IN THE COURT OF APPEAL
AT SUVA

APPELLATE JURISDICTION

CRIMINAL APPEAL NO. AAU 0067 OF 2011

BETWEEN	:	**1. LAISENIA BESE**
		2. ARE AMAE
		APPLICANTS
AND	:	**THE STATE**
		RESPONDENT
COUNSEL	:	**Applicants in Person**
		Ms M. Fong for Respondent
Date of Hearing	:	**01 July 2013**
Date of Ruling	:	**10 July 2013**

RULING

[1] The applicants were convicted on two counts of robbery with violence after a trial in the High Court at Suva. Both were sentenced to 11 years and 8 months' imprisonment. At trial, both applicants were unrepresented. They filed timely appeal against conviction. The second applicant is also appealing against sentence.

[2] Both applicants raise common grounds of appeal. Their first complaint concerns the admissibility of their confessions made under caution and the manner in which the learned trial judge dealt with their confessions in the summing-up. Their second complaint relates to the manner in which the learned trial judge dealt with their defence of alibi in the summing-up.

[4] Since the complaints raise questions of mixed law and fact, leave is required to appeal. Further, leave is required to appeal against sentence (section 21 of the Court of Appeal Act).

[5] The prosecution's case was solely depended on the admissibility and truth of the applicants' confessions. The voluntariness of the confessions was determined in a *voir dire* by the trial judge. In admitting the confessions the trial judge applied the correct test for admissibility. The burden was on the prosecution to prove voluntariness beyond a reasonable doubt. Using this burden and standard of proof, it was open on the evidence for the trial judge to conclude the confessions were admissible. No criticism can be made to the trial judge's decision to admit the confessions in evidence.

[6] The concerns relate to the learned judge's directions to the assessors on the confessions. In his summing-up, the learned trial judge directed the assessors at paragraph 23:

> The only credible evidence the prosecution has against each accused was the alleged confessions they gave to police in their caution interview statements. (Underlining mine)

[7] Whether or not the confessions were credible was a matter for the assessors to decide. It could be argued that the trial judge misdirected

on the truth of the confessions by directing they were the "only credible evidence".

[8] The learned trial judge gave further directions on the confessions at paragraph 24:

> As a matter of law, I must direct you that, a confession, when accepted by a trier of fact, is strong evidence against its maker. However, before you can accept a confession, you must be satisfied beyond reasonable that it was given voluntarily by its maker. The prosecution must satisfy you beyond reasonable doubt that the accused gave his statements voluntarily, that is, he gave his statements out of his free will. Evidence that the accused had been assaulted, threatened or unfairly induced into giving those statements, will negate free will, and as judges of fact, you are entitled to disregard them. However, if you are satisfied beyond reasonable doubt, so that you are sure, that the accused gave those statements voluntarily, as judges of fact, you are entitled to rely on them against the accused.

[8] In *Tara Chand v Reginam* 14 FLR 73 the Court of Appeal held that, where the judge has admitted a confession as being voluntary, it is not incumbent on him or her to direct the assessors to disregard it unless they in their turn are satisfied as to its voluntariness. The Court went on to say at page 81:

> ...the question of admissibility is the decision by the Judge and by him alone; and that, if he admits the confession, the sole question for the jury is as to its probative value or effect (or in other words, its truth). ...The jury's duty is to accept the confession as being admissible, and to consider only its protective value, though in considering that

> question, every matter of fact that might be relevant to the Judge's decision is relevant for consideration by the jury in deciding as to probative value, and may be fully canvassed for that purpose both in evidence and in argument.

[9] The respective roles of the trial judge and the assessors in relation to a confession were also highlighted by the Court of Appeal in *Suresh Sani and Deo Raj v The State* (Criminal Appeal No. AAU0026 of 2004S) at paragraph [31]:

> However, at the trial within a trial, the judge had been required to apply a different test. There it was solely to determine whether or not the prosecution had proved that the confessions were voluntary and not the result of oppression. It is not part of the judge's function at that stage to ascertain the truth of the confessions as the judge herself correctly stated in the final sentence of the conclusion to her ruling which we have set out in paragraph [17] above.

[10] It is clear from the learned trial judge's directions that he did not leave the truth or weight of the confessions for the assessors' consideration. This is a further arguable misdirection on the applicants' confessions.

[11] At trial, both applicants' relied on alibi as their defences. The learned trial judge's directions on the applicants' alibi are contained in paragraphs 36 and 38:

> Are Amae called his Aunty, Josefini Biu, as his alibi witness. According to Josefini, the accused came and weed her place on 28th March 2009. She said, the accused had breakfast at her home and then went to the farm. She said, when he returned from the farm, he had his shower and then his dinner. He slept

at her home that night, and went home on Sunday, at midday. So, according to the accused's aunty, Are was asleep at her home, at the time of the robbery. When cross-examined by the prosecution, Ms Biu admitted Are's father was her brother. She admitted she could recall what occurred on 29th March 2009, but could not recall what she had for breakfast or dinner. Amazingly, the accused himself, when giving evidence in his defence, mentioned nothing about sleeping at his aunty's house, at the time of the robbery. Was it possible his aunty was lying in Court? Was it possible he was not at his aunty's place at all, and why he didn't mention it in his evidence? As assessors and judges of fact, these are matters for you to decide.

Laisenia Bese said, he was asleep at his mother's home, on 29th March 2009, between 3 am and 4.30 am, the time the robbery was happening. In other words, he said, he cannot be part of the robbery, because he was asleep, at his mother's house, at the time of the robbery. He called his wife, Lusia Tagi, and his mother Lavenia Mateiwai, to confirm the above. However, when his wife was cross examined, she admitted that, she loved the accused so much, she doesn't want to see him go to jail, and she would do anything to keep him out of jail. When Bese's mother was cross-examined, she repeated what Bese's wife said. She said, she loved her son so much, she would do anything to keep him out of jail. Were these witnesses' objective? Were their objectivity clouded by the fact they were closely related t o the accused, as mother and wife? Was it possible for them to lie to court to save a son and husband from going to jail? In other words, were they credible witnesses? Was Laisenia Bese credible on this issue? Here was a person who was already breaking the rules by drinking in public. Do you accept his evidence? These are matters for you to consider, as assessors and judges of fact.

[12] When an accused raises alibi as his defence, in addition to the general direction on the burden of proof, the jury should be directed that the prosecution must disprove the alibi and that even if they conclude that the alibi was false, that does not by itself entitle them to convict the accused (*R v Anderson* [1991] Crim. LR 361, CA; *R v Baillie* [1995] 2 Cr App R 31; *R v Lesley* [1996] 1 Cr App R 39; *R v Harron* [1996] 2 Cr App R 457). Not only these directions were not given, the number of rhetorical questions posed by the trial judge in relation to the applicants' alibi, arguably made the summing-up imbalance and unfair to the applicants. Whether the alleged errors caused miscarriage of justice is for the Full Court to determine. As far as this application is concerned, I am satisfied that leave should be given to both applicants to appeal against their convictions.

[13] In assessing merits of the second applicant's appeal against sentence, I am guided by the judgment of the Full Court in *Kim Nam Bae v The State* Criminal Appeal No. AAU0015 of 1998S (26 February 1999) at paragraph 2:

> It is well established law that before this Court can disturb the sentence, the appellant must demonstrate that the Court below fell into error in exercising its sentencing discretion. If the trial Judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some relevant consideration, then the Appellate Court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (*House v The King* (1936)55 CLR 499)).

[14] The main complaint of the second applicant is that his sentence is manifestly excessive. It is apparent from the sentencing remarks of the learned judge that he considered the guideline judgments for sentences on robbery with violence and picked 10 years as a starting point. After adjusting for the mitigating and aggravating factors, the learned judge arrived at a final term of 11 years and 8 months' imprisonment. The sentence is clearly within the tariff for robbery with violence as established by cases like *State v Rasaqio* [2010] FJHC 287; HAC155.2007 (9 August 2010); *Basa v State* [2006] FJCA 23; AAU0024.2005 (24 March 2006); *Wainiqolo v The State* [2006] FJCA 70; AAU0027.2006 (24 November 2006); *State v Rokonabete* [2008] FJHC 226; HAC118.2007 (15 September 2008); *State v Singh* [2010] FJHC 535; HAC022.2010 (24 November 2010); and *State v Volau* [2011] FJHC 6; HAC085.2009 (24 January 2011). The complaint regarding the sentence has no merits.

[15] **Result**

Leave to appeal against conviction granted.

Leave to appeal against sentence refused.

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DANIEL GOUNDAR
JUDGE

Solicitors:

Applicants in Person
Office of the Director of Public Prosecutions for Respondent.