

IN THE COURT OF APPEAL, FIJI

[On Appeal from the High Court]

CRIMINAL APPEAL NO. AAU 0040/24 & AAU 0044 of 2024

AAU 0045 of 2024

AAU 0046 of 2024

AAU 0056 of 2024

AAU 0080 of 2024

[Suva High Court Case No: HAC 246 of 2022]

BETWEEN : **ISIKELI BALE**
SOLOMONE BALE
EREMASI RAILEQE
ADRIAN MOREL
ISOA KOROIVUKI

Appellants

AND : **THE STATE**

Respondent

Coram : **Mataitoga, P**

Counsel : **Manulevu L, Daunivesi S and Ratidara L for the Appellants**
: **Shameem S for the Respondent [ODPP]**

Date of Hearing : **21 February, 2025**

Date of Ruling : **10 April, 2025**

RULING

[1] The appellants [Isikeli Bale, Adrian Morel, Solomon Bale, Isoa Koroivuki and Eremasi Raileqe] were jointly charged in the High Court at Suva with 1 count of Aggravated Robbery contrary to section 313 (1)(a) of the Crimes Act 2009, 1 count

of Theft contrary to section 291(1) of the Crimes Act 2009 and 1 count of Damaging Property, contrary to section 369 (1) of the Crime Act 2009.

- [2] The prosecution alleges that the appellants between the 11th and 12th of May 2022 at Raiwaqa in the Central Division in the company of each other broke into the office of RC Manubhai as trespassers with intent to commit theft, and did dishonestly appropriate assorted jewellery and foreign currency belonging to Arti Patel, and damaged a steel and hand carry safes, louvre frames, blades and gothic mesh belonging to RC Manubhai & Co Pte. Ltd.
- [3] After the trial all the appellants were found guilty as charged and convicted on 30 April 2024. On 3 June 2024, they were sentenced as follows after allowance was made for time served in remand: Isikeli Bale, 1 year 6 months imprisonment; Adriam Morell, 1 Year 10 months imprisonment; Solomone Bale, 1 year 11 months imprisonment; Isoa Koroivuki, 2 years, 6 weeks imprisonment and Eremasi Raileqe, 1 year 5 months imprisonment.

Appeal

- [4] All the appellants filed timely appeal against conviction: Isikeli Bale on 11 June 2024, Adrian Morell on 18 June 2024, Solomone Bale on 14 June 2024, Isoa Korivuki on 7 June 2024 and Eremasi Raileqe on 16 June 2024. Isoa Koroivuki appeal against conviction, is treated as being timely because his affidavit sworn 13 November 2024, states that he gave his appeal letter on 7 June 2024 to the Corrections Officer Bulikiobo to be submitted to the court registry but was not received in court.
- [5] The matter was initially treated by the court registry as individual appeals. However, after it was called for mention in the court, it was decided that the 5 appeals against conviction would be consolidate under AAU 044 of 2024. The previous appeals recorded as: AAU 056/24; AAU80/24/AAU 046/24/AAU /24 and AAU 045/24 now are consolidated into AAU 044/24 under Isikeli Bale and Others.
- [6] The Respondent [State] filed an untimely appeal against sentence on 29 July 2024. This is a delay of 26 days.

[7] For this leave to appeal hearing, I will treat both, the Appellants leave to appeal against conviction and the respondent leave application against sentence to be timely.

Law

[8] Grounds of appeal involving questions of law and facts require leave before it goes to the court of appeal: section 21(1)(b) Court of Appeal Act. In determining whether leave is to be granted the test is “*reasonable prospect of success*”: **Caucu v State [2018] FJCA 171; Navuki v State [2018] FJCA 172 and Waqasaqa v State [2019] FJCA 144.**

Grounds of Appeal Against Conviction

[9] The consolidated submission of the grounds of appeal against conviction submitted on behalf of all the appellants are:

- i) The trial judge erred in law and fact in convicting the appellants when the totality of the evidence does not support the conviction;
- ii) The trial judge erred in law and fact by convicting the appellants of theft when there was no evidence offered at the trial to confirm ownership of the stolen property as listed in count 2 of the Information.

Assessment of Grounds of Appeal

Totality of the Evidence Insufficient to Convict

[10] With regard to Ground 1: At the trial there was no direct identification evidence produced by the prosecution placing each of the appellants at the scene of the crime, the subject of the charges in this case. The prosecution relied on DNA evidence which were produced by the police officers, which showed that the appellants could not be excluded as contributors for the major and in some cases the minor component of the evidential samples, gathered from the scene of the crime. Given that the prosecution must prove the charges against the appellants beyond reasonable doubt, they challenged the veracity of the DNA Evidence on 4 distinct bases: i) Chain of custody of the DNA samples; ii) Discrepancies in the exhibits by Forensic Officers; iii) Lack of Government Accreditation of the Laboratory that carried out the analysis of the DNA samples of the appellants and iv) Secondary transfer of the DNA.

Chain of custody of DNA samples

- [11] The Court of Appeal in **Kumar v State [2023] FJCA 125 (AAU 132 of 2018)** stated the following:

“[27] *In criminal cases, the chain of custody refers to the chronological documentation and control of the physical evidence involved in a case. It ensures that the evidence is properly collected, preserved, handled, and accounted for from the moment it is discovered until tested by an analyst but not essentially until it is presented in court, for the absence of physical evidence in court per se is not a bar to a successful prosecution. The chain of custody is crucial to maintain the integrity and reliability of the evidence and to prevent tampering, contamination, or loss. By maintaining a clear and documented chain of custody, the legal system aims to ensure that the evidence presented in court is admissible, reliable, and has not been compromised or tampered with. It helps protect the rights of the accused by ensuring that the evidence is handled properly and that its integrity is upheld throughout the investigation and legal proceedings.*”

- [12] The trial judge dealt with the issue of the chain of custody evidence at paragraph 159 to 170 of the judgement. At paragraph 163, the trial judge stated:

“I have considered the Prosecution evidence on chain of custody, from the crime scene officers WPC Maraia and WPC Jiko who uplifted and packed and labelled the exhibits before the same were given to Salome Apole at the lab. There was a delay in the submission to the lab owing to other duties but they were kept safely at the crime scene office and submitted on 13 May 2022. Salome Apole checked the submission before placing the exhibits in the registration room and the crime scene swabs in the fridge to await registration. There is no dispute that one Sweta Krishna registered the exhibits. She did not give evidence but Maikeli Rauqueuge testified to reviewing and verifying accurate and correct the registration process she conducted on the first submission (exhibits from the crime scene) and the third submission which was the blood reference sample of Eremasi Raileqe. When this process was completed, he gave the case file to the senior scientific officer for a case officer to be assigned.”

- [13] The above statement of the trial judge was made after PW4 WPC Maraia Toga evidence were recorded at paragraph 17 of the judgement thus:

- “16. *A swab was taken from the door knob of the Finance Office and the office floor; a full fingerprint examination was conducted around the office area and on the safe but no fingerprints were uplifted. A wet swab was therefore taken from the safe, from the window sill at the point of entry and from the elevator buttons. A white glove was uplifted from the floor of the Residential Director’s office. An opened packet of milk found on the table was (wet) swabbed. Another pair of the same heavy duty glove was also uplifted; fingerprints were uplifted from boxes around the director’s office and the unopened safe swabbed and fingerprinted. They conducted dry and wet swabbing in the main office where the big vault was. A sock was found at the main Hardware counter near the Director’s office.*
17. *The swabs were packed into their original packing, labelled with the place they were uplifted from, time, date, initialled, sealed and recorded at the crime scene. They were kept in the crime scene lab and given to Salome of the DNA and Biology Lab (the lab) on 13 May 2022. About **nine physical exhibits** were handed over: a bolt cutter, a flip flop, a glove, a heavy duty glove, sock, and a number of swabs taken from the crime scene but which were not included in her statement. She signed a chain of custody document before the exhibits were given to the Lab. No one else had access to the exhibits before they were given to the lab.*
18. *In cross-examination, WPC Toga agreed that the time the examination concluded was different in her two statements given on the same day - one at 10:36am, the other 9.30am. She said the difference in the times may have been a typing error on her part.”*

[14] The appellants submit that PW4 WPC Toga’s evidence established that she signed a chain of custody document before the exhibits were given to the laboratory. The judgement did not delve into whether there were Police Operating Procedures in the Fiji Police that guides police officers involved in forensic investigation on how to maintain integrity of the chain of custody of the evidence collected from a crime scene to the laboratory. There is the issue that there were no evidence offered by prosecution to remove reasonable doubt, that when the exhibits were left in Crime Office it was not interfered with; how long was it there and under whose custody and whether there was no other person able to access it.

[15] Against that background it is difficult to be satisfied that the protection discussed by **Kumar** (supra) above, namely, “By maintaining a clear and documented chain of

custody, the legal system aims to ensure that the evidence presented in court is admissible, reliable, and has not been compromised or tampered with. It helps protect the rights of the accused by ensuring that the evidence is handled properly and that its integrity is upheld throughout the investigation and legal proceedings,” was satisfied. There is real possibility that the chain in the custody of the evidence was broken

- [16] This submission by the appellant should to be considered by the full court with the advantage of the full record of the trial in the High Court.

Discrepancies in the Exhibit by Forensic Officers

- [17] The appellant’s submission is clear PW4 WPC Toga said she handed over 9 exhibits to Salome of the DNA and Biology laboratory on 13 May 2022. Salome [PW] however stated that she received 10 exhibits from PW4 Maraia Toga. Paragraph 159 of the judgement state:

“The main contention at trial was in respect of the chain of custody of the DNA samples. WPC Maraia uplifted the exhibits from the scene. She said that she collected around 9 exhibits which she gave to Salome Apole. Salome however says she had received 10 exhibits from WPC Maria. I note that though WPC Maraia was shown her statements for the purpose of refreshing her memory on the number of exhibits she had given to Salome Apole, she was taken instead to her signature and date and other things and when asked the number of exhibits, simply gave an estimated guess of about nine. I do not think this inconsistency shakes the basis of the Prosecution case.”

- [18] The trial judge should provide the reasons her decision that the inconsistency did not shake the basis of the prosecution case. In the context of this case, where the only evidence linking the appellants to the charges they were facing, is DNA evidence and any this inconsistency is at the heart of the prosecution case; it is not peripheral. The evidence is WPC Maraia gave 9 exhibits of DNA samples to Salome Apole; the latter claim she had received 10 exhibits.

- [19] The other item of discrepancy in the evidence collected at the scene of the crime raised by the appellants related to the gloves. At paragraph 161 and 162 of the judgement it state:

“161. There were inconsistencies in the colour of the gloves uplifted from the scene. WPC Maraia said the gloves uplifted from the scene were

white. Salome Apole said when they register exhibits at the lab, they do not put a description, such as the colour or size. They simply state what the item is. A description is given after the item is opened and inspected.

162. *Paulini Saurogo said the glove in exhibit 5 was faded blue in colour while the final report recorded exhibit 3, a pair of gloves, as being grey in colour. Perception of colour is relative and can vary from person to person. Amongst other things, it can be subject to lighting, surroundings, eyesight and age. Mr. Gusu said when items are examined, they are laid out on the bench with all lights turned on.”*

[20] According to WPC Maraia she uplifted white gloves from the scene of the crime. Paulini Saurogo’s evidence is that the gloves in exhibited 5 was faded blue in colour; but the final report recorded the gloves as grey in colour. The issue that arise which needed clarification was did WPC Maraia made a mistake in identifying the glove as white. This is the same witness that said she submitted 9 exhibits to Salome and Salome said she received 10 exhibits from her. This goes to the veracity and reliability of this witness evidence and should have been addressed by the trial judge in some detail.

Laboratory Accreditation

[21] It is a fact that the Forensic Laboratory used to process the DNA sample evidence and related exhibits is not formally accredited. It is a requirement of the law in Fiji for it to be accredited: section 49 Trade Standards & Quality Control Act 1992. This was not done. There is no reference to a Police Standard Operating Procedures that guides police forensic investigators to follow. Paragraph 72 of the judgement state:

“72. *Mr. Gusu stated that the laboratory is not accredited and that work is conducted following guidelines set out by the Scientific Working Group on DNA Analysis Methods (the SWGDAM guidelines). These guidelines are used by forensic scientists around the world. Forensic scientists from other countries train scientists at the lab on DNA analysis and track the analyses carried out at the lab through proficiency tests. In this exercise, samples from overseas labs in Australia and New Zealand are sent to the local Biology and DNA lab for testing. Results are then sent to the same labs to compare them with their own results on the sample. The feedback was that the results from the local lab were the same as those from the overseas forensics lab and was an indication to them that the lab here was up to date with DNA analysis.*

73. *To ensure proficiency in the lab's operations, their overseas counterparts also conduct annual refresher trainings on DNA analysis.*

74. *As a means of quality control, a blank sample with only the chemicals for the analysis is included together with the batch of samples for analysis. It is blank in the sense that it contains zero DNA. At the end of the analysis, this sample should be blank. If it yields a DNA profile, they will know that the whole run is contaminated."*

[22] Accreditation of laboratories is critically important in ensuring the competency and reliability of results of investigation it produces. In this regard and especially with regard to DNA evidence for use in prosecution at a criminal trial, the high standards of beyond reasonable doubt will be difficult to meet without an independent verification process that is certified by the government.

[23] Paragraph 117 and 118 of the judgement states:

"117. After the submission of the DNA report, they discovered an oversight in respect of exhibit 9.1.C1. The DNA report noted it as a crime scene swab uplifted from the bolt cutter found at the scene but it was actually an uplift from a flip flop. They had tried to issue an addendum to rectify the error but by then, the DNA report was already in Court for trial.

118. In her statement to the Police, she had not stated that she reviewed the findings of the case officer as at the time of her statement, only the summary report had been released and they were awaiting further reference samples."

[24] The above problem may be avoided if the Fiji Police Forensic Laboratory is accredited according to the relevant laws of Fiji and Standard Operating Procedures are developed for forensic police investigators which capture international best practices and continuing training. The lack of accreditation will pose problems if it is not addressed.

Secondary Transfer of DNA

[25] This issue arose in the context of conflicting evidence on the possibility of secondary transfer of the appellant's DNA on to the glove. Paragraph 179 to 182 states:

“179. Nacanieli Gusu was cross-examined on the date of the summary report preceding the date Eremasi Raileqe’s blood reference sample was obtained. He explained that the date 18/6/22 on the report was the date he started preparing it. He confirmed that the report was made after all the evidential samples and blood reference samples of the accused and the two victims has been submitted.

180. There were many differences noted between the summary report and the final DNA report. Nacanieli Gusu explained the reasons for these differences. The summary report was a preliminary report prepared as soon as the analysis was done. In light of the unidentified DNA profiles in the summary report, the investigating officer was requested to obtain the reference sample of anyone who had access to the safe. He got the reference samples of the managers who became the major and minor contributors of exhibit 6.C1, a crime scene swab uplifted from the safe door knob. The accused persons Adrian Morel and Solomone Bale were bumped off as contributors when the blood reference samples of the two company managers were analysed and established that their DNA profiles constituted a major and minor component of the sample.

181. There is an error in the final report which states that sample 9.1.C1 is a crime scene swab uplifted from the bolt cutter found at the scene, when it should be an uplift from the flip flop. This error was admitted by Mr. Gusu and Ms. Tuitoga in Court. An addendum to the report was sought to be included but by then, the report was before the Court in these proceedings.

182. I have considered the defence proposition that the Accused’s DNA could have been transferred onto the glove by secondary transfer. I note that while Mr. Gusu and Ms. Tuitoga said this could happen, Ilaisa Tamanalevu said that for contact DNA, a secondary transfer would be very hard on a glove given the amount of DNA that would be present. He said secondary transfer of contact DNA onto a glove would be difficult to be detected in the lab.”

[26] I am satisfied that Ground 1, on the basis of the appellants submission above and my review of it against the judgement, that there is reasonable prospect of success on appeal, if leave is granted.

Count 2 – No evidence on ownership of stolen property

[27] The appellants submission is that Count 2 charges Theft, contrary to section 291(1) of the Crimes Act 2009, which requires 4 elements of the offence to be proven beyond reasonable doubt the prosecution. Paragraph 7 of judgement states:

“For theft in count 2, the Prosecution must prove beyond reasonable doubt that

- *the accused*
- *dishonestly appropriated*
- ***jewelleries and cash belonging to the Complainant***
- *with intent of permanently depriving the Complainant of the said property.”*

[28] The complainant in this case was Ms Arti Patel. Counsel for the appellants submit that the ownership of the jewellery was not adduced in evidence at the trial. The judgement does not refer at all to Ms Arti Patel giving any evidence nor is any evidence discussed in the judgment. That being so, it is not stated clearly how the conviction could be entered. This ground should also go to the full Court for further consideration with the full court record.

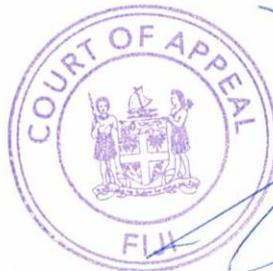
Grounds of Appeal Against Sentence

[29] On the principle enunciated in **Kim Nam Bae v State [1999] FJCA 29**, the manner in which the sentence against the appellants were made was wrong in principle, because it did not follow proper tariff identified in **Kumar v State [2022] FJCA 164**. In terms of the relevant factors that court must consider factors indicating higher culpability. These were outlined in the State submission on sentence.

[30] The Respondent [State] Leave to Appeal against sentence is granted.

ORDERS:

1. *Appellants leave to appeal against conviction on both ground of appeal allowed;*
2. *State leave to appeal against sentence is allowed.*

Hon. Justice Isikeli U. Maitoga
PRESIDENT, COURT OF APPEAL