

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

CRIMINAL APPEAL NO: AAU0058 of 2015
[High Court Case No: HAC181 of 2013]

BETWEEN : **JOELI BALEILEVUKA**
WATISONI SAQAILAGILAGI
ISAIA BOBO
ISIMELI NAREZIA
SAKIUSA TUKANA

Appellants

AND : **THE STATE**

Respondent

Coram : Hon. Mr. Justice Daniel Goundar

Counsel : 1st Appellant in person
Mr M Fesaitu for the 2nd and 3rd Appellants
Mr S Waqanaibete for the 4th and 5th Appellants
Ms S Puamau for the Respondent

Date of Hearing : 2 August 2017

Date of Ruling : 8 August 2017

RULING

[1] Following a trial in the High Court at Lautoka, the appellants were convicted of two counts of aggravated robbery, three counts of assault causing actual bodily harm and one count of theft of a motor vehicle. On 17 April 2015, the appellants were sentenced to various terms of imprisonment. They seek leave to appeal against their convictions only. The appeals are timely.

[2] At the trial, the appellants were legally represented. The convictions were based on the following evidence:

1st Appellant – confession, recent possession and accomplice evidence.

2nd Appellant – confession, recent possession and accomplice evidence.

3rd Appellant – accomplice evidence.

4th Appellant – recent possession.

5th Appellant – recent possession and accomplice evidence.

- [3] Although the appellants have filed separate grounds of appeal, they raise common complaints. The common complaints relate to the direction on the evidence of an accomplice, immunity for the accomplice and the chain of custody of the stolen properties that were allegedly recovered from the appellants. The 3rd appellant further contends that the learned trial judge gave no direction on the exercise of his right to remain silent, misdirected on alibi, failed to give cogent reasons for not agreeing with the majority not guilty opinions of the assessors and failed to give Turnbull direction on identification evidence of the accomplice.
- [4] At the trial, the prosecution led evidence from a witness, Sailasa Momo. Mr Momo on oath admitted that he participated in the alleged offences with the appellants. He implicated all except the 4th appellant. At this stage, it is not clear whether Mr Momo was granted immunity from prosecution. However, it is not in dispute that Mr Momo was an accomplice as that term was defined by the House of Lords in *Davis v DPP* [1954] AC 378. The law requires a warning to be given about the danger of convicting upon the evidence of an accomplice, unless that evidence is corroborated (*Singh v The State* [2006] FJSC 18; CAV0007U.2005S (19 October 2006)). The reason for this rule was explained by the High Court of Australia in *Jenkins v R* [2004] HCA 57 at 123 [30] as follows:

The rule exists for a reason. That reason is related to the potential unreliability of accomplices, an unreliability thought to be so well known in the experience of courts that judges are required, not merely to point it out to jurors, but to tell them that it would be dangerous to convict upon the evidence of an accomplice unless it is corroborated. The principal source of unreliability, although it may be compounded by the circumstances of a particular case, is what is regarded as the natural tendency of an accomplice to minimise the accomplice's role in a criminal episode, and to exaggerate the role of others, including the accused. Accomplices are regarded by the law as a notoriously unreliable class of witness, having a special lack of objectivity. The warning to the jury is for the protection of the accused. The theory is that fairness of the trial process requires it. It is a warning that is to be related to the evidence upon which the jury may convict the accused. The reference to

danger is to be accompanied by reference to a need to a need to look for corroboration.

[5] Further, the High Court of Australia said at 124 [32]:

Although the common law rule about accomplice warnings is a rule of law, and although (subject to the proviso) in the ordinary case the requirement for a warning does not depend upon a request being made by trial counsel, the rule is not so mechanical as to call for a warning in any case in which an accomplice gives any evidence which may be relied upon to establish the prosecution case. The application of the rule must be related to its purpose, and will require a consideration of the issues as they have emerged from the way in which the case has been conducted.

[6] In the present case, apart from summarising Mr Momo's evidence in the summing up, the learned trial judge gave no accomplice direction. This ground is reasonably arguable.

[7] The summing up makes no reference to any immunity granted to Mr Momo. If Mr Momo was granted immunity from prosecution, then the terms of the immunity should have been put to assessors in the summing up. This issue is arguable provided there is evidence that Mr Momo was granted immunity from prosecution.

[8] If identification of the 3rd appellant by Mr Momo was raised as an issue in cross examination, then the question whether the Turnbull direction was required on identification of the 3rd appellant by Mr Momo is arguable.

[9] The direction on alibi and the lack of direction on the right to remain silent are questions of law alone. The complaint regarding the lack of cogent reasons for not agreeing with the majority not guilty opinions of the assessors is arguable.

[10] Not all stolen properties that were allegedly recovered from the appellants were produced in evidence. The question whether there was evidence of recent possession and the direction given in the summing up on recent possession is arguable.

[11] Although I am satisfied that the appeals are arguable, I am not convinced that the grounds of appeal have every chance of success for bail to be granted.

Result

[12] Leave granted.
Bail refused.



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

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Hon. Mr. Justice Daniel Goundar
JUSTICE OF APPEAL

Solicitors:

1st Appellant in person
Office of the Legal Aid Commission for the 2nd, 3rd, 4th and 5th Appellants
Office of the Director of Public Prosecutions for the State