IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL AAU 107 OF 2008
(High Court HAC 41 of 2008S)

BETWEEN	**:**	**AKUILA DROMUDOLE** **IRIMAIA RATUNARUKUTABUA** **FELIX VUSONITOKALAU** **ALIFERETI TOKONA**
		Appellants
AND	**:**	**THE STATE**
		Respondent
Coram	**:**	**Calanchini AP** **Basnayake JA** **Madigan JA**
Counsel	**:**	**Mr. J Savou (L.A.C.) for 1st Appellant** **2nd Appellant in person** **Ms M. Tikoisuva for 3rd Appellant** **4th Appellant in person** **Mr. M. Korovou for the Respondent**
Date of Hearing	**:**	**14 May 2013**
Date of Judgment	**:**	**4 July 2013**

JUDGMENT

Calanchini AP

[1] I agree that the appeals should be allowed. The convictions should be quashed and the sentences set aside.

Basnayake JA

[2] I also agree that the appeals should be allowed, the convictions quashed and the sentences set aside.

Madigan JA

[3] The four appellants were tried together with one other in the High Court at Suva in October 2008 on four counts of robbery with violence contrary to section 293(1)(b) of the Penal Code, Cap 17 and one count of unlawful use of a motor vehicle contrary to section 292 of that Code. At the close of the prosecution case two of the robbery charges were dismissed and all accused were found not guilty of those two charges. This was presumably subsequent to a no-case application and ruling but the Court Record does not assist in providing information with regard to the reasons.

[4] The learned trial Judge summed up the case to the assessors on 6 November 2008, and the assessors unanimously found all five accused guilty of the two remaining robbery charges and the unlawful use of motor vehicle charge. The record does not say so because there is no written Judgment on file, but the learned Judge obviously agreed with the assessors' opinions because they were all convicted on the remaining counts and he proceeded to sentence them on 7 November 2008.

[5] The first three appellants, having been granted leave by the single Judge appeal both their convictions and sentences.

[6] The fourth appellant wrote to the Court on 29 July 2011 seeking to withdraw his appeal. He now wishes to withdraw that abandonment and to re-instate his appeal. His appeal was not heard on the day of the hearing because being uncertain of his status as an appellant, he had not come prepared to prosecute his appeal.

Facts

[7] The facts of the case were that at approximately 12.30am on 6 December 2007, Mr. Chetty's home in Deuba was invaded by a group of at least four (one witness says 4, another 8) men all masked and carrying pinch bars and other weapons. Mr. Chetty was hit on his back and thigh and his wife had her mouth taped. Two adult children were dragged from their beds and locked in the bathroom. The robbers seized items from the house, including a lap-top, mobile phone, cash and a camera. Two items stolen that were to feature large in the evidence were an "*Eveready*" torch and a radio/stereo. They took the keys to Mr. Chetty's Toyota Prado and fled the scene in that vehicle.

Trial evidence relevant to this appeal

[8] The prosecution's main witness apart from the victim family was PW4, Manasa Vudi. He was the driver of a taxi van who lived in the same area (Nasinu) as the accused. He gave evidence that at about 6pm when driving in Nasinu he had been flagged down by two persons he knew and was asked to take them to the Raiwai gym. There they picked up another and then proceeded to Nadonumai where they picked up two more men. Manasa was told to take the whole group to Navua. On the journey to Navua the witness heard them discussing a proposed robbery in Navua. At a beach near Pacific Harbour, all of the men got out of the van and Manasa waited for them for about 3 hours. They then got back on board and he was directed to the Makosoi junction where they again got off and he was told to go back to the beach and wait for them to call.

[9] He subsequently got a call to go to Lami town and pick up the group there and take them back to Suva. He picked up the same group of people in Lami and was given a radio/cassette player as payment for the use of his van. This radio was an item stolen in the Chetty robbery.

[10] The driver later identified the third and fourth appellants at an identification parade conducted at Navua Police Station.

[11] Another important witness for the prosecution, and also for the purposes of this appeal, was PW13 at trial. He stated that he was a neighbour and friend of the first appellant, and on 6 December at about 7pm, the first appellant came to his house. He had originally told the Police in a witness statement that the first appellant had come with a bag of pom pom hats and an "*Eveready*" torch and had asked him to look after it for a few days until he picked them up again. At trial, PW13 sought to retract this evidence (the torch was an item stolen) and was eventually turned "*hostile*". In court he said that the first accused never came to his house on 6 December and when shown the stolen torch he said it was not the torch found in his house. He had made the incriminating statement to the Police because he was assaulted. He signed it but did not read it.

[12] All four of these appellants made exculpatory interviews under caution which by consent were admitted into evidence.

The Appeal

First Appellant

[13] The first appellant relies on the grounds of appeal against conviction that (1) that the State had not proved that he was one of the robbers, there being no proper identification of him; (2) that the case against him was so weak that the Judge should have over-ruled the assessors; (3) that the assessors were not directed on the alternative and more apposite offence of receiving stolen goods; (4) that the Judge erred in allowing the whole statement of the hostile witness to go to the assessors; (5) the Judge did not follow the correct procedure in dealing with a witness who might have a hostile animus and failed to adequately address the assessors on issues regarding their treatment of the evidence of a hostile witness; and (6) the Judge erred in law in refusing to hear the unrepresented accused's alibi witness which resulted in an unfair trial.

[14] The one ground he pleads against sentence is that it is harsh and excessive.

Second Appellant:

[15] The second Appellant relies on the grounds of appeal that (1) the evidence of identification given by the taxi driver witness is the evidence of an accomplice and the assessors should have been directed as to the danger of relying on accomplice evidence without corroboration; and (2) the Judge was unfair and biased towards the second appellant in his summing up to the assessors by dismissing as "*unhelpful*" the evidence of his witness; when the true import of the witness' evidence was to show a hostile animus of PW4, the taxi driver, towards the second appellant.

[16] The second appellant files no grounds nor makes any submissions on sentence.

Third Appellant

[17] The third appellant has filed 9 grounds of appeal against conviction and 4 grounds against sentence. He tells this Court through his Counsel at hearing that he withdraws his appeal against sentence.

[18] Most of the grounds he relies on are general, repetitive and nebulous. He prays that the evidence against him was insufficient, that not all elements of the charges were proved. He was unfairly prejudiced when the Judge refused him leave to call an alibi witness. He also prays that he was prejudiced at trial by being unrepresented.

Fourth Appellant

[19] The fourth Appellant did not address the Court at the hearing of this appeal because he had not prepared any submissions. He had applied to have his appeal re-instated, he thinking that by writing on 29 July 2011 purporting to withdraw the appeal, it had been dismissed. However that cannot be the case. An appeal can only be dismissed as having been abandoned after a hearing and determination of that issue alone before the Full Court. That has not been the case in this particular instance and therefore the fourth appellant's appeal, despite his earlier letter, is still extant and he is to be regarded as a legitimate appellant on the same footing as his three co-appellants.

[20] By way of a letter to the Court on 17 November 2008, the fourth appellant filed ten grounds of appeal against conviction and one general ground of appeal against sentence.

[21] His first three grounds of appeal relate to his status at trial being an unrepresented accused. He has two grounds relating to insufficiency of evidence, an objection to the admissibility of a copy (i.e. not original) of his caution interview and three grounds relate to the unsatisfactory treatment and direction to the assessors on the evidence of the "*accomplice*" witness.

Discussion

[22] It is most unfortunate that the Judge's notes for this trial and the records kept are grossly deficient and seriously inadequate. It is obvious that a no case submission was made but no note was made on the proceedings and certainly no ruling can be found. Similarly there is no judgment after the assessors returned with their opinions, nor is there any ruling exhibited as to the result of the fifth accused's voir dire hearing.

[23] The manner in which the Judge dealt with the hostile witness was not in accordance with this Court's strong recommendation in **Armogam and Ors.-v- The State** (AAU 32 of 2002; 30 May 2003). There is no record of whether the unrepresented accused were asked to make any submissions on the issue or even if the assessors were out of the Court Room when the matter was being dealt with. The first accused is certainly correct when he submits that the previous inconsistent statement in its entirety should never have gone to the assessors. The incriminating evidence which is contained in that statement was stressed in the summing up and given to them as if it were evidence; when the real evidence was the "*hostile*" viva voce evidence from the witness in Court when he said nothing at all which would incriminate the first appellant. This was unfair.

[24] These matters pale into insignificance however when put against the treatment of the evidence of PW4, the van driver and the treatment of the unlawful use of motor vehicle charge (Count 5 on the Information).

[25] It is quite apparent that the summing up does not address in any way at all the law on unlawful use of a motor vehicle nor the evidence relating to that charge. A summing up should be both of assistance to the assessors and also a fair and balanced summary of the evidence relating to a particular charge. When nothing is said at all about a particular crime, either on the law or on the evidence then there is a miscarriage of justice in respect of that crime, especially when in the light of absence of direction the assessors return unanimous opinions of guilty on that charge and the Judge proceeds to convict (presumably - because it is not recorded) and sentence. The convictions against all appellants on that count *("Unlawful Use of Motor Vehicle")* must be quashed and the sentence of three months' imprisonment set aside.

The Accomplice Issue

[26] The success of this appeal lies ultimately in the resolution of the question, was PW4, the van driver an accomplice or not? Two of the three appellants claim that he was, the State says no.

[27] How a Court should deal with an accomplice witness was recently examined in detail by this Court (differently constituted) in **Ali and Devi** (AAU105 of 2008; 30 May 2013). In concluding that the lack of an accomplice warning to the assessors was fatal to the conviction entered, the Court canvassed the origins of the warning and the reasons why, in the interests of justice, the assessors must receive a strong warning of the dangers inherent in relying on the evidence of an accomplice without corroboration.

[28] The "*propositions*" were originally formulated by Lord Simmonds L.C. in **Davies v D.P.P**. *[1954] A.C.378*, propositions which were adopted by the Fiji Supreme Court in **Delaibatiki and Metui** CAV 6 of 2011 (20 Aug 2012).

[29] Lord Simmonds said that apart from a sexual offence, it is the duty of a Judge to give a warning to the [assessors] to examine with great care the evidence of an accomplice and that it would be dangerous to accept it without corroboration. A second proposition is that the failure to give such a warning will result in any conviction

obtained by such evidence being quashed; and lastly that that be the case even if there exists ample corroboration.

[30] Who then is an "*accomplice*"? Lord Simmonds answered this question again in the **Davies** case (supra) at p.400 when he said:

> *"on any view persons who are **participes criminis** in respect of the actual crime charged, whether as principals or accessories before or after the fact _ _ _ this is surely the natural and primary meaning of the term".*

[31] We examine the role of the van driving witness therefore. He testifies that at 6pm on 5 December 2007 he was driving in the Nasinu area when he was stopped by two persons whom he knew - he used to see them 2-3 times a week and would greet them. He knew their nick-names only. (Unfortunately, the Judge has not made a note of the rest of his evidence in chief). In cross-examination he said that he picked up more people and when driving to Nabua, he heard them discuss a robbery they planned on a house there. He did not report the matter to the Police because he had not been paid. In his Summing Up, the learned Judge gives a lot of detail about this witness' evidence. Where he got this evidence from is uncertain, because it is a factual scenario that has not been recorded in the Judge's notes.

[32] The learned Judge says (in the Summing Up) that PW4 drove his van to Navua and was directed to a beach where all the men left his van and he waited on the beach for 3 to 4 hours. They then came back into the van and he drove them towards Mokosoi where he dropped them at the junction of the main road and the Mokosoi turn-off. He was again told to go and wait on a beach and sometime later he received a phone call from one of them to pick them up in Lami. He went to Lami and picked up the same 7 people that he had dropped at Mokosoi earlier. He took them to Navesi Primary School. He was given a radio/CD Player as payment for the use of his van.

[33] This Court is of the view that this witness certainly was an accomplice to the robbery that night. Even if he were not complicit when picking up the passengers, he certainly did become complicit in the course of the evening/night on hearing of the plan to rob and doing nothing to withdraw from the enterprise. He assisted them to the extent of

dropping them near the crime scene waiting for them and then collecting them in Lami to taken them home. For his efforts he was given the stolen stereo. We consider that he was certainly participes criminis.

[34] We have perused the entire court record (incomplete as it unfortunately is) and there is nowhere a reference to "*accomplice*" or "*immunity*". The State should have realized that their chief witness was an accomplice; the Judge should have realized it and given the appropriate warnings to the assessors. This is especially so when the Judge in his Summing Up tells them that the driver's evidence is "*critical*" and goes on to set out evidence purportedly given by this witness which is not found in the record of proceedings.

[35] The detail can only have come from the witness' Police statement which of course is not valid evidence unless it is confirmed by the witness in Court.

[36] The danger of convicting on the evidence of the van driver can be seen from the evidence of the second appellant's witness (Etuate). He says that the van driver suspected that the second appellant was having an affair with the driver's girlfriend and he asked Etuate to go and punch up the second appellant. In his Summing Up, the Judge dismissed this evidence as being "*most unhelpful*" when of course if it were to be believed it would establish a motive for the van driver to do "*damage*" to the second appellant. It also indicates that the van driver may have been more part of the group than he would have the Court believe.

[37] In all these circumstances we have concluded that there has been a gross miscarriage of justice in this case. The appellants were not afforded the opportunity to be found not guilty of the robberies for the very reason that they were not given the accomplice warning which is a rule of law.

[38] The Judge of course does not have to agree with the assessors. He could in recognition of the fact that the evidence of PW4 was unreliable, over-ride their opinions in the Judgment of the Court. However the Judgment is yet another document missing from the file; if indeed a Judgment was ever prepared. We will never know if the Judge turned his mind to the evidence of PW4 or not.

[39] For these reasons alone we would allow the appeal pursuant to section 23(1) of the Court of Appeal Act and would quash the convictions. The appeals against sentence fall away and the sentences set aside.

[40] This is not a suitable case for application of the proviso. The Summing Up is so unfairly weighted against the accused. The first appellant was not identified by PW4 and the only other evidence against him is the evidence of the hostile witness who at best could say that he was in possession of stolen property, which could be evidence of receiving as well as robbery but the assessors were never directed on this alternative. The only evidence against the second and third appellants is identification by the accomplice witness and nothing else. The evidence against the fourth appellant is that he was in possession of a watch which the victims were not sure if it was stolen from them or not.

[41] For the reasons given in the preceding paragraph, we would not order a retrial of this matter. These events occurred in December 2007 and all four are serving terms of imprisonment for other crimes.

Orders:

1. *Appeals by all four Appellants against convictions and/or sentences are allowed.*

2. *Convictions are quashed and sentences set aside.*

HON. MR JUSTICE W.D. CALANCHINI
ACTING PRESIDENT

HON. MR JUSTICE E. BASNAYAKE
JUSTICE OF APPEAL

HON. MR JUSTICE P. K. MADIGAN
JUSTICE OF APPEAL