IN THE SUPREME COURT OF FIJI
APPELLATE JURISDICTION

CRIMINAL PETITION NO. CAV 0018 of 2019
[Court of Appeal No. AAU 139 of 2014]

BETWEEN : **ASESELA ROKODREU**

Petitioner

AND : **THE STATE**

Respondent

Coram : **The Hon. Mr. Justice Priyasath Dep**
Judge of the Supreme Court

The Hon. Mr. Justice Priyantha Jayawardena
Judge of the Supreme Court

The Hon. Mr. Justice Madan Lokur
Judge of the Supreme Court

Counsel : **Mr. A. K. Singh for the Petitioner**
Mr. S. Babitu for the Respondent

Date of Hearing : **5 August, 2022**

Date of Judgment : **25 August, 2022**

JUDGMENT

Dep, J

[1] The accused (petitioner) with Amena Dela and Dwayne Hicks were indicted in the High Court of Fiji on two counts of robbery with violence contrary to section 293 (1) (b) of the Penal Code and a count of unlawful use of a vehicle contrary to section 292 of the Penal Code. These offences were committed on 19th March 2009 at Ba in the Western Division.

[2] In Count one it was alleged that the accused did use personal violence and robbed a mobile phone, jewellery, Fijian and foreign currency, and other items to the value of $7549.00 in the possession of Azaad Chandra Prakash.

[3] In Count two it was alleged that the accused did use personal violence and robbed liquor, jewellery, Fijian and foreign currency and twelve pairs of canvas and other items to the value of $ 39,500.00 in the possession of Alini Prakash.

[4] In Count three it was alleged that the accused unlawfully took to their use a motor vehicle belonging to Arvind Chandra Prakash.

[5] The case was taken up for trial in the High Court of Fiji sitting at Lautoka. The accused pleaded not guilty to the charges and the case proceeded to trial. After the end of the prosecution case due to want of evidence, the honorable high court judge acquitted 2nd accused Amena Dela and the 3rd accused Dwayne Hicks. The accused petitioner was called upon for his defence. He elected to give evidence and called a witness to support his evidence.

[6] After the summing up the assessors tendered their opinion finding the accused guilty of all charges. The honorable high court judge sentenced the accused for a period of 13 years and 5 months imprisonment and imposed a non-parole period of 12 years.

[7] The accused filed a petition of appeal in the Court of Appeal and the Court of Appeal having considered the grounds of appeal held that the grounds are devoid of merits and proceeded to dismiss the appeal.

[8] The Accused being aggrieved by the judgment of the Court of Appeal filed a petition to this court seeking leave to appeal. Before considering the grounds urged by the accused it is necessary to briefly refer to the evidence led in the High Court.

[9] The main witness for the prosecution was Azaad Chandra Prakash who was 62 years of age at the time of the commission of these offences. In his evidence he stated that on 18.3.2009 around 10.00 p.m. three persons came and tried to forcibly open the door and he tried to prevent them from opening the door. The door had a glass on top. They broke the glass with an iron rod and the iron rod struck his forehead and he suffered injuries. When they were trying to pull the grill gate, he struck the person in front of him with the knife and he felt that person got injured in his left hand. All three entered the house. One of them hit him on the lap and he fell. His knife was grabbed by one of them and another tried to strangle him with a rope. He was kicked and beaten and fell on the ground. His head was bleeding. Intruders ransacked the house and took the goods in a sack and went away in the Pajero belonging to his son. His son was sent to call the neighbours and report the matter to the police.

[10] The next witness called by the prosecution was Arvind Chandra Prakash who is the son of the first witness. As regards to the incident he corroborated the evidence of his father. His father asked him to go and get help. He went through the back door to the house of a neighbour. When they were coming back, to the house they were stoned. He could not come back. Then he heard his vehicle being started. He came back and found the glasses were broken, his daughters are crying, and his father's forehead was full of blood. They have taken away jewellery, liquor, twelve pairs of canvas and cash including foreign currency, four chains, two bracelets, pendant and four rings. He identified stolen jewellery including the pendant with his name ‘Prakash’ engraved at the police station and in court. It is significant to note that at the time of the arrest of the accused he was wearing this pendant. He stated that his green and silver coloured Pajero with number plate DS 983 which was stolen by the robbers was recovered later.

[11] The third witness for the prosecution was Alini Prakash. She is the wife of the second witness. On 18.3.2009 in the night her mother-in-law came and woke her up. She was told

that thieves are inside the house. She ran towards the door and saw her father-in-law arguing and pushing the door. There was a man in front of her and she told him in i-Taukei to take whatever they want and not to harm them. He had replied in English that they want gold and cash. She went to the bedroom, took her jewellery box and gave it to him. That person asked her to bring a sack and he told her to pack all the liquors in the empty bag. She had done that. When she came to the sitting room, she had seen her father-in-law fallen. One man came and opened the washing machine and broke the mirror on the wall. He took the bangles she was wearing. Altogether three persons entered the house and one of them asked for the keys of the Pajero. She identified the jewellery at the Ba police station and in Court. All the items of jewellery that was stolen were recovered.

[12] None of the witnesses were able to identify the persons who entered the house and committed robbery. In the absence of direct evidence, the prosecution must rely on circumstantial evidence.

[13] Witness Aisea Bani stated that on 18.3.2009 night he was having grog with Maciu and Qio near Maseki's house. Thereafter they started drinking beer. The accused (petitioner) Asesela came with others and joined them at about 3 a.m. He could not properly recognize the persons who came with Asesela as he was drunk. They were not from his area. While they were drinking police came and took them to the police station.

[14] After leading the evidence of Aisea Bani, the prosecution called Maciu Lagibalavu as the next witness. He stated that when he was drinking with Aisea Bani and others, the accused Asesela came and joined them. They drank till morning when the police came and arrested them and took them to the police station. He did not see the accused Asesela having anything with him. The Police forced him to state in his statement that the accused Asesela had a bag full of jewellery. He was later treated as an adverse witness by the prosecution.

[15] The witness TaioneVitau stated that on 19.3.2009 around 8.00 a.m. when he came down to go for work, he met some youth of Kaleli who were drinking at that time. Bani and Qio invited him to join them. Semioni, Maciu and Asesela (accused) were also there. There

were few others all of them are i-Taukei men. Police came there and took all of them to the station around 11.00 a.m.

[16] Inspector Iakobo Vaisewa gave evidence regarding the investigations conducted by him and the arrest of the accused. According to him on 19.3.2009 he was summoned to the station early in the morning and informed of a robbery with violence at the house of Azaad in Varadoli. He proceeded to the scene with other officers around 6.00 a.m. They received information that the stolen vehicle was abandoned in Wairabetia. They proceeded to that area and found the vehicle. There were blood stains in the steering wheel and on the driving seat. The vehicle was brought to Lautoka police station. Then they received information that a group of youths are drinking in Kaleli settlement. They proceeded to Kaleli settlement and found 7 youths drinking. The 1st accused was wearing a chain with 'Prakash' initial in the pendant. The 2nd accused was also there with five other boys. He had searched the 1st accused. He was holding a blue bag and inside the bag items of jewellery were found. Cpl. Tamani had searched the 2nd accused. Some cash and two gold rings were found from his possession. Other five were also searched and nothing was found from them. He took possession of the bag of jewellery. The first accused was verbally questioned by him, arrested and brought to Lautoka police station.

[17] He took a count of all the jewellery at the station and noted those down in a search list. All the suspects were locked in the cell as they were drunk. The five boys were questioned, interviewed and their statements were recorded, and they were released. The two accused were brought to Ba police station. He signed the search list. He was shown a photocopy of the search list. He said that a carbon copy was given to the 1st accused and the original was put in the prosecution file. Original was photocopied and given with the disclosures. When he was giving evidence, the original was not available. Original was traced and he was recalled to identify the same. The items listed in the search list were in his possession and those were handed over to Investigating Officer PC Belo. He identified and tendered the blue carry bag marked P25.

[18] The last witness for the prosecution was Cpl. Ilaria Belo who visited the scene and made observations and recorded the statements of Arvind Chandra Prakash, Alini Prakash and Azad Chandra Prakash.

[19] After the close of the prosecution case, the counsel appearing for the 2nd and the 3rd accused made an application to discharge the accused as there is no case for them to answer. The Court upheld the applications and discharged and acquitted the 2nd and 3rd accused.

[20] The Court called upon the 1st accused (petitioner) for his defence. He elected to give evidence. He denied the allegation of robbery and possession of stolen property. He stated that on the day in question he was at his employer's house partaking liquor till 1.00 a.m. and on his way home he met his friends and having drinks with them when the police arrived. Police picked up a bag from the ground and said that it is his bag and arrested him and took them to the police station. He refused to make a statement. In support of his alibi he called his former employer Narendra Michael who testified to the effect that on the day in question the accused and fellow employees were having drinks in his house till 2.00 a.m.

[21] After the summing up the assessors in their unanimous opinion found the accused guilty of all charges. The learned High Court Judge agreed with the assessors and found the accused guilty of all charges and sentenced him for 13 years 5 months imprisonment with non-parole period of 12 years.

[22] Being dissatisfied with the conviction and sentence, the accused filed a petition of appeal in the Court of Appeal. The following ground were raised in the petition.

> *"That the learned Trial Judge erred in principle and fact by lacking to provide a fair and balance Summing Up, in particular, to the following:*
>
> *(a) Inadequate and improper directions to the assessors on the principle of 'recent possession';*
>
> *(b) Failing to direct the assessors on the totality of the evidence regarding the original Search List; and*
>
> *(c) Misdirecting the assessors on the Appellant's Notice of Alibi.*

(d) Failing to direct the assessors on the inconsistencies of the State's evidence in totality.

(e) Erring in principle by directing the assessors that "inferences of guilt is the only rational conclusion to be drawn from this evidence."

The Court of Appeal after hearing the petition dismissed the petition as it is devoid of merits.

[23] Thereafter, the accused filed this petition in the Supreme Court seeking leave to appeal. The petitioner in his original petition of appeal and in the amended petition submitted several grounds of appeal. However, in the written submissions filed on behalf of the petitioner, submitted four grounds of appeal. According to the solicitor, these grounds are based on the grounds raised in the Court of Appeal, in the original and in the amended petition submitted to this Court.

[24] The Solicitor has raised the following issues based on the grounds of appeal:

(1) Principles of recent possession

(2) Totality of evidence

(3) Appellant's notice of alibi

(4) Erred in sentencing.

[25] In order to obtain leave the Petitioner has to satisfy the criteria set out in Section 7(2) of the Supreme Court Act which states:

In relation to a criminal matter, the Supreme Court must not grant special leave to appeal unless –

(a) A question of general legal importance is involved.

(b) A substantial question of principle affecting the administrator of criminal justice is involved; or

(c) Substantial and grave injustice may otherwise occur.

[26] It was held in series of cases that the Supreme Court is not a Court of Appeal and the parties as of a right has no right of appeal. An aggrieved person should seek special leave to appeal from the Supreme Court under section 7(2) of the Supreme Court Act No. 14 of 1998.

[27] In Livia Lila Matalulu and Another v. The Director of Public Prosecutions [2003] FJSC 2; (2003) 4 LRC 712 (2003) the court held that.

> *"The Supreme Court of Fiji is not a court in which decisions of the Court of Appeal will be routinely reviewed. The requirement for special leave is to be taken seriously. It will not be granted lightly. Too low a standard for its grant would undermines the authority of the Court of Appeal and distract this court from its role as the final appellate body by burdening it with appeals that do not raise matters of general importance or principle or in the criminal jurisdiction, substantial and grave injustice."*

[28] In Aminiasi Katonivualiku v State, Criminal Appeal No. CAV 001/1999S (14th April 2003) at page 3 paragraph 5, the Supreme Court said:

> *"It is plain from this provision that the Supreme Court is not a Court of Criminal Appeal or general review nor is there any appeal to the Court as a matter of right, and whilst we accept that in an application for special leave some elaboration on the grounds of appeal may have to be entertained, the Court is necessarily confined within the legal parameters set out above, to an appeal against the judgment of the Court of Appeal".*

[29] This Court will consider the grounds raised by the petitioner to satisfy whether it fulfil the stringent criteria laid down in section 7 (2) of the Supreme Court Act in order to obtain leave.

Ground No. 1

Principles of Recent Possession

[30] In common law jurisdictions there is a presumption that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession. In order to apply this presumption, the prosecution is required to establish several requirements.

i. Stolen property

ii. Recent possession

iii. Exclusive and conscious possession

When the above factors are established, the possessor has to give an account as to how he came to possess. In other words, he should give a reasonable or a plausible explanation.

i. Stolen Property*:*

[31] The property must be stolen property. It is therefore necessary to establish the identity of the property. In this case witnesses Arvind Chand Prakash and his wife Alini Prakash had identified the property which belonged to them such as jewellery, mobile phones which are personal to them. They identified this property at the police station and in courts.

ii. Recent Possession:

[32] The property should be recently stolen property. In other words, recent possession has to be established. According to the evidence, the robbery has taken place on 18 March 2009 after 10.00 p.m. The accused joined witness Aisea Bani and others who were having drinks at about 3.00 a.m. in Kaleli, Lautoka and they were in their company having drinks when the police came and arrested the accused and others and recovered the blue bag which was in the possession of the accused containing stolen items. These items were recovered within twelve hours after the commission of the offence. The items such as jewellery which will not change hands many a times such as cash. Therefore, the prosecution has established the property was recently stolen property.

iii. Exclusive Possession

[33] The next element the prosecution is required to prove is that the stolen items were in the exclusive possession or control of the accused. Inspector Iakobo Vaisewa recovered the blue bag which was in the possession of the accused. That bag contained stolen items. The accused denied that he was in possession of the stolen property and alleged that police fabricated evidence. However, the assessors and the trial judge accepted the evidence of

Inspector Iakobo Vaisewa as truthful. The accused did not give a reasonable account as to how he came to possess these items.

[34] The case of *Wainiqolo v State* [2006] FJCA 49; AAU0061.2005 [28 July 2006] is relevant to this case. It states:

> *"The principal ground relates to the so-called doctrine of recent possession which is that where property has been stolen and is found in the possession of the accused shortly after the theft, it is open to the Court to convict the person in whose possession the property is found of theft or receiving. It is no more than a matter of common sense and a Court can expect assessors properly directed to look at all the surrounding circumstances shown on the evidence in reaching their decision. Clearly the type of circumstances which will be relevant are the length of time between the taking and the finding of the property with the accused, the nature of the property and the lack of any reasonable or credible explanation for the accused's possession of the property. What is recent in these terms is also to be measured against the surrounding evidence.",*

[35] Therefore, in this case the prosecution proved beyond reasonable doubt that the accused was in the possession of recently stolen property

Ground 2

Totality of Evidence

[36] In the written submission of the petitioner, it was stated that the trial Judge did not consider the totality of evidence such as the issue of search list, inconsistent evidence and the issue of blue bag. Counsel for the Petitioner submits that although case was presented on the basis of joint enterprise, the trial judge adopted a different yardstick and proceeded to acquit the 2nd and 3rd accused against whom there was evidence.

[37] I find that this submission is factually incorrect. Two items of jewelry and cash was recovered from the possession of the 2nd accused. Those items were not identified by the victims. There was no evidence against the 3rd accused. The learned trial judge after the close of the prosecution case on applications made by the counsel for the 2nd and 3rd accused

stating that no case to answer, upheld the applications and proceeded to discharge and acquit the 2nd and 3rd accused without calling for the defence.

[38] The next issue is regarding the search list. Inspector Iakobo Vaisewa giving evidence stated that he recovered the stolen jewelry from the 1st accused and after taking him to the police station prepared a search list of the items recovered from the possession of the accused. The accused refused to sign the search list. Photocopies of the search list was taken, and a copy was given to the accused. Further a copy was annexed to the disclosures. When giving evidence he did not have the original and produced a photocopy which contained his signature. His position was that it was not available to him at that time, and it was in the prosecution file. The following day it was located and produced in court.

[39] It was submitted that witness Aisea Bani and two others who were drinking with the accused did not refer to the blue bag. It was submitted that these three witnesses did not support Inspector Iakobo Vaisewa's evidence. However, Aisea Bani in his evidence stated that the accused Asesela came with others when they were having drinks. He did not recognize or identify the others as he was fully drunk. Other two witness who were with him were also in a similar situation. They were drinking beer till morning when they were arrested after 9 am. They were in a highly intoxicated state. In that state of intoxication, one could not expect them to observe what the accused and others having with them. In those circumstances one could not state that these witnesses contradict or did not support the prosecution case.

[40] Having considered the submissions made on behalf of the petitioner, I find that this ground is devoid of merits.

Ground 3

Appellant's notice of alibi

[41] The Counsel for the Petitioner submits that the trial judge erred when he stated that there was no notice of alibi. The counsel submitted that this offence was committed when the Criminal Procedure Code Chapter 21 was in force, and the accused is required to give notice under that Code.

[42] Section 234 of the Criminal Procedure Code (Chapter 21) states:

> *'On a trial before the Supreme Court the defendant shall not without the leave of the Court adduce evidence in support of an alibi unless, before the end of the prescribed period he gives notice of particulars of the alibi.*
>
> *In this section "prescribed period" means the period of fourteen days from the end of the preliminary inquiry before the magistrate."*

[43] According to this section, after the conclusion of the preliminary inquiry within a prescribed time the accused is required to give notice of an alibi if he is to take up an alibi as a defence. However, by an amendment to the Criminal Procedure Code (Chapter 21), the requirement to have a preliminary inquiry in respect of robbery cases was dispensed with. Therefore, it is not possible for the accused to give notice under the Criminal Procedure Code (chapter 21).

[44] When the trial was taken up in the High Court, the Criminal Procedure Decree 2009 had come into force and the applicable law as far as the procedure is concerned is the Criminal Procedure Decree of 2009. Section 125 of the Criminal Procedure Decree reads thus:

'On a trial before any court the accused person shall not, without the leave of the court, adduce evidence in support of an alibi unless the accused person has given notice in accordance with this section.
A notice under this section shall be given -

(a) Within 21 days of an order being made for transfer of the matter to the High Court (if such order is made); or
(b) In writing to the prosecution, complainant, and the court at least 21 days before the date set for trial of the matter, in any other case.

[45] The accused in this case failed to give notice prior to the commencement of the trial. The Notice was given after the commencement of the trial and towards the end of the prosecution case when police witnesses are giving evidence. Therefore, he had not

complied with the requirements of the section 125 of the Act and also the notice does not contain the necessary particulars as required and therefore it is not a valid notice.

[46] The learned trial judge in his summing up commented on the 'notice of alibi' thus:

> *"No notice was given of alibi in this case. The accused is not represented in this case. However, according to above legal position accused cannot take a defence of alibi without giving a proper notice. That requirement is there for the prosecution to investigate the truthfulness of the alibi. Therefore, you have to decide what weight can be given to this alibi evidence".*

[47] However, the trial judge permitted the accused to give evidence of an alibi and also to call a witness in support of his alibi.

Therefore, I am of the view that no prejudice is caused to the accused.

[48] The next allegation is that the trial judge failed to give proper direction to the assessors regarding the evidence of an alibi and the direction he gave is prejudicial to the accused. The relevant part of the summing up states

> *"The accused's defence is one of alibi. He says that he was not at the scene of crime when it was committed. As the prosecution has to prove his guilt so that you are sure of it, he does not have to prove he was elsewhere at the time. On the contrary, the prosecution must disprove the alibi. Even if you conclude that 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 defence."*

[49] I find that the learned High Court Judge had given an adequate and a proper direction regarding evidence of alibi.

[50] The Counsel for the petitioner submits that in relation to the evidence of the witness Narendra Michael who was called to support the alibi, the learned trial judge made the following comment which was adverse and prejudicial to the accused. The trial judge in his summing up stated:

> *"This witness is giving evidence in 2014 about something happened in 2009. He had not made any statement to police. It is up to you to decide*

whether his evidence creates a reasonable doubt in the prosecution case. If so accused should be discharged".

[51] The learned trial Judge had given proper directions regarding the alibi based on the evidence of the case. Accordingly, I find that this ground has no merits.

Ground 4

Erred in Sentencing

[52] It was alleged that the sentence of 13 years and 5 months is an excessive sentence and the imposing a non-parole period is illegal. It was submitted that there was no provision in the Criminal Procedure Code Chapter 21 to impose a non- parole period.

[53] This Court has to decide whether the sentence of 13 years and five months is an excessive sentence or not. The robbery committed by the accused considered as an aggravated robbery and at the time the accused committed the robbery Penal Code was in force and the maximum sentence for robbery involving violence was life imprisonment. In this case the accused with two others entered the house in the night when the inmates retired to sleep. They broke the doors, assaulted Azad Prakash and caused injury to him, damaged properties, instilled fear in the inmates and robbed their personal belongings.

[54] At the time the accused was convicted in 2014, there was no Sentencing Guidelines. However, in the year 2015 in *Wise v State* [2015] FJHC 7 the Supreme Court had given a range or the tariff of 8 to 16 years for aggravated robbery. This judgment was considered and approved in the recent case of *State v Tawake* [2022] FJHC 22 and the Supreme Court proceeded to give guidelines to different types of robbery. When considering whether the sentence given in the instant case is excessive or not this Court considered the guidelines given in those judgments in relation to aggravated robbery. I find in comparison the sentence of 13 years and 5 months is not excessive.

[55] The next argument is that at the time of commission of the offence there was no provision for a non-parole period and the imposition of a non-parole period is illegal. However, at the time of conviction, Sentencing and Penalties Act 2009 had come into force, and it provided for the imposition of a non-parole period.

According to Section 61 (1) of the Sentencing and Penalties Decree

> *"A Court hearing any proceeding for an offence which was commenced prior to the commencement of this Decree shall apply the provisions of this Decree if no sentence has been imposed on the offender prior to the commencement of this Decree."*

[56] The High Court acting under Section 18 (1) of the Sentencing and Penalties Decree, fixed a non-parole period of 12 years. I find that the imposition of a non-parole period is in accordance with the law.

[57] I have carefully considered the grounds raised in the petition and the written submissions tendered by the parties and find that there are no merits in the petition seeking leave to appeal. The Petitioner failed to satisfy the criteria set out in section 7(2) of the Supreme Court Act. Leave is refused. Petition dismissed.

Jayawardena, J

[58] I have considered the draft judgment of Dep J and I agree with his reasoning and conclusions.

Lokur, J

[59] I agree with the proposed judgment and orders.

Orders of Court

1. Leave is refused and the Petition dismissed
2. The judgment of the Court of Appeal affirmed
3. The conviction and the sentence of the High Court will stand

The Hon. Mr. Justice Priyasath Dep
Judge of the Supreme Court

The Hon. Mr. Justice Priyantha Jayawardena
Judge of the Supreme Court

The Hon. Mr. Justice Madan Lokur
Judge of the Supreme Court