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

CRIMINAL APPEAL N0. AAU0061 OF 2005
CRIMINAL APPEAL N0. AAU0072 OF 2005

BETWEEN:

1. **SEMISI WAINIQOLO**
2. **SOLOMONI BOINI**

APPELLANTS

A N D;

T HE S T A T E

REESPONDENT

Coram: **Ward, President**
Gallen, JA
Ellis, JA

Hearing: **Tuesday, 25th July, 2006**

Counsel: **Appellants in person**
R. Gibson for respondent

Date of Judgment: **Friday 28th July, 2006**

JUDGMENT OF THE COURT

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[1] The appellants and two others were tried in the High Court on a joint count of robbery with violence. The first appellant was charged in the alternative with receiving stolen property and the second appellant was charged in addition with

unlawful use of a motor vehicle. They were both convicted of robbery and the second appellant was also convicted on the count of unlawful use.

[2] The first appellant was sentenced to seven years imprisonment and the second appellant to six years for the robbery and six months concurrent for the unlawful use.

[3] The first appellant, Semisi Wainiqolo, appeals against conviction and sentence and the second, Solomoni Boini, against sentence only.

[4] The robbery took place on 5 June 2005 in Suva. An Armourguard van carrying a large quantity of cash was backed into an entrance at the rear of the Westpac Bank premises. It arrived at 9.30 pm and had been let in by an employee. After it had entered, a steel roller grille gate was shut and the security guards and some bank employees started to unload the money.

[5] Whilst this was happening, a twin cab van was driven by the robbers into the gate smashing it. The robbers were unable to unload the remaining cash and flee. A total of $450,000.00 was taken.

Appeal against Conviction

[6] There was no challenge to the evidence of the robbery because the accused all denied being involved, as the learned judge pointed out in her summing up.

[7] The evidence against the first appellant was that, on 24 June 2005, the police searched his bedroom at his sister's home. Behind the study table they found a suitcase containing a knapsack inside which was a plastic bag. In that bag was $61,000.00 in cash.

[8] In his interview under caution the first appellant said it was delivered to him by an unknown man who told him it was from the Westpac robbery. He was instructed, he told the police, "to keep it and I have to receive a share". When the officer put

to him that the 61,000 was his share, he agreed that it was his share but he later still denied being "involved in the robbery".

[9] In the trial he was not represented and at the close of the prosecution case made a submission that there was "no evidence I was in robbery. I told the police that. I did not know the money was stolen. I later came to know when I was questioned by police."

[10] He also made an unsworn statement and called one alibi witness in respect of the robbery. In his statement from the dock he again made a similar assertion changed only in that he named the man who left the money. He said, "I received the money from the co-accused. I never knew it was stolen. I wish to call Solomoni Boini as my witness to prove this."

[11] The second appellant Boini, had attended the trial for the first six days but failed to appear on the seventh and the trial had been completed in his absence. A bench warrant was issued but the following day a medical certificate was produced by a relative. It had clearly been altered and was not accepted by the court – correctly, as became apparent when the police went to execute it and were unable to find him. It was while the trial was continuing in his absence that the first appellant made his unsworn statement.

[12] The first appellant submitted five original grounds and four further grounds. We do not set them out as some are repetitive and many are simply not supported by the record of the proceedings. However, they reveal three main matters of contention:

1. that the judge prevented the appellant from calling Boini;
2. that the court admitted circumstantial evidence and erred in relying on it; and
3. that the judge misdirected the assessors on the doctrine of recent possession.

[13] We have considered the remaining grounds and are satisfied they have no merit.

[14] Although the appellant referred in his statement to the court to a wish to call the co-accused, Boini, there is no indication whether the court specifically ruled on that request. Clearly he was not called as he had absented himself from the trial.

[15] There is no substance in this ground of appeal. Had the co-accused given sworn evidence supporting the appellant's case, it would have been admissible evidence. If his evidence had not supported the appellant, he could have been cross examined by the appellant. However, he did not appear and there was no power by which the court or, indeed, the appellant could have compelled him, as a co-accused, to give evidence.

[16] The second and third grounds we have set out are related because the circumstantial evidence relied upon was the finding of the money in his bag.

[17] It appears to be a widely held misapprehension that circumstantial evidence is not proper evidence and that it cannot prove the guilt of an accused. That is not correct. If the circumstantial evidence is relevant to the allegation, it will be admissible. In general it is unlikely to be as telling as direct evidence but, in some cases, it may be more persuasive as, for example, where there are a number of matters of circumstantial evidence from different sources which all point to the same conclusion.

[18] The learned judge's direction to the assessors on the manner in which they should consider such evidence was correct and there is no merit in this aspect of the appeal.

[19] 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 really 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.

[20] Thus, possession on the day after a large theft or robbery of a single item stolen may be strong evidence of involvement in the principal offence but, if it was found some months afterwards, would be unlikely to result in conviction of the theft although it may still result in conviction for receiving stolen property.

[21] In his submissions the appellant pointed out that the only evidence of how he came to have the money in his possession was his account to the police and the Court. In those circumstances, he submits, the assessors could not be satisfied to the criminal standard that he did not receive them. Consequently, a conviction of robbery was unsafe and he should only have been convicted on the alternative count of receiving.

[22] It is correct that some cases of recent possession must lead to that conclusion. However, that will be the case where the evidence of the recent possession is literally the only evidence. Where there are other aspects to consider, the assessors must evaluate them also.

[23] In the present case, the assessors had the appellant's explanation of how he came to have the money, the large amount of money involved and the fact that, if it had been given to him to hold, he was still holding it more than two weeks after the robbery were all factors the assessors would have taken into account in deciding whether to convict of robbery or receiving.

[24] The assessors were correctly directed on this aspect of the case:

> "In law, where a person is found in possession of stolen property shortly after the theft, he can be found guilty either of stealing it or of receiving

stolen property, if he offers no reasonable explanation for the possession of that property."

[25] The judge then used a hypothetical case to illustrate the point and continued:

> "In this case the [appellant] does not dispute that he was found in possession of $61,062.00 cash by the police ... When he was interviewed by the police he confessed that the money was given to him by an unknown person who told him that it was from the Westpac robbery. If you accept the contents of this interview, you may think that the [appellant] himself admitted all the elements of the offence of receiving stolen property. However, if you do not accept the contents of the statement, then you must ask yourself on the circumstances of the case and the amount of money found in his house, whether there is any other reasonable explanation for the presence of the money in the house other than the accused's guilt. If you are satisfied beyond reasonable doubt that the [appellant] has given no satisfactory explanation for his possession of the money, then you may find him guilty either of the robbery on count 1 or of receiving on account 2."

[26] She returned to this in her concluding remarks:

> "You must ask yourselves whether they [the first and second accused] have offered any reasonable explanation for their possession of that money in their unsworn statements in court and to the police. If they have not, you may then consider that they were in possession of recently stolen money with no explanation for that possession and they must therefore be guilty either of the robbery or of receiving stolen property."

[27] In her judgment she found;

> "All assessors find the [appellant] guilty on count 1. These opinions are clearly based on the lack of a satisfactory explanation as to the possession of $61,000.00 which he says he received a day after the

robbery. On the basis of the doctrine of recent possession I accept their unanimous opinions and convict [him] on count 1."

[28] Having been properly directed, the assessors clearly did not accept the explanation of the appellant as truthful and concluded that his possession of the money was because he had take part in the robbery. That was a decision open to them on the evidence and there is no reason why this Court should interfere.

[29] The appeal against conviction is dismissed.

Appeals against Sentence

[30] The first appellant had a long list of previous convictions extending over a period of sixteen years many of which were for dishonesty and violence and including two for robbery. The learned judge allowed a year for the time he had spent in custody and sentenced him to 7 years imprisonment

[31] The second appellant's role was described as the back-up driver. He also had a considerable number of previous convictions over a similar period principally of dishonesty but with two involving violence, of which one was robbery. The judge sentenced him to six years imprisonment for the robbery and six months concurrent for the unlawful use giving a total of six years.

[32] Both appellants really ask the Court to reduce the sentences because of their personal circumstances. In addition, the second appellant, who was sentenced in his absence and so had not been able to mitigate before sentence was passed, sought and was granted leave to call two witnesses in this Court. They showed his role in his community and the manner in which he has changed whilst in prison.

[33] We accept that both the appellants have strong personal mitigating factors in their favour but we must consider the sentence principally against the facts of the offence. This was a serious robbery of a large sum of money by a number of people which had clearly been carefully planned. We are satisfied that the learned Judge applied the proper test to determine the appropriate sentence. In view of

the concluding comments of this Court in the recent case of *Sakiusa Basa v The State*, Crim App AAU 24 of 2005, 24 March 2006, it is likely that the sentence would now be considered too lenient.

[34] We see no reason to interfere and the appeals against sentence are dismissed.

[35] In respect of the evidence we heard of the improvement in the attitude of the second appellant, we would suggest these are matters more appropriately dealt with by the prison authorities when considering any extra mural punishment and should be referred to them.

Order

1. The appeals against conviction and sentence of the first appellant are dismissed and the sentence confirmed.
2. The appeal against sentence by the second appellant is dismissed and the sentence confirmed.

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WARD, PRESIDENT

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GALLEN, JA

FIJI COURT OF APPEAL

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ELLIS, JA

Solicitors:

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