IN THE FIJI COURT OF APPEAL

CRIMINAL JURISDICTION

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CRIMINAL APPEAL NO. 19 OF 1993
(High Court Criminal Case No. 7 of 1993)

BETWEEN:

ILIASERI SAQASAQA — **APPELLANT**

-and-

S T A T E — **RESPONDENT**

Mr. A. Seru for the Appellant
Mr. I. Wikramanayake for the Respondent

Date of Hearing : 25th May, 1994
Date of Delivery of Judgment : 27th May, 1994

JUDGMENT OF THE COURT

The appellant was charged on an information containing two counts: one of robbery with violence and one of damaging property. He was tried before Ashton-Lewis J and three assessors on 31 August 1993 and seven subsequent days in the High Court at Lautoka. All three assessors were of the opinion that he was guilty on both counts and the learned Judge shared their view. The appellant was accordingly convicted on the 16th September 1993. He was sentenced to 8 years and 2 months imprisonment. The learned Judge recorded that a sentence of nine years imprisonment would have been the appropriate punishment but he took into account that he had spent approximately ten months in custody whilst on remand and hence the sentence imposed was 8 years and 2 months.

At the trial the accused was unrepresented by counsel but on the hearing of his appeal he has been represented by Mr Seru and the Court is grateful to him for his assistance. The appellant put in writing grounds of appeal in a detailed, digressive and confused form. Counsel's first service to the Court was in reducing those grounds to two broad areas in respect of the appeal against conviction and one in respect of sentence. The appellant's appeal lost nothing by this; to the contrary such prospects of success as he might have had were enhanced by it.

The circumstances surrounding the matter, as disclosed by the evidence, may be stated fairly shortly. In 1986 a Mr and Mrs McElrath lived with their family of two sons at Vuda Point, Lautoka, where they had lived since 1970. On the night of 15 August 1986 Mr and Mrs McElrath were asleep in their bedroom and the two boys were asleep downstairs. At about 3-4 a.m. Mr and Mrs McElrath were woken. Mr and Mrs McElrath said there was a male person holding a knife to his body. There was another man standing next to his wife, he having some wire, and a third man standing at the foot of the bed who was holding a "pinch bar". Mrs McElrath began to scream and Mr McElrath seized the knife from the man near him. the man at the foot of the bed said they wanted money. Mr McElrath said when he seized the knife he also turned on the light. He said the accused was the one with the pinch bar standing at the end of the bed. There was then confusion in the room. Mrs McElrath was being held down by one man and was screaming, Mr McElrath had the knife and the three man started to retreat from the room. Mrs McElrath had been

screaming to her boys to get the Police and as the three intruders went downstairs into the library the two boys were making their way from the living room into the library. These two boys were aged 12 and 13 years. When the three men moved aside the boys joined their parents.

The three intruders then searched in the library study and removed a brief case that belonged to Mr McElrath. In the case there was cash, about $1400, cheques, calculator, bank slips, pen and other items to a value of $2000. Mrs McElrath was apparently still shouting for help and one of the men hit her in the face by throwing a vase at her. This caused a split in the skin above the eye and down the nose. She had to have 10 stitches in all.

After Mrs McElrath was attacked the three men ran away. Mr McElrath heard his van being started. There appeared to be three vehicles of the McElraths on the premises; a white van, a green van and a car in the garage. The van Mr McElrath heard being started was the green van and it was driven away. Before they left the intruders smashed the windscreen of the white van. The green van that was driven away was later recovered about half a mile away from the house. The pinch bar was in it on the front seat but there was no sign of the brief case.

Subsequently the Police charged several men with the offences. Mr McElrath had attended an identification parade but had not been able to identify any of the intruders as being on the parade. He said at the trial that the person who had the

pinch bar was the accused and at the time of the incident he had had a moustache, beard and white towel about his head. All those on the identification parade had been clean shaven. He asserted, however, he recognised the accused at the Magistrates Court at the committal proceedings from his voice, complexion, size and eyes. Mrs McElrath also said she recognised the accused at the Magistrates Court. It is important, however, in considering this evidence to bear in mind that the events when the McElrath house was broken into had occurred some seven years earlier.

It appears that the Police charged four men, including the appellant, in 1986 with the breaking in and robbery. At some stage before trial the appellant was granted bail and he absconded and made his way to Australia. He apparently returned, or was returned, to this country last year and was re-charged with these offences on 22 January 1993. He had been interviewed when first arrested in 1986 and had firmly denied being one of the persons involved in the break in. He maintained he had been at Vatuwaqa at the house of his Aunt and Uncle, there being also present his wife as well as several other brothers and sisters of his Aunt Salanieta. At the trial seven years later he gave evidence. He again said, this time on oath, that he was at Vatuwaqa on the night in question. He was cross examined vigorously by the State's counsel but consistently denied he had been present that night. He acknowledged that while on bail he was aware of the seriousness of the matter and of his obligation to appear when required to answer to his bail. At first he said he did not know the date he was required to attend as the Police

had not given it to him; but when that was shown to be wrong and that he had been given the date, he admitted he had known it but nevertheless had stowed away on a ship to Australia. Indeed he admitted he had stowed away twice, the first time unsuccessfully, and had been sent back. He was also cross examined about where he said he had been on the night in question and he again said he was at Vatuwaqa, with his wife and with Salanieta, who somewhat surprisingly he now called his mother-in-law, and the others he called his brothers and sister-in-law. None of these possible witnesses to his being with them that night were called at the trial.

We turn now to the two broad grounds of appeal. The first relates to the issue of the identification of the accused. Mr Seru makes the point that identification of an accused in the Court, often called a dock identification, is quite unsatisfactory as proof of identification by itself. Here the identification of the accused by Mr and Mrs McElrath comes in the category of a dock identification and, it might be added, a dock identification made weaker than usual by the fact that seven years had elapsed between the events the subject of the charge and the dock identification. If, therefore, the appellant's participation in this crime depended upon the evidence of Mr and Mrs McElrath it would plainly have been insufficient to support the conviction. However, it did not.

That leads us to the second broad ground of the appeal which relates to the evidence of identification by finger print, or

more accurately in this case, thumb print. There was clear evidence that a thumb print on the green van used by the intruders as a get away vehicle was that of the accused. Mr Seru was not disposed to challenge this evidence but we record in view of the appellant's own written complaints about it that we are satisfied there was nothing improper in the way the Police obtained the thumb print in the course of their investigations. That evidence clearly establishes that the accused was one of the party of those who were present that night at the McElrath property. We add that the appellant in his evidence made no attempt to explain how his thumb print came to be on the van.

The accused denied he had been present when clearly he had been; his denial was plainly false. No witnesses were called from those relations with whom he had said he had been. We are satisfied that there was sufficient direct evidence supported by the strong inferences to be drawn from the other evidence for the Court to be satisfied beyond reasonable doubt that the accused was guilty. The appeal against conviction is dismissed.

Sentence

We turn now to the appeal against sentence.

The first submission Mr Seru made was based upon an alleged disparity between the sentence imposed on the appellant and those imposed on the other participants. It appears that one of the

others involved was sentenced to 5 years imprisonment and we were informed from the bar that the proceedings against the other two of the four originally charged were withdrawn. Reliable information was lacking since the records had apparently been destroyed in the course of a fire at the premises where they were kept. We record, however, that the man sentenced to 5 years pleaded guilty, and Courts very properly make a significant allowance on sentence for a plea of guilty, and in addition his record, though bad, was considerably less so than the appellant's. We reject this submission.

In his second submission Mr Seru pointed out that the Judge in his remarks on sentence made it clear that he took the view that the appellant was the man in the bedroom with the pinch bar. Mr Seru argued that the Judge was not justified in proceeding on that basis. He submitted that the dock identification made by the McElraths was not sufficient to establish that and the Judge should have proceeded on the basis that it was proved only that the appellant was one of the men involved; he might, in fact, not have been in the house at all but only have been involved with the get away vehicle, the green van. Mr Wikramanayake on the other hand, argued that the Judge was justified in the view he took in the light of the evidence of the McElraths supported by the finger print evidence; and further that the degree of

blameworthiness was the same whether the appellant had been inside the house or not.

We think it is not definitely established that the appellant was the man with the pinch bar. We think the learned Judge should have proceeded on the basis submitted by Mr Seru that it was established only that he was one of the participants. In the light of all the evidence we consider a reduction should be made to the length of the sentence and that instead of 9 years, 7 years would have been appropriate.

The appeal against sentence is allowed and the sentence imposed is reduced from 8 years and 2 months to 6 years and 2 months from the date on which it was imposed.

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Sir Peter Quilliam
Judge of Appeal

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Mr. Justice Savage
Judge of Appeal

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Mr. Justice Peter Hillyer
Judge of Appeal

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