amounting to an agreement with another or others that they will commit a crime, and one or other of the parties to the arrangement does, or they do between them, in accordance with the continuing understanding or arrangement, all those things which are necessary to constitute the crime, all are equally guilty of the crime regardless of the part played by each in its commission[98].'*

> *111. The doctrine has further application. It is not confined in its operation to the specific crime which the parties to the agreement intended should be committed. "[E]ach of the parties to the arrangement or understanding is guilty of any other crime falling within the scope of the common purpose which is committed in carrying out that purpose"[99]. The scope of the common purpose is to be determined subjectively: by what was contemplated by the parties sharing that purpose[100]. And "[w]hatever is comprehended by the understanding or arrangement, expressly or tacitly, is necessarily within the contemplation of the parties to the understanding or arrangement"[101]. '*

[13] In **McAuliffe v The Queen** (1995) 183 CLR108; 130ALR26; 79 A Crim R 229 it was reaffirmed that:

> *'The understanding or arrangement need not be express and may be inferred from all the circumstances'*

[14] The prosecution evidence shows that while the complainant (PW1) was walking home in the night a group of people travelling in a van had abducted him and assaulted him inside it. When he tried to escape they had caught him again and dragged him back to the van. His boots, bag, money and the phone had been robbed inside the van. PW 3 who had heard cries came out to see a group of people assaulting a person whom he identified as the complainant at the back of the vehicle. He had come to his aid but he too had been assaulted by the group. However, at his instance the van had been stopped by PW5 (police officer) and directed it to Nayavu community police post where the witness met the complainant looking frightened. Both PW5 and PW6 had identified the appellant and his co-accused there. PW7 had searched the appellant's house and recovered the gum boot and the backpack from his house. The appellant had suffered swelling and minor injuries that could have been caused by multiple punches. The appellant's cautioned and charge statements too had been led in evidence.

[15] According to the appellant when he along with a group was returning in the early hours in a van they saw the complainant lying unconscious on the road. There was a gum boot and a bag beside him and they took him inside the van. He admitted having caught the complainant again when he attempted to flee and put him back inside the vehicle. The complainant was shouting for help. Then they delivered him to Nayavu police post.

After they returned to the village the driver noticed the gum boot and the bag and the appellant had taken them home to hand them over later to the village headman. The complainant was already known to the appellant as Beca.

[16] The co-accused had also said in evidence that the driver of the van informed them about the items left behind in the van and they were given to the appellant. However, the driver (DW3) had said that he did not find anything in the van. But, he had said that they saw a man lying on the road and the appellant and co-accused brought him inside the van but not forced him inside the vehicle.

[17] The Magistrate had not believed the defense version because the group travelling in the van instead of handing the complainant over to Korovou police station or the hospital which were admittedly closer to where they 'found' the complainant, continued towards Nayavu police post. Secondly, the group failed to hand over the complainant's items to Nayavu police post. According to PW5 the group in the van did not voluntarily arrive at the police post but he stopped them and directed the van to the police post.

[18] The Magistrate had rejected the appellant's explanation for his recent possession of the items belonging to the complainant and drawn the inference from recent possession of complainant's stolen property that he was involved in the robbery of the complainant.

[19] Although the appellant had said that they informed Nayavu police post that they got the bag and the boot, PW5 or PW6 did not support that position. Further, DW3 himself had stated contradicting the appellant and his co-accused that he did not find anything in the van.

[20] The cries raised by the complainant who was seen being assaulted inside the van supported by corresponding injuries coupled with the group chasing behind him to catch him when he attempted to escape from the group and even assaulting PW3 who came to check on the commotion make the defense story of trying to assist a man lying unconscious on the road incredible. It is also unbelievable that the appellant

took the items belonging to the complainant home in order to hand over the same to the village headman on the following day. This appears to be an opportunistic crime committed by the group including the appellant in the early hours of the day on the complainant who was walking alone. Both parties had consumed liquor by the time of the incident but were fully aware of what they were doing.

[21] Therefore, given the facts and circumstances of the case, I do not think that the Magistrate had erred in inferring a joint enterprise and made the appellant criminally liable on that basis. He had come to that conclusion after considering the relevant provisions of the law and all the evidence. The fact that the appellant and his co-accused had failed to make any effort to stop the complainant being assaulted or also to prevent the others in the group dragging him back to the van for the second time were only two aspects among others considered by the Magistrate. For the appellant to be made liable under the joint enterprise it was not necessary that he should have assaulted the complainant causing him the injuries.

[22] Therefore, there is no reasonable prospect of success in this ground of appeal.

02nd ground of appeal

[23] The Magistrate had not convicted the appellant on recent possession evidence alone. He had thoroughly analyzed all the evidence, guided himself correctly on the law and taken recent possession evidence as one of the items of evidence to convict the appellant. Since the Magistrate had rejected the appellant's explanation for the recent possession of the complainant's items he was free to draw the inference from that evidence on the complicity of the appellant in the crime.

[24] The Court of Appeal in **Boila v State** [2021]; AAU 049.2015 (4 May 2021) *inter alia* referred to the following two decisions on recent possession evidence and the possible inferences therefrom.

> *'[19] **R v Langmead** (1864) Le & Ca 427; 169 ER 1459 Blackburn J stated at pages 441 and 1464 respectively:*

'I do not agree … that recent possession is not as vehement evidence of receiving as of stealing. When it has been shown that the property has been stolen, and has been found recently after its loss in the possession of the prisoner, he is called upon to account for having it, and, on his failing to do so, the jury may very well infer that his possession was dishonest, and that he was either the thief or the receiver according to the circumstances.'

[20] Dickson C.J. and McIntyre, Le Dain and La Forest JJ. said in ***R v Kowlyk*** *[1988] 2 SCR 59:*

'The doctrine of recent possession may be succinctly stated. Upon proof of the unexplained possession of recently stolen property, the trier of fact may--but not must--draw an inference of guilt of theft or of offences incidental thereto. This inference can be drawn even if there is no other evidence connecting the accused to the more serious offence. Where the circumstances are such that a question could arise as to whether the accused was a thief or merely a possessor, it will be for the trier of fact upon a consideration of all the circumstances to decide which, if either, inference should be drawn. The doctrine will not apply when an explanation is offered which might reasonably be true even if the trier of fact is not satisfied of its truth.'

[25] The Court of Appeal in **Batimudramudra v State** [2021]; AAU 113.2015 (27 May 2021) quoted **Timo v State** [2019] FJSC 1; CAV0022.2018 (25 April 2019) where the Supreme Court said:

'[17] …….Indeed, this was a classic example of the application of that strand of circumstantial evidence commonly called "recent possession". In cases where a defendant is found to have been in possession of property which has been stolen very recently, so that it can be said that he was in recent possession of it such that it plainly calls for an explanation from him about how he came to be in possession of it, and either no explanation is given, or such explanation as is given is untrue, the court is entitled to infer, looking at all the relevant circumstances, that the defendant stole the property in question or was a party to its theft. ***And if the property had been stolen in a burglary or a robbery, the court is entitled to infer, again looking at all the relevant circumstances, that the defendant took part in the burglary or the robbery in which the property was stolen****: see, for example, Blackstone's Criminal Practice 2016, paras F.63-F.64, and applied in Fiji in Wainiqolo v The State [2006] FJCA 49 and Rokodreu v The State [2018] FJCA 209'*

[26] Therefore, there is no reasonable prospect of success in this ground of appeal.

03rd ground of appeal

[27] The appellant contests his identity under this ground of appeal. In the light of the appellant's own evidence, his cautioned interview, the evidence of his co-accused and DW3 (driver) there cannot be any issue of his identity. Even the counsel for the appellant had in his submissions conceded that the appellant was part of the group travelling in the van when the incident happened.

[28] Therefore, there is no merit at all in this ground of appeal.

Additional grounds of appeal

01st ground of appeal

[29] The gist of this ground is the same as the 02nd ground of appeal which I have already dealt with and concluded that there is no reasonable prospect of success in appeal.

02nd ground of appeal

[30] This ground of appeal is on the same complaint made under the 01st ground of appeal which also I have already dealt with and determined that it has no reasonable prospect of success in appeal.

Order

1. Leave to appeal against conviction is refused.

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
ACTING RESIDENT JUSTICE OF APPEAL