# IN THE COURT OF APPEAL FIJI ISLANDS
# ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU0073 OF 2005S
CRIMINAL APPEAL NO. AAU0090 OF 2005S
(High Court Criminal Action No. HAC 032/2004S)

BETWEEN:

SENIJIELI BOILA
PITA NAINOKA

*Appellants*

AND:

THE STATE

*Respondent*

Coram: Ward, President
Barker, JA
Henry, JA

Hearing: Tuesday, 11 July 2006, Suva

Counsel: Appellants in Person
Mr Daniel Goundar for the Respondent

Date of Judgment: Friday, 14 July 2006, Suva

## JUDGMENT OF THE COURT

### Introduction

[1] The appellants were jointly charged with armed robbery and unlawful use of a motor vehicle. At the commencement of the trial Mr Nainoka pleaded guilty to the offence of armed robbery, and the trial then proceeded against Mr Boila on both

counts. The trial also proceeded against Mr Nainoka on the count of unlawful use of a motor vehicle, but in the course of the hearing the State entered a *nolle prosequi* in respect of that count against him.

[2] Mr Boila was convicted on both counts. Mr Nainoka was sentenced to 6 years imprisonment for armed robbery, and Mr Boila to 7½ years on that count and to a concurrent term of 6 months imprisonment for unlawful use of a motor vehicle.

[3] Mr Boila now appeals his conviction and sentence, and Mr Nainoka appeals his sentence.

**Appeal against Conviction**

[4] Leave to appeal conviction was granted, but restricted to one issue, namely whether the trial Judge's had properly directed the assessors on the use of circumstantial evidence.

[5] At the hearing in this Court, Mr Boila sought to address other grounds of appeal. As leave had been refused by a single Judge and that ruling had not been challenged, we are unable to entertain those grounds. We observe however, that they do not raise issues which give any concern as to the safety of the convictions. We also record that the availability of legal aid to persons such as Mr Boila would assist their own understanding of the appeal process, as well as the Court in processing the appeals.

[6] The relevant facts disclosed by the evidence can be summarised.

[7] On 29th February 2004, at about 7 pm, a security guard at the Raffles Tradewinds Hotel, noticed that a motor vehicle belonging to the Hotel was missing from its car park. The vehicle was a white Ford Festiva Sedan, registered as DD 696. The vehicle had the Hotel logo on it. On the same

night, at around 8 pm, Mr Boila was seen with two other men in a white car carrying Raffles Tradewinds Hotel logos at the Water Supply pump at Wailoku. They covered the logos with stickers and changed the registration number plate to one reading GN027 before leaving the place.

[8] The following morning, on 1 March 2004, at abut 9.15 am, a robbery took place outside the ANZ bank at the Vinod Patel Plaza. The robbers robbed two employees of the R B Patel Centre point and a police officer, using a cane knife, bottles, and stones. The victims were on their way to the ANZ Bank to deposit $66,079.52. The robbers were masked. They fled the scene in a white car with the registration number GN027. At around 9:30 am, the getaway car was found abandoned at Caubati.

[9] At about 10 am, on the day of the robbery, Mr Boila was seen at his friend Laisiasa Loki's home in Tamavua Village. He was with some other friends and they wanted to use Loki's house to share money. The money was in a plastic bag. They gave Loki $40.00 or $50.00, after which Loki left for his plantation.

[10] Mr Boila elected not to give evidence but called his wife who testified that he was at home during the time of the alleged robbery.

[11] There are no special directions required of a trial judge in directing on the use of circumstantial evidence. What is required, is a clear direction that the tribunal of fact must be satisfied of the guilt of the accused beyond reasonable doubt. (***McGreevy v. Director of Public Prosecutions*** [1973] 1 WLR 276, applied in ***Kalisoqo v. R.*** Criminal Appeal No. 52 of 1984). The adequacy of a particular direction will necessarily depend on the circumstances of the case.

[12] In her directions in the present case, the trial Judge said:

> ***"The law on circumstantial evidence is that before you can act on it to find the accused guilty, you must be satisfied beyond reasonable doubt that the only reasonable inference you can draw from the circumstances, is his guilt. Let me give you an example. You bake a cake one day and you leave it in the kitchen to cool, and you find it has been eaten 20 minutes later. There are two children in the locked house and you find one fast asleep and the other sitting in the kitchen with a lot of cake crumbs down his shirt. These circumstances would lead you to conclude beyond reasonable doubt, that the cake was eaten by the second child. However, if you have left the back door open, and other people have entered your kitchen and there are no crumbs on the children's clothes, then there are other reasonable explanations for the disappearance of the cake. Someone might have entered the kitchen and taken it, or a dog might have eaten it. So the guilt of one of the children is not proven beyond reasonable doubt. It is your duty in this case to ask yourselves whether there is any other alternative hypothesis to explain the circumstances led in evidence other than the guilt of the Accused. It is only if, having considered all the evidence, you are satisfied beyond reasonable doubt that the guilt of the Accused is the only reasonable explanation, that you may find him guilty."***

[13] The above passage must be viewed in the light of the following instruction to the assessors, when the Judge was referring to what she described as the issues.

> ***"The issues are very simple. If you accept the evidence that the accused brought the stolen car knowing that it was taken unlawfully to the workplace of Tawake at Wailoku on the night of the 29 of February, then you may find him guilty of unlawful use of motor vehicle on Count 2. In considering this count, you may consider the evidence of Tawake that the accused with others changed the number plates that night, and covered the logos. Is there any other conclusion you can draw from this evidence other than that the accused was involved in the unlawful use of the vehicle?***
>
> ***If you accept the evidence that he brought the stolen car, that he with others changed the number plates, and covered the Tradewinds logos, and that the same car was used the next day in the robbery, and that the Accused was at the house of Laisiasa Loki only 45 minutes after the robbery sharing money with his friends, then you***

***must ask yourselves whether on that evidence the only reasonable conclusion you can draw is that the accused was part and parcel of the armed robbery as an aider and abetter and is therefore guilty on Count 1. As I said to you earlier, it does not matter that you do not know which role the Accused might have actually played in the robbery. You do need to be satisfied beyond reasonable doubt that he was involved in the planning of the robbery and shared a common intention to rob the R B Centrepoint staff of the money. If you are not satisfied that the circumstances point to this conclusion, beyond reasonable doubt then you must find the accused not guilty."***

[14] We have considered carefully the way in which the assessors were directed on the use of circumstantial evidence and the content of that evidence. There was no error of law, and we are satisfied that there is no risk of a miscarriage of justice having resulted.

Appeals against Sentence

[15] At sentencing, the Judge correctly identified the aggravating factors in the offending. Four persons were involved, they were disguised, one was wielding a cane knife, and others were carrying stones and a bottle. Actual, as well as threatened, violence resulted. In excess of $60,000 including a little under $49,000 in cash was stolen, of which only some $5,000 was recovered. The Judges starting point of 6 years, increased to 8 years for those aggravating factors, was fully justified.

[16] As regards Mr Boila, there were no mitigating factors. At the time of offending he was 28 years of age. He has a lengthy list of previous convictions, including burglary, assault causing bodily harm and robbery with violence. The Judge's allowance of 6 months for the time spent in custody prior to sentencing was appropriate. We are not persuaded that the sentence imposed was excessive.

[17] Mr Nainoka was 29 years of age at the time of offending. He has an appalling list of previous convictions, including burglary, housebreaking, escaping and, significantly, three for robbery with violence. The Judge again used 6 years as the

appropriate starting point, but appears to have increased that by three years to allow for the aggravating circumstances, although she observing that the sentence imposed on Mr Boila recognised his greater culpability. The appellant submitted that insufficient weight had been given to his plea of guilty, his lesser culpability and the inadequate conditions he would have to undergo in prison, the latter themselves constituting additional punishment. In the light of this appellant's full confession on interview, the allowance of two years for the late guilty plea was, if anything, generous, as also was the Judges' observation that he was not an "habitual violent offender." We see no substance to the other matters urged by the appellant. We have also taken into account his further submissions presented at the hearing. While possibly demonstrating remorse, they do not justify any reduction to the Judge's assessment.

[18] Our only concern in respect of this sentence is the apparent discrepancy in the allowance of 3 years for aggravating circumstances when 2 years had been assessed for Mr Boila. The circumstances in question were identical, in favour if anything of Mr Nainoka who was seen as having played a lesser role. For the State, Mr Goundar submitted that despite the discrepancy, the resulting sentence of 6 years imprisonment was not excessive. While taken in isolation as a penalty for this offending that may be so, the appearance of justice and even-handedness is important, as is the need of consistency. This experienced Judge could not have intended to differentiate between the two appellants in respect of the aggravating features of their joint participation, and the benefit of the lesser assessment must be given to this appellant. His sentence must therefore be reduced by one year.

**Result**

[19] Mr Boila's appeal against conviction and sentence is dismissed. Mr Nainoka's appeal against sentence is allowed, the sentence of 6 years imprisonment is quashed and a sentence of 5 years imprisonment substituted.

Ward, President

Barker, JA

Henry, JA

Solicitors:

Appellants in Person
Office of the Director of Public Prosecutions, Suva for the Respondent

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