

IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court of Fiji]

CRIMINAL APPEAL NO: AAU0048 of 2015
CRIMINAL APPEAL NO: AAU0054 of 2015
[High Court Case No: HAC109 of 2012]

BETWEEN : **RAVINESH SINGH**
RONIL KUMAR
Appellants

AND : **THE STATE**
Respondent

Coram : **Hon. Mr. Justice Daniel Goundar**

Counsel : **Mr R Vananalagi for the 1st Appellant**
2nd Appellant in person
Mr M Korovou for the Respondent

Date of Hearing : **22 June 2017**

Date of Ruling : **28 June 2017**

RULING

[1] The appellants seek leave to appeal against both conviction and sentence. They were convicted of aggravated robbery following a trial in the High Court at Lautoka. The 1st appellant was sentenced to 9 years, 10 months imprisonment with a non-parole period of 8 years. The 2nd appellant was sentenced to 12 years, 1 month imprisonment with a non-parole period 10 years. There is no appeal from a third person who was also convicted and sentenced for the same offence.

[2] The 1st appellant's grounds of appeal are:

(1) The Learned Trial Judge erred in law and in fact when he failed to direct the assessors carefully in detail on the evidence of the complainant that she was

unable to identify the Appellant as one of the persons that was involved in robbery.

- (2) The Learned Trial Judge erred in law and in fact when he failed to direct the assessors carefully in detail on evidence of the complainant in relation to the number of men she saw on the night of the incident and to instruct the assessors to assess it against the credibility of the evidence of the complainant and the Appellant.
- (3) The Learned Judge erred in law when he sentenced your Petitioner to a term of imprisonment which is harsh and excessive considering the facts of the offending.
- (4) The Learned Trial Judge erred in principle and also erred in exercising his sentencing discretion.

Whether the complainant's failure to identify the appellant as one of the intruders required direction in the summing up?

- [3] The complainant, Mailing Chang was one of the occupants of the house that was allegedly robbed by the appellants. Her evidence proved the offence of robbery but she was unable to identify the intruders. The learned trial judge fairly summarized the complainant's evidence in paragraphs 30-31 of the summing up. The fact that the complainant did not identify the 1st appellant as one of the intruders was an undisputed fact. There was no need for the learned trial judge to give any special direction on the complainant's failure to identify the 1st appellant. The complainant's evidence did not implicate the appellant. The 1st appellant was convicted solely upon his confession made under caution. This ground is unarguable.

Whether the complainant's evidence regarding the number of intruders required direction in the summing up?

- [4] The complainant's evidence was that four men invaded her home on the night in question. Three men entered her room while the fourth intruder remained outside. Under cross-examination, it was suggested to her by the 1st appellant's trial counsel that an I-taukei man who was known to her and was sleeping outside was one of the intruders. In her evidence, the complainant rejected that suggestion. The learned trial

judge fairly covered this aspect of the complainant's evidence in paragraph 31 of the summing up. This ground is unarguable.

Whether the 1st appellant's role in the robbery reduced his overall culpability?

- [5] In his caution interview, the 1st appellant admitted that his role in the robbery was to transport his accomplices to and from the crime scene. He knew a crime had been committed and he also admitted receiving his share of the stolen property. The learned trial judge did take into account the 1st appellant's role as the driver of the getaway vehicle as a mitigating factor. However, the 1st appellant was equally culpable for his role as the driver of the vehicle used in the robbery under the doctrine of joint enterprise. This was a home invasion robbery by a group of men. All relevant considerations were taken into account in sentence. The sentence imposed on the 1st appellant is within the tariff for aggravated robbery. There is no arguable error in the exercise of the sentencing discretion. For these reasons, I would refuse leave to the 1st appellant.

2nd Appellant

- [6] Initially, the 2nd appellant advanced numerous grounds of appeal. Subsequently, the grounds were amended and at the leave hearing, the 2nd appellant pursued four complaints against conviction and one complaint against sentence.

Whether the trial judge's reasons for not agreeing with the unanimous not guilty opinion of the assessors are cogent?

- [7] The only incriminating evidence against the 2nd appellant was his disputed confession made under caution. The appellant's evidence was that his confession was fabricated by police and that his signature on the record of interview was obtained by promise and under oppression. In paragraphs 50-52 of the summing up, the learned trial judge directed the assessors by reference to evidence led at the trial to first consider whether the 2nd appellant had made the confession freely and voluntarily and if he had, then they were to consider whether the confession was true. The assessors unanimously expressed opinions of not guilty. The learned trial judge did not agree with that opinion and in a written judgment pronounced in open court, convicted the 2nd appellant of the alleged charge.

- [8] It is well established that an appellate court reviews the trial judge's reasons for disagreeing with the majority opinion of the assessors for cogency. The reasons must be carefully stated in a written judgment and reflect the trial judge's views as to the credibility of witnesses and other considerations (*Ram Bali v R* [1960] 7 FLR 80, 83). They must also be capable of withstanding critical examination in the light of the whole of the evidence presented in the trial (*Setevano v State* unreported Cr App No 14 of 1989; 27 May 1989, 7). In *Roko & others v State* unreported Cr. App. No. 5 and 12 of 2002; 29 April 2004, the principle regarding the trial judge's obligation to give cogent reasons for not agreeing with the majority opinion of the assessors was endorsed by the Full Court at p 15:

The authorities to which we have referred make it clear that the reasons for the Judge not agreeing with the majority opinion of the assessors must be cogent and in sufficient detail to enable this court critically to examine them in the light of the whole of the evidence and reach a conclusion on whether the decision to reject the majority opinion of the assessors is justified.

- [9] The main issue for the trial judge to consider was whether the 2nd appellant had in fact made the disputed confession and whether that confession was true. In paragraph 11 of the judgment, the learned trial judge specifically directed his mind to the main issue and in paragraph 19 of the judgment, the trial judge believed the prosecution witnesses to make a determination that the 2nd appellant's confession was not fabricated as alleged by him but was true admission of guilt. I am satisfied that the trial judge's reasons are cogent in the light of the whole of the evidence presented in the trial.

Whether the trial judge made a complete wrong assessment of the evidence in admitting the 2nd appellant's confession in evidence?

- [10] The 2nd appellant's objection to the admissibility of his confession was that it was fabricated and that his signature on the record of interview was obtained by a promise and under oppressive circumstances. The promise was that the police would not disrupt the wedding ceremony of the 2nd appellant's sister by raiding their home on the

wedding date, if he signed the fabricated confession. The oppressive circumstances were that he was injured and was in pain when he was made to sign the fabricated confession. The learned trial judge examined these claims in a voir dire and after making an assessment of the evidence, he was satisfied beyond reasonable doubt that the claims were not true. I am not satisfied that the learned trial judge made a complete wrong assessment of the evidence in admitting the 2nd appellant's confession in evidence. The question of fabrication was ultimately an issue for the trial judge to consider after the conclusion of the 2nd appellant's case. This ground is unarguable.

Whether the carbon copy of the record of interview was admissible?

- [11] This complaint is unarguable because a carbon copy is admissible as primary evidence in Fiji.

Whether the 2nd appellant was prejudiced due to the prosecution's failure to call Kushal Kumar to give evidence at the trial?

- [12] Although Kushal Kumar was named as the complainant in the charge, the evidence established that the victims were both Kushal Kumar and Mailing Chang. The prosecution did not call Mr Kumar as a witness at the trial. The reason for that decision is not clear. The witness may have been abroad and was unavailable. It appears that the appellant did not take any issue regarding the prosecution's failure to call Mr Kumar as a witness with the trial judge. I note that the 2nd appellant was unrepresented at the trial. However, at the hearing of this application, the 2nd appellant chose to represent himself and was very articulate with his legal arguments. If Mr Kumar's evidence was relevant to the 2nd appellant's defence, then he could have taken an issue with the prosecutor's decision not to call the witness with the trial judge. By not taking the issue with the trial judge, the appellant has waived any arguable prejudice arising from the prosecutor's decision not to call the witness. This ground is not arguable.

Whether the trial judge shifted the burden of proof when he said "the 2nd accused had failed to create a reasonable doubt in the prosecution case"?

- [13] The impugned statement is contained in paragraph 18 of the judgment. While the statement that the accused had failed to create a reasonable doubt may be objectionable, but when the summing up and the judgment is read as a whole, I am not satisfied that it

is reasonably arguable that the impugned statement had the effect of vitiating the direction on the burden and standard of proof. The trial judge made is clear that the burden to prove guilt was on the prosecution and that burden never shifted on the accused.

Whether the trial judge mistook the facts when he said the complainant was assaulted during the robbery?

[14] In his caution interview, the appellant admitted assaulting the occupant of the house during the robbery. The 2nd appellant's contention that the trial judge mistook the facts regarding infliction of physical violence during the robbery is unarguable. There is no arguable error in the exercise of the sentencing discretion in that regard.

[15] For these reasons, I would refuse leave to the 2nd appellant.

Result

[16] The applications for leave are refused.



A handwritten signature in black ink, appearing to read "Daniel Goundar", written over a horizontal line.

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Hon. Mr. Justice Daniel Goundar
JUSTICE OF APPEAL

Solicitors:

R Vananalagi & Associates for the 1st Appellant

2nd Appellant in person

Office of the Director of Public Prosecutions for the State