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

CRIMINAL APPEAL AAU 20 OF 2016
(High Court HAC 174 of 2014)

BETWEEN : **JEKESONI VULI**

Appellant

AND : **THE STATE**

Respondent

Coram : **Calanchini P**

Counsel : **Mr T Lee for the Appellant**
Ms S Tivao for the Respondent

Date of Hearing : **12 July 2018**

Date of Ruling : **24 September 2018**

RULING

[1] Following a trial in the High Court at Suva the appellant was convicted on one count of aggravated robbery and was sentenced to 12 years imprisonment with a non-parole term of 11 years. This is his timely application for leave to appeal against conviction and sentence pursuant to sections 21(1)(b) and (1)(c) of the Court of Appeal Act 1949 (the Act). Section 35(1) of the Act gives a single judge of the Court of Appeal power to grant

leave. The test for granting leave to appeal against conviction is whether the appeal is arguable before the Court of Appeal. The test for granting leave to appeal against sentence is whether there is an arguable error in the exercise of the sentencing discretion.

[2] The grounds of appeal against conviction are:

> *"1. **THAT** the learned trial Judge erred in law by relying on the confession made by the Appellant in the Caution Interview Statement yet not adequately and properly directing the assessors on convicting the Appellant on any other evidence apart from the confession.*
>
> *2. **THAT** the learned trial Judge erred in law in not properly and adequately directing the assessors on the principle of Turnbull since the identification of the "attackers" was disputed.*
>
> *3. **THE** Learned Trial Judge erred in law in causing the trial to miscarry in convicting the Appellant on insufficiency of evidence led by the Prosecution.*
>
> *4. **THE** Learned trial Judge caused the trial to miscarry when the Summing Up lacked fairness and balance."*

[3] The grounds of appeal against sentence are:

> *"1. **THAT** the learned Sentencing Judge erred in law by enhancing the sentence in "double counting" after considering the Aggravating Features.*
>
> *2. **THAT** the learned Sentencing Judge erred in law in choosing a non-parole period that is close to the head sentence."*

[4] By way of background the relevant facts may be stated briefly. The complainant and his family were asleep in the family home on 1 May 2014 when it was alleged that at about 2.30am the appellant with six others armed with crowbars and metal rods broke into the house.

[5] The intruders were all masked. They threatened the complainant and his family, forcefully demanding money and jewellery. They then ransacked the house and stole property with a total value of $31,350.00. They then fled the scene.

[6] To some extent the first ground of appeal is misconceived. The only evidence upon which the prosecution relied at the trial was the admissions in the caution interview. The directions on the approach to those admissions in paragraphs 25 – 28 of the summing up were adequate and fair. There was no other evidence upon which the trial judge could give directions. It is well settled in Fiji that an accused may be properly convicted on evidence consisting of an uncorroborated confession alone: **Kean –v- The State** [2015] FJSC 27; CAV 7 of 2015, 23 October 2015. Leave to appeal on this ground is refused.

[7] Ground 2 concerns the inadequacy or failure to give what is referred to as "*Turnbull*" directions on identification. This ground is misconceived as there was no evidence adduced on identification. It was not disputed that the perpetrators were all masked. Leave to appeal is refused on this ground.

[8] Ground 3 concerns the reliance by the State on the uncorroborated confession of the appellant as the basis for the conviction. This is already discussed in ground 1 and for the same reason, leave is refused on this ground.

[9] Ground 4 raises three issue that relate to the summing up lacking fairness and balance thereby causing the trial to miscarry.

[10] The first issue claims that the trial Judge should have given directions on the evidence given at the voir dire hearing. The admissibility of an admission is a question of law for the trial Judge. The weight, truthfulness and voluntariness are issues for the triers of fact at the trial. The directions in the summing up on those issues were quite proper (see paragraphs 25 – 28). There is no material before the Court to suggest that Counsel for the appellant had objected to the witness at either the voir dire or the trial itself. It is not alleged that a re-direction had been sought.

[11] The second issue claims that the judge erred when he stated that the defence's case was simple. The defence position was that the appellant was not one of the intruders. The admissions in the caution interview were either made under force and hence not voluntary or were fabricated by the police. The defence position was simple. It was not an observation by the trial Judge that in any way detracted from or diminished the position taken by the appellant. Finally, the directions given on the issue of weight to be attached to the confession in paragraphs 25 – 28 were proper. Leave to appeal on ground 4 is refused.

[12] There were other grounds of appeal against conviction that had been filed in person prior to representation by the Legal Aid Commission. I have considered those additional grounds and have concluded that none of them raise an issue that should be argued before the Court of Appeal. Leave to appeal on those grounds is refused.

[13] As for the first ground of appeal against sentence, the appellant alleges that the sentence is excessive and harsh as a result of the sentencing court including as aggravating factors matters that were elements of the statutory offence of aggravated robbery. In particular the appellant claims that including the use of crowbars and iron rods in the offending and the fact that the victims were verbally threatened and abused to enhance the sentence constitutes an arguable error in the exercise of the sentencing discretion.

[14] The appellant was charged with aggravated robbery under section 311(1)(a) of the Crimes Act 2009. Put in basic terms this section is about robbery in company. If during the course of robbery violent threats are made or excessive force is used, then those matters will constitute aggravating factors since the threats and force exceed that which is necessary to constitute robbery.

[15] There may be some merit in the argument that the use of iron rods and crow bars constitutes an element of the offence under section 371(1)(b) being robbery armed with

an offensive weapon. However the appellant had not been charged under section 371(1)(b).

[16] The appeal is against sentence by way of re-hearing. In such an appeal the law as it presently stands is applied by the appellate court. Although the offence occurred in 2014 the Supreme Court decision of **Wallace Wise –v- The State** [2015] FJSC 7; CAV 4 of 2015, 24 April 2015 now provides the appropriate guidance for sentencing for a person convicted of a single offence of aggravated robbery in the context of home invasion at night. The Supreme Court took the view that night time home invasions in the context of aggravated robbery offences fall within the range of 8 – 16 years imprisonment. In paragraph 26 the Court observed that:

> *"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.*
>
> *Sentences will be enhanced where additional aggravating factors are also present. Examples would be:*
>
> *(i) offence committed during 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.*
>
> *(v) the weapons in their possession were used and inflicted injuries to the occupants or anyone else in their way.*
>
> *(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.*

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 civilized and secure society that its inhabitants can sleep safely in their beds without fear of armed and violent intruders."

[17] The head sentence imposed in this case was 12 years imprisonment and is not indicative of any arguable error in the exercise of the sentencing discretion that would warrant the Court of Appeal's intervention. Leave to appeal on his ground is refused.

[18] In relation to ground 2, the claim is that the non-parole term is too close to the head sentence. Certainly the non-parole term of 11 years is close to the head sentence. However there is no material in the sentencing decision to suggest that the appellant would be either suitable for or responsive to the possibility of a re-habilitation programme. He was not given any discount as a person of good character. Leave to appeal on this ground is refused.

Orders:

1. *Leave to appeal against conviction is refused.*
2. *Leave to appeal against sentence is refused.*

W. Calanchini

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