

IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL AAU 36 of 2015
(High Court HAC 338 of 2012)

BETWEEN : DESHWAR KISHORE DUTT *Appellant*

AND : THE STATE *Respondent*

Coram : Calanchini P

Counsel : Ms B Malimali for the Appellant
Mr S Vodokisolome for the Respondent

Date of Hearing : 28 September 2015

Date of Ruling : 27 January 2016

RULING

[1] This is an application for leave to appeal against conviction and sentence. The Appellant was charged with the offence of receiving stolen property contrary to section 306(1) of the Crimes Decree 2009 (the Decree). The particulars of the offence

were that between 19 and 21 September 2012 the Appellant dishonestly received stolen property in the form of cash to the value of FJD\$6400.00 and AUD\$510.00 knowing or believing the same to be stolen. There were five co-accused charged with the same or related offences. After a trial lasting 10 days the two assessors returned unanimous opinions of not guilty of the offence of aggravated robbery for two of the accused and not guilty for the offence of receiving stolen property for the four other accused, including the Appellant who was the sixth accused. The learned trial judge did not agree with the opinions of the assessors and in a written judgment delivered on 23 February 2015 convicted all six accused of the offences as charged. It is against that conviction that the Appellant, as the sixth accused, now seeks leave to appeal to this Court. On 20 April 2015 the learned Judge sentenced the Appellant to a term of imprisonment 18 months with a non-parole term of 12 months. The Appellant seeks leave to appeal against that sentence.

- [2] The Appellant filed a timely application for leave to appeal against conviction on 19 March 2015 and a timely application for leave to appeal against sentence on 7 May 2015. Subsequent notices seeking to amend his grounds of appeal were filed by the Appellant in person. On 27 August 2015 the legal practitioner acting for the Appellant filed amended grounds of appeal of which six related to the appeal against conviction and three related to the appeal against sentence. The six grounds of appeal against conviction are:

- “1. The Learned Trial Judge erred in law when he omitted to provide cogent reasons for overturning the unanimous verdict of the Assessors, especially when he had found that the verdict of the assessors was not perverse and that it was open to them to reach such conclusion on the evidence.*
- 2. The Learned Trial Judge erred in law when he omitted to explain how the State had proven beyond reasonable doubt the 5 or 6 elements of the charge of receiving stolen property against the Appellant, as per his direction to the Assessors at Paragraph 14 of the Summing Up.*
- 3. The Learned Trial Judge erred in law when he omitted to explain in his Judgment which mental element had been satisfied or proved beyond reasonable doubt by the State i.e. whether it was “knowing” or “believing”.*

4. *The Learned Trial Judge made an error of fact and of law when he based his finding of guilt on the fact that the Appellant was seen drinking grog and liquor with Mr Prasad (the 2nd Accused) soon after the BSP Robbery.*
5. *The Learned Trial Judge made an error of law when he rejected the evidence of the witnesses produced by the Appellant on the basis that they were related to him.*
6. *The Learned Trial Judge erred in law when he rejected the evidence of the witnesses who gave evidence on behalf of the Appellant without stating what their evidence was and the reasons for rejecting their evidence (apart from being related). This was especially since there was no direct evidence against the Appellant."*

[3] The three grounds of appeal against sentence are:

- “7. *The Learned Trial Judge erred in law when he took into account as an aggravating factor “utter disregard to the BSP Bank property rights.” This is apparent from the Sentencing remarks at Paragraph 7B(iii) when the Learned Trial Judge stated thus:*
 - (iii) *For you Mr Dutt, by receiving the stolen money from the BSP Bank robbery from Mr Prasad, you showed utter disregard to the BSP Bank property rights.*
8. *The Learned Trial Judge erred in law when he deducted 3 months from the time spent in remand (2 years 6 months) without taking into account that the Appellant had been sentenced already for Escaping from Lawful Custody.*
9. *The Learned Trial Judge erred in law when he failed to explain what the other Aggravating Factors were. At Paragraph 7B(iii), it appears that His Lordship has made receiving stolen property of BSP bank robbery an aggravating factor.”*

[4] To the extent that the grounds of appeal against conviction raise questions of mixed fact and law or questions of fact alone, the Appellant requires the leave of the Court under section 21(1) (b) of the Court of Appeal Act Cap 12 (the Act). Any ground of appeal against sentence requires the Court’s leave pursuant to section 21(1) (c) of the

Act. Pursuant to section 35(1) of the Act a justice of appeal may exercise the power of the Court to grant leave. The test for granting leave to appeal against conviction is whether any ground of appeal raises a properly arguable point that is worthy of the consideration of the Court of Appeal. The test for granting leave to appeal against sentence is whether the Appellant has established an arguable error in the exercise of the sentencing discretion by the learned trial Judge.

- [5] The first ground of appeal against conviction raises two issues. The first is whether the reasons given by the learned trial Judge were sufficiently cogent to overturn the unanimous not guilty opinions of the two assessors and enter a verdict of guilty. The second issue, although related to the first issue, concerns the observations of the learned trial Judge when at paragraph 6 he stated:

"I have reviewed the evidence called in the trial, and I have directed myself in accordance with the Summing Up I gave the assessors on 20 February, 2015. The two assessors' verdict was not perverse. It was open to them to reach such conclusion on the evidence. However, I am not bound by their opinion. On my analysis of the case based on the evidence, and on my assessment of the credibility of the witnesses, I am bound to disagree with the two assessors' opinions. I will consider each accused's case below

- [6] Counsel for the Appellant submits that the second issue raises a question of law alone which is expressed as whether a trial judge can depart from the opinions of the assessors after he has said in his judgment that the evidence allowed the assessors to reach their opinions and that those opinions were not perverse.
- [7] Although there is no doubt that the trial Judge is not bound by the opinions of the assessors, the two issues raise arguable points which should be considered by the Court of Appeal. Under what circumstances is it open to a trial Judge to enter a verdict contrary to the opinions of the assessors when those opinions are considered by the Judge to be open to the assessors on the evidence and when those opinions are not perverse. In the circumstances of this case were the reasons sufficiently cogent in view of the learned trial Judge's observations in paragraph 6. To the extent that leave is required it is granted.

- [8] The second ground of appeal is related to the first in that the Appellant submits that the failure to provide cogent reasons includes the failure to explain in his judgment how the Respondent had established each of the elements of receiving stolen property. It is submitted that in his judgment the learned trial Judge had failed to consider each element of the offence that he had identified in paragraph 14 of his summing up. Leave is granted on the ground.
- [9] Ground 3 of the grounds raises in specific terms one of the elements of the offence and is therefore covered in ground 2. Ground 4 relates to the sufficiency of the evidence upon which the learned trial Judge relied for his finding of guilt. It must be noted however that the finding to which reference is made in grounds 4 was not the only matter upon which the trial Judge relied. Leave is refused on that ground. Ground 5 challenges the rejection by the trial Judge of the evidence given by the Appellant's witnesses on the basis that they were related to the Appellant. This ground raises a matter that can only really be considered by examining the transcript of the evidence. To that extent it should be considered by the Court.
- [10] Ground 6 once again raises the issue of the cogency of the reasoning of the learned trial Judge. Leave is granted.
- [11] In relation to the appeal against sentence, the Appellant claims that the learned Judge took into account as an aggravating factor a matter that was irrelevant for the purpose of sentencing for the offence of receiving stolen property. The learned Judge stated in paragraph 7(B)(iii) of the Sentencing judgment that the Appellant had, by receiving stolen property from the Bank robbery, shown utter disregard "*to the BSP Bank property rights.*" This ground is arguable.
- [12] The next ground of appeal against sentence claims that the Appellant has been penalized twice for the same offence of escaping from lawful custody. The issue arises under paragraph 14 of the Sentencing decision. The Appellant claims that he had been remanded in custody for 2 years and 6 months although the trial Judge had deducted only 2 years and 3 months. The reason for the lesser deduction was explained by the Judge in paragraph 8(iv) of the Sentencing decision. The problem arose as a result of the Appellant having escaped from lawful custody whilst on

remand for the offence of receiving stolen property. Having escaped from lawful custody the Appellant was recaptured and charged with and pleaded guilty to damaging property and escaping from lawful custody. In the Magistrates Court at Suva on 31 January 2013 the Appellant was sentenced to 1 month in custody for damaging property. In arriving at that sentence the learned Magistrate had deducted 2 months as time spent in custody. In relation to escaping from lawful custody the Magistrate sentenced the Appellant to 3 months in custody to be served consecutively to any sentence being served. In arriving at the term of 3 months the Magistrate had again deducted 2 months spent in custody. Although there does appear to be some overlapping in terms of deductions made for time spent in custody for these offences and for the offence of receiving stolen property, leave is granted for the Court of Appeal to consider to what extent the Appellant may have been unfairly sentenced by the failure to deduct the period of 2 years and 6 months.

- [13] In my opinion the third ground of appeal against sentence raises the same issue as the first ground of appeal against sentence. It is repetitive or at least is encompassed by the first ground.
- [14] In conclusion and for the reasons stated leave to appeal against conviction and sentence is granted on the grounds that have been identified as raising arguable grounds against conviction and arguable errors in the sentencing discretion.



W. Calanchini

Hon. Mr Justice W. D. Calanchini
PRESIDENT, COURT OF APPEAL