IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL AAU 88 OF 2014
and AAU 93 OF 2014
(High Court HAC 150 of 2013)

BETWEEN : **NACANI TIMO**
DAVID LOCKINGTON

Appellants

AND : **THE STATE**

Respondent

Coram : **Calanchini P**
Temo JA
Rajasinghe JA

Counsel : **First Appellant Nacani Timo in person**
Mr M Fesaitu with Ms V Narara for the second Appellant
Mr L Burney with Mr E Samisoni for the Respondent

Date of Hearing : **5 July 2018**

Date of Judgment : **30 August 2018**

JUDGMENT

Calanchini P

[1] The two appellants along with a third person were charged with one count of aggravated robbery contrary to section 311 (1)(a) of the Crimes Act 2009. The particulars of the

offence were that the appellants with two others in company of each other on 18 July 2013 at Lautoka robbed the complainant of assorted items and money with a total value of $159,483.36. The fourth person to which reference is made in the particulars of the offence was never brought to trial. The third person, Sunia Roraqio was acquitted on the assessors' unanimous opinions of not guilty and the concurring judgment of the trial judge. The appellant Timo, initially pleading not guilty at the commencement of the trial, changed his plea to guilty during the course of the trial. At the conclusion of the trial the assessors returned unanimous opinions of guilty for the appellant David Lockington. The trial judge agreed with the opinions and convicted Lockington as charged.

[2] On 30 June 2014 the learned trial Judge sentenced the second appellant (Lockington) to a term of imprisonment of 13 years with a non-parole term of 12 years. The first appellant (Timo) was sentenced to a term of imprisonment of 12 years 1 month with a non-parole of term of 11 years 6 months. Before sentencing Timo the trial Judge had accepted that his plea of guilty was unequivocal and voluntary.

[3] Both appellants filed in person timely notices of appeal against conviction and sentence. On 1 December 2015 a judge of the Court of Appeal granted leave to the appellant Timo to appeal against conviction and sentence on the grounds that (1) he was prejudiced by lack of legal representation, (2) his confession was wrongly admitted into evidence, (3) his guilty plea was given insufficient weight by the trial judge and (4) the trial judge erred in concluding that the offence was committed whilst on bail.

[4] The appellant Lockington was granted leave to appeal against conviction and sentence on the grounds that (1) his conviction was unsafe, (2) his trial was unfair, (3) the verdict is unreasonable and inconsistent, (4) an element of the offence was used to enhance the sentence and (5) the starting point was excessive.

[5] On June 2018 the appellant Timo filed a document which purported to set out the following three additional grounds of appeal: (1) the guilty plea was equivocal and made involuntarily; (2) failure to consider the medical report in the voir dire; (3) non-

compliance with the judges rules. These additional grounds overlap with the initial grounds filed by the appellant and are really particulars of the more general grounds considered at the leave stage. On 18 June the appellant Timo filed detailed handwritten submissions with attached case law authorities.

[6] On 26 June 2018 the Legal Aid Commission on behalf of the appellant Lockington filed written submissions. After referring to the leave ruling by the single judge of the Court, the submissions state in paragraph 11 that in a nutshell the grounds of appeal focus on the guilty verdict that is to say it is unreasonable and the verdict is inconsistent considering the appellant's co-accused was found not guilty on the same charge as the appellant. The submission points out that the prosecution relied on circumstantial evidence to prove the charge against the appellant. That evidence consisted of a search list allegedly signed by the appellant and his conduct on 18 July 2013 until his arrest.

[7] For the purpose of the background facts it is sufficient to quote the summary of facts presented by the respondent upon the appellant Timo's change of plea to one of guilty.

> *"The complainant in this case is Mr Flaviano Pisoni, businessman of 2 Savala Place in Lautoka.*
>
> *On 18 July 2013 at about 12.30am the complainant was sleeping in his bedroom when he heard the alarm on. He came to the door and saw the 4 figures were standing outside of his house. He also told them that there was nothing in the house.*
>
> *The accused then went towards the back of the house then suddenly threw a stone through the kitchen window causing it to break. The stone hit the complainant on his hand and on his sides. The accused with others then entered the house through the broken window.*
>
> *One of the person entering the house then got hold of the complainant's neck and asked him for the money. He gave them his wallet containing cash and cards. The accused took the cash but complainant requested for his passport and cards which were returned to him. The accused ransacked the house and took the items through the same window they had entered.*

The complainant raised the alarm and the matter was report to Police by his house girl. Upon checking the house, he found the following items were missing:

- *assorted mobile phones valued at $5,900.00*
- *8 wrist watches – valued at $131,000.00*
- *assorted jewellery valued at $8,500.00*
- *2 bags valued at $5,500.00*
- *Cash – FJ$2,500.00, US$700.00, €$1000.00, NZ$500.00, AUS$1000.00, HK$30.00, SG$2.00.*

Upon arrest the following items were recovered from Timo's house, namely 1 Nokia phone, 1 Digicel Blackberry mobile phone and 1 Rolex wrist watch."

[8] The appellant Timo had pleaded not guilty at the mention hearing and at the commencement of the trial. At pre-trial conference mentions on 14 December 2013 and on 29 January 2014 Counsel appeared on behalf of all three accused. Thereafter Timo appeared in person and maintained his plea of not guilty until 12 June 2014. On that day, the record at page 278 indicates that Timo informed the Court that he wanted to plead guilty. This change of plea was announced immediately after the witness Rupeni Vuli Suguturaga of Natabua had completed giving his evidence.

[9] It is reasonable to conclude that it was the evidence given by Suguturaga that was the reason why Timo decided to change his plea. It is in fact that evidence that also formed a part of the circumstantial evidence upon which the prosecution relied in its case against Lockington. The trial judge has recorded that he was satisfied that Timo was aware of the consequences of changing his plea. The information was read again to Timo who formally pleaded guilty to the charge. The next day Timo agreed with the summary and was convicted as charged.

[10] Having read the court record I have no doubt that the change of plea to guilty was unequivocal and voluntary. The change of plea was not related to any admissions made in caution interview that had been ruled admissible. Rather it was made after Mr Suguturaga had given his evidence. It follows that even if the caution interview had been ruled inadmissible, the evidence at the trial given by the prosecution witness was the

reason for the change of plea. In my judgment the admission into evidence of the caution, wrongly as argued by Timo, was not a factor in the decision by Timo to change his plea thereby rendering it an equivocal plea of guilty. By the time Timo had decided to change his plea, two witnesses had given evidence and then came the evidence of Mr Suguturaga. I do not accept that his plea should be considered equivocal or involuntary.

[11] I have also concluded that Timo had freely decided to represent himself. He was well aware that legal assistance was available if he wanted representation since his co-accused Lockington was assisted by Counsel. The record does not indicate that Timo was unfairly prejudiced by deciding to represent himself. He was given adequate opportunity to cross-examine witnesses and his rights at each stage of the proceedings were explained in a manner that he understood. At no stage did he complain about any aspects of the trial up to and including the change of plea and subsequent sentencing.

[12] The issue of the caution interview being ruled admissible is of little consequence. However as a ground of appeal raised by Timo it is necessary to determine whether there is merit to the claim that it had been admitted into evidence in error on account of insufficient weight being given to the medical evidence. Timo's caution interview took place on 23 July 2013 and a charge statement was taken on 24 July 2013. Timo challenged the caution interview on the basis that it was obtained involuntarily through force and intimidation. He had been arrested the previous days on 22 July 2013.

[13] During the voir dire hearing the respondent State called Doctor Kele Tabuaniqili to give evidence concerning her examination of Timo. Her evidence is at pages 260 – 261 of the appeal record. She stated that she had examined Timo on 25 July 2013 and made notes on her examination. She subsequently prepared a brief medical report dated 29 May 2014 which was disclosed but not tendered into evidence. Upon examination the doctor noted that Timo had bruises on his forehead and head, swollen nasal bridge and fractured nasal bone. The injuries were more than a day old and were consistent with the history given by Timo. The injuries were due to punches. The injuries may be two to three days old.

[14] In his voir dire Ruling delivered on 10 June 2014 at paragraph 19 the learned Judge accurately summarised the doctor's evidence. In paragraphs 38 – 40 the Judge states his conclusions rejecting the evidence given by Timo and his witnesses as being inconsistent. There is no analysis of the evidence given by the doctor since the Judge notes that Timo did not complain to the doctor about all the alleged assaults about which he gave in evidence at the voir dire.

[15] In my judgment the material before the judge at the voir dire was such that it was not open to conclude that the prosecution had established beyond reasonable doubt that the admissions in the caution interview were made voluntarily. There was sufficient doubt raised by the medical evidence for the Judge to rule the caution statement inadmissible.

[16] However, be that as it may, as I stated earlier, it was not the voir dire ruling admitting the caution interview into evidence that prompted Timo to change his plea to guilty. That step was taken well after the trial proper had commenced and more particularly after the third prosecution witness, Rupeni Suguturaga had completed his evidence. The change in plea cannot be attributed to the caution interview being admitted into evidence.

[17] As this is an appeal against conviction and considering that the decision by Timo to change his plea to guilty was taken, apparently, in the absence of legal advice, it is incumbent on this Court to consider, under section 23 of the Court of Appeal Act, whether the conviction should be set aside due to a wrong decision of any question of law. Put another way, if the caution interview had not been admitted into evidence, would the admitted facts in the summary have been sufficient to sustain the trial Judge's decision to convict Timo on his plea of guilty. This raises a question of law and if the decision to convict was wrong then the conviction should be set aside.

[18] The summary of facts to which Timo agreed at page 279 of the appeal record is reproduced at page 144 of the record. There is no doubt whatsoever that the agreed facts satisfy the elements of the offence of aggravated robbery. The trial Judge was not in

error when he proceeded to convict Timo of the offence on his plea of guilty. The appeal against conviction should be dismissed.

[19] Timo's grounds of appeal against sentence relate to his guilty plea and to the sentencing judge including as an aggravating factor that Timo was on bail at the time of the offending. Taking the second point first, as a fact the sentencing judge erred when he included this matter as an aggravating factor. There was no reference to Timo being on bail at the time of the offence in the respondent's written submissions on sentencing filed in the High Court on 13 June 2014. Furthermore given that Timo was charged under section 311 (1)(a) of the Crimes Act 2009, the inclusion of group offending is to include as an aggravating factor an element of the offence. I am also of the view that there was no evidence, although it may be inferred that the robbery was well-planned. Certainly the perpetrations appeared to be familiar with the residence and that the prospects of obtaining money and valuable goods justified the risks involved.

[20] In relation to the guilty plea it must be noted that the change of plea was notified well after the trial proper had commenced and after the third prosecution witness had completed his evidence. A guilty plea at such a late stage of proceedings does not merit any specific discount that would in any way affect the final head sentence. Furthermore apart from the actual late change of plea to guilty, there was no other evidence of remorse and really nor could there have been. As the Supreme Court noted in **Wise –v- The State** [2015] FJSC 7; CAV 4 of 2015, 24 April 2015:

> *"a late plea, such as one made just prior to the commencement of trial in the High Court is not to be treated as substantial remorse."*

[21] In the same decision the Supreme Court provided additional guidance for sentencing in the case of single charge of aggravated robbery. At paragraphs 25 to 27 the court stated:

> *"[25] .....We believe that offences of this nature should fall within the range of 8 – 16 years imprisonment. Each case will depend on its own peculiar facts. But this is not simply a case of robbery, but one of aggravated robbery. The circumstances charged are either*

that the robbery was committed in company with one or more other persons, sometimes in a gang, or where the robbers carry out their crime when they have a weapon with them.

[26] Sentences will be enhanced where additional aggravating factors are also present. Examples would be:

(i) offence committed during a home invasion.

(ii) in the middle of the night when victims might be at home asleep.

(iii) carried out with premeditation, or some planning

(iv) committed with frightening circumstances, such as the smashing of windows, damage to the house or property, or the robbers being masked.

(vi) injuries were caused which required hospital treatment, stitching and the like, or which come close to being serious as here where the knife entered the skin very close to the eye.

(vii) the victims frightened were elderly or vulnerable persons such as small children.

[27] It is our duty to make clear these type of offences will be severely disapproved by the courts and be met with appropriately heavy terms of imprisonment. It is a fundamental requirement of a harmonious civilised and secure society that its inhabitants can sleep safely in their beds without fear of armed and violent intruders."

[22] It must be noted that many of the factors that are described by the Supreme Court as aggravating factors enhancing a sentence were present in the present case. Whatever minor omissions or inclusions formed part of the sentencing decision, the sentence imposed on the appellant Timo was well within the range and there has been no substantial error in the exercise of the sentencing discretion that would warrant a reduction in the sentence imposed. The appeal against sentence should be dismissed.

[23] Counsel for David Lockington (Lockington) the second appellant has submitted that the guilty verdict is unreasonable and should be set aside under section 23 of the Court of

Appeal Act. It is submitted that the trial Judge could not reasonably have found Lockington guilty on the evidence before him.

[24] It is not disputed that the complainant was not able to identify Lockington as one of the group that invaded his home in the early hours of 18 July 2013. However it is also correct to say that the complainant was not able to identify any of the three accused who were presented for trial. Consequently, it was necessary for the trial Judge, when agreeing with the unanimous opinions of the assessors, to consider the totality of the evidence against Lockington. That evidence consisted of the testimony of Rupeni Suguturaga the evidence of two police witnesses D/Cpl. Vereivalu and D/Cpl Ilisoni and a search list allegedly signed by Lockington acknowledging that the items listed were handed over voluntarily by him to the Police.

[25] Another aspect of the appeal by Lockington is that the verdict of guilty and subsequent conviction is inconsistent with the not guilty verdict and subsequent acquittal of his co-accused Sunia Roraqio.

[26] I propose to consider first the issue of inconsistent verdicts. The evidence relied upon by the respondent against the first accused Sunia Roraqio and the second accused David Lockington was circumstantial. The circumstantial evidence against Roraqio consisted of the testimony of a taxi driver who drove him and his wife to Lami on 18 July 2013, leaving Lautoka at about 9.00am. This was not disputed by Roraqio. Circumstantial evidence against Roraqio was given by D/Cpl Vereivalu and D/Cpl. Ilisoni concerning Roraqio attending voluntarily at the Totogo Police Station in Suva on 20 July 2013 and a search list of some of the items stolen during the aggravated robbery on 18 July 2013 that were voluntarily surrendered to Police by Roraqio at Tamavua-i-wai on the way back to Lautoka. The voluntary handing over of the items in the search list was denied by Roraqio.

[27] However at the trial the prosecution was unable to produce the search list alleged signed by Roraqio. The learned Judge in his judgment noted that the prosecution case was based

on circumstantial evidence and that the search list signed by Roraqio was missing and was not produced at the trial. It is apparent that without the search list, the assessors and the judge were not prepared to find guilt beyond reasonable on the evidence of the police witnesses and the circumstantial evidence of the taxi driver. The circumstantial evidence did not lead to a conclusion of guilt beyond reasonable doubt.

[28] The circumstantial evidence against Lockington came from the evidence of Mr Rupeni Suguturaga. His evidence was that he was awoken at his residence early in the morning on 18 July 2013 to be told that David Lockington wanted to speak to him. Lockington was with Timo and another person who was not identified. Suguturaga took Lockington and Timo to Rakiraki. On the way Lockington gave Suguturaga $50.00 and Timo gave him $100 to purchase fuel. At Rakiraki it would appear that all three were involved in exchanging foreign currency. After driving and drinking for most of the day Suguturaga took Timo and Lockington together with 2 other to Suva and arrived at Kinoya at about 8.00p.m. The next day Suguturaga and Lockington were drinking when the Police arrived at Kinoya and took them to Nabua Police Station. Under cross-examination Suguturaga agreed that the reason for going to Suva was for the "*100 nights*" for Suguturaga's deceased uncle.

[29] The evidence in relation to the search list was given by D/Cpl Vereivalu who testified that upon being apprehended after a brief chase on foot, Lockington was returned to the house at Kinoya after being cautioned about the aggravated robbery in Lautoka. Upon arrival at the house Lockington voluntarily surrendered some of the stolen items to the police. A list of the items was prepared in the form of a search list signed by Lockington which was tendered and admitted into evidence at the trial. Lockington denied voluntarily surrendering any stolen items and claimed that he had been forced to sign the search list.

[30] In his judgment the learned Judge has accepted the evidence of the police witnesses that certain items stolen from the complainant were voluntarily handed over to the police by Lockington at the time of his arrest and in doing so has relied upon the search list signed

by Lockington and admitted as evidence at the trial. The production of a search list signed by Lockington explains why the learned judge accepted the guilty opinions of the assessors and convicted Lockington while the failure to produce a search list allegedly signed by Roraqio explains why the judge agreed with the not guilty opinions of the assessors and acquitted Roraqio.

[31] At the trial Lockington disputed the police evidence that he had voluntarily surrendered the stolen items at the time of his arrest and signed the search list voluntarily. However, the issue of credibility and weight were matters for the assessors and the trial judge. It does not appear that the appellant Lockington took issue with the directions given by the trial to the assessors on circumstantial evidence.

[32] In my judgment once the assessors and the trial judge had accepted the evidence adduced by the prosecution, which they must be taken to have accepted, then that evidence, although circumstantial, was sufficient to establish that the only certain conclusion was that Lockington was guilty of the offence charged. In my judgment the guilty verdict was neither inconsistent nor not unreasonable and can be supported having regard to the circumstantial evidence. I would dismiss the appeal against conviction.

[33] As for Lockington's appeal against sentence, the appellant signed an application dated 5 July 2018 for leave to withdraw his appeal against sentence. During the course of the hearing Lockington confirmed that he wanted to abandon his sentence appeal and that the decision to do so had been made voluntarily and of his own free will. He stated that as a result of having received legal advice he does not want to proceed with the sentence appeal. He confirmed that he understood the consequences for him in the event that his applications were granted. I would allow the application and dismiss the sentence appeal.

Temo JA

[34] I agree with the draft judgment of Calanchini P.

Rajasinghe JA

[35] I agree with the reasoning and conclusions of Calanchini P.

Orders:

1. *Appeal by Timo against conviction and sentence dismissed.*
2. *Appeal by Lockington against conviction dismissed.*
3. *Application by Lockington to abandon appeal against sentence granted and appeal against sentence dismissed.*
4. *Convictions and sentences affirmed.*

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

Hon Mr Justice S Temo
JUSTICE OF APPEAL

Hon Mr Justice T Rajasinghe
JUSTICE OF APPEAL