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

CRIMINAL APPEAL: AAU 0025 OF 2015
AAU 0026 OF 2015
AAU 0027 OF 2015
AAU 0036 OF 2015
AAU 0050 OF 2015
AAU 0051 OF 2015
(High Court HAC 338 of 2012)

BETWEEN : **JOSAIA USUMAKI**
TEVITA SUGU
KUNAL PRASAD
DESHWAR DUTT
SOLOMONI QURAI
EPELI QARANIQIO

Appellants

AND : **THE STATE**

Respondent

Coram : **Calanchini P**

Counsel : **First Appellant in person**
Mr S Waqainabete for the second Appellant
Third Appellant in person
Fourth Appellant in person
Ms S Nasedra for the fifth Appellant
No appearance for the sixth Appellant
Mr S Vodokisolome for the Respondent (24 April 2018)
Ms P Madanavosa for the Respondent (2 May 2018)

Date of Hearing : **24 April and 2 May 2018**

Date of Ruling : **31 May 2018**

RULING

[1] These are various applications by the Appellants who were charged with offences following a robbery from the BSP Bank at Samabula on 19 September 2012. The Appellants were charged on the one indictment and were presented for trial before a judge sitting with assessors on 2 February 2015 at Suva. The trial lasted 10 days. Towards the end of the trial (on day 7) one of the three assessors became ill and was excused. The proceedings continued with two assessors pursuant to section 225(1) and (2) of the Criminal Procedure Act 2009.

[2] At the conclusion of the evidence the two assessors returned opinions of not guilty for the first and third appellants on the charge of aggravated robbery being count 1 on the indictment. The two assessors returned opinions of not guilty for the second, fourth, fifth and sixth appellants on the charge of receiving stolen property being counts 2 – 5 on the indictment. In a reasoned judgment delivered on 23 February 2015 the learned trial Judge indicated his disagreement with the opinions of the assessors and convicted the six appellants as charged.

[3] On 20 April 2015 the first appellant (Usumaki) was sentenced to a term of imprisonment of 17 years with a non-parole term of 16 years *"effective forthwith."* The second appellant (Sugu) was sentenced to a term of imprisonment of 4 years to be served consecutively to his existing sentence. The third appellant (Prasad) was sentenced to 12 years imprisonment with a non-parole term of 11 years "*effective forthwith.*" The fourth appellant (Dutt) was sentenced to a term of 1 year 6 months imprisonment with a non-parole term of 12 months "*effective forthwith.*" The fifth appellant (Qurai) was sentenced to 4 years imprisonment to be served consecutively to his existing sentence. The sixth appellant (Qaraniqio) was sentenced to 2 years and 8 months imprisonment with a non-parole term of 2 years.

[4] The background facts may be stated briefly. On 17 September 2012 Usumaki, Qurai, Sugu and Qaraniqio were serving prisoners at Naboro Prison. Some time after 8.00pm on

that day they managed to escape to the main road. Prasad drove them in his vehicle to Veisari. At a bridge at Veisari a small outboard boat was waiting for them. It was well supplied with food, water and clothes. They got into the boat and travelled to Cave Island (adjacent to the Novotel at Lami). At Cave Island they changed into civilian clothes.

[5] On 19 September 2012 between 1.00pm and 2.00pm the BSP Bank at Samabula was attacked by a group of armed men. A vehicle was reversed into the Bank's wooden wall creating an opening through which men entered with cane knives. They ransacked part of the Bank and stole $70,000.00 in Fijian and foreign currency. Usumaki was identified at the crime scene as one of the men who had robbed the Bank. Prasad admitted to police that he was the get-away driver for the robbers on the day in question. Both were convicted on the charge of aggravated robbery.

[6] Usumaki later met Qurai, Sugu and Qaraniqio at Cave Island and gave them money. Prasad met Dutt soon after the robbery and drank "*grog*" (kava) with him. They later went to a night club. Prasad gave some money to Dutt which was later discovered in his possession and in his home. All four recipients of the money were convicted on the charge of receiving stolen property.

[7] All six of the convicted accused subsequently filed notices of appeal. Unfortunately for reasons which have not been made known the appeals have not proceeded together and as a result it is necessary to consider each appellant's present position separately.

[8] To the extent that the grounds of appeal against conviction raised by the appellants involve question of mixed law and fact or questions of fact alone, leave to appeal is required under section 21(1)(b) of the Court of Appeal Act 1949 (the Act). Any grounds of appeal against sentence require leave to appeal pursuant to section 21(1)(c) of the Act. Pursuant to section 35(1) of the Act the power of the Court to grant leave to appeal may be exercised by a Judge of the Court. The test for granting leave to appeal against conviction is whether any ground of appeal raises a properly arguable point for the

Court's consideration. The test for granting leave to appeal against sentence is whether the Appellant can show an arguable error in the exercise of the sentencing discretion by the trial judge: **Naisua –v- The State** [2013] FJSC 14; CAV 10 of 2013, 20 November 2013.

FIRST APPELLANT – USUMAKI

[9] The first appellant (Usumaki) filed a timely notice of appeal against conviction dated 16 March 2015. An amended notice of appeal against conviction was filed on 29 January 2016. The amended grounds of appeal are:

> *"1) That the learned trial judge erred in law when he ommitted to provide cogent reasons for overturning the unanimous verdict of the assessors especially when he 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) That the learned trial judge erred in law in failing to exercise his judicial discretions properly in not excluding inadmissible evidence of testimonies of prosecution witnesses relating to unclaimed and unconnect monies not identified to be monies stolen from BSP and photographs of unclaimed monies.*
>
> *3) That my right to a fair trial was prejudiced and violated when the learned trial judge erred in law in not giving me the statutory option laid down by law to choose the court of choice to stand trial when I was initially charged for the summary offence of receiving stolen property. This has resulted in a miscarriage of justice in the circumstances of the case and to the appellant.*
>
> *4) That the learned trial judge erred in law and fact in convicting me on unreliable and poor quality **Identification Evidence** without corroboration. This is a serious miscarriage of justice in the circumstances of the case and to the appellant.*
>
> *5) That the learned trial judge erred in law when his lordship did not direct the assessors in his summing up and did not direct himself in*

> *his judgment pronounced in court that there was weakness in the* ***Dock Identification*** *in that there was Indo Fijians in the dock and I was the smallest structed person and was different from the rest, in this he failed to direct on the unfairness of the* ***Dock Identification*** *and thereby the conviction is unsafe."*

[10] The appellant filed in person written submissions on his grounds of appeal. He subsequently filed an application for bail pending appeal together with a supporting affidavit sworn on 16 March 2016 by the appellant. Submissions were filed by the appellant on bail pending appeal. The respondent filed written submissions on the application for leave and on bail pending appeal on 9 February 2018. In the absence of the appeal record it is not possible to determine whether the reasons stated by the trial judge for his disagreeing with the assessors were sufficiently cogent. As a result this ground should be considered by the Court of Appeal and that reason leave is granted on ground 1.

[11] Ground 2 raises an issue concerning the admissibility of photographic evidence and is a question of law. The ground is not frivolous or vexatious and should be considered by the Court of Appeal.

[12] Ground 3 claims that the appellant was wrongly denied a right to select the court for his trial. However aggravated robbery is an indictable offence and as such is triable only in the High Court. The appeal is dismissed on this ground pursuant to section 35(2) of the Act.

[13] Grounds 4 and 5 relate to identification issues. The appellant has raised issues that should be considered by the Full Court. Leave is granted on those grounds.

[14] For the first appellant (Usumaki) leave is granted on grounds one, four and five. The appeal can proceed on ground 2 raising an error of law. The appeal is dismissed on ground 3 under section 35(2) of the Act.

[15] The appellant has also applied for bail pending appeal. The principles that are considered in an application for bail pending appeal were fully discussed in the decision of **Zhong – v- The State** [2014] FJCA 108; AAU 44 of 2013, 15 July 2014. In this case neither the material in the affidavit sworn by the appellant in support of his application nor the grounds of appeal upon which the appeal is to proceed satisfy the threshold of exceptional circumstances. The application is refused.

SECOND APPELLANT – SUGU

[16] The second appellant filed in person a timely notice of appeal against conviction on 16 March 2015. On 15 January 2016 the second appellant filed in person an amended notice of appeal against conviction and in effect a notice of appeal against sentence that was out of time by about 8 months. The appellant through the Legal Aid Commission filed on 19 April 2017 an amended notice of appeal against conviction and sentence without any reference to the sentencing appeal being out of time. Written submissions were filed by the appellant on 27 April 2017 and by the respondent on 8 February 2018.

[17] The grounds of appeal against conviction are:

> *"1. **THE** Learned trial judge erred in law and in fact when he did not provide sufficient cogent reasons for overturning the unanimous opinion of the assessors after he found their opinion not perversed.*
>
> *2. **THE** Learned Trial judge erred in law and in fact when based his finding of guilt mostly on the fact that the Appellant was caught together with Mr Usumaki at the Cave Island."*

The grounds of appeal against sentence are:

> *"3. **THE** Learned Trial judge erred in law and in fact when he gave a sentence at the very end of the tariff of the offence of Receiving stolen property and also made the sentence consecutive hence prevent the appellant from any possibility of rehabilitation.*

4. ***THE*** *Learned Trial judge erred in law and in fact when he took in to consideration irrelevant factor being the appellant was and escaped prisoner who committed other offences."*

[18] In respect of both grounds of appeal against conviction whether the reasons for overturning the opinions of the assessors were sufficiently cogent and whether there was sufficient evidence to be satisfied beyond reasonable doubt as to the guilt of the appellant must necessarily in this case involve an examination of all the evidence which in turn is a matter for the Court of Appeal after the record has been settled.

[19] The issue of the application for leave to appeal against sentence must be regarded as an application for an enlargement of time to appeal against sentence. The factors to be considered for an enlargement of time are well known and were discussed by the Supreme Court in **Kumar and Sinu –v- The State** [2012] FJSC 17, CAV 1 of 2009, 21 August 2012. For the purposes of this application it is only necessary to say that the appellant's grounds need to demonstrate a likelihood of succeeding. In my judgment the trial judge has correctly applied section 21(1) and 22(2) of the Sentencing and Penalties Act 2009 and has not erred in ordering a cumulative sentence. I am not satisfied that in this case there has been an error in the selection of the starting point and the addition of one year for aggravating factors. As a result the application for an enlargement of time to appeal against sentence is refused.

[20] In summary, leave to appeal against conviction is granted and the application for an enlargement of time to appeal against sentence is refused

THIRD APPELLANT – PRASAD

[21] The third appellant (Prasad) filed a timely notice of appeal against conviction on 11 March 2015. On 8 July 2015 the appellant filed a document with the title *"Additional grounds of appeal against conviction."* On 17 March 2016 the appellant filed in court his

amended grounds of appeal and written submissions on those grounds. For reasons that are not known the respondent did not file written submissions until 5 April 2017.

[22] The seven grounds of appeal against conviction are:

> *"1) The learned trial judge erred in admitting the charge statement in the voir dire hearing.*
>
> *2) That the learned trial judge erred in law in admitting the charge statement in voir dire without first proving to himself that the prosecution has proven beyond reasonable doubt that it was voluntary made. Failure to State the result in the charge statement wrongly submitted.*
>
> *3) That the learned trial judge failed to establish the principle of complicity and common purpose beyond reasonable doubt.*
>
> *4) That the learned trial judge erred in not giving cogent reason whilst overturning the verdict of not guilty by the assessors.*
>
> *5) That the learned trial judge erred in law and in fact on convicting the appellant on uncorroborated circumstantial evidence found alone in the charge statement.*
>
> *6) That the learned trial judge erred in law and in fact in holding the evidence and convicting the appellant on the charge statement when there is no other evidence to support the same.*
>
> *7) That the learned trial judge erred in law and in fact by misdirecting himself with the evidence adduced by the prosecution and of that which was found in the charge statement alone."*

[23] In a notice filed in person on 27 April 2017 the appellant added four further grounds of conviction as follows:

> *8) That the learned Trial Judge erred in law and in fact when his lordship failed to disregard the statement contained in the charge statement of the appellate which was in breach of the Judge's Rule.*
>
> *9) That the learned Trial Judge erred in law and in fact when his lordship failed to reject the charge statement of the appellate under Section 78 of the Police and Criminal Evidence Act (1984).*

> 10) *That the learned Trial Judge erred in law and in fact when his lordship failed to exercise his Judicial discretion, in rejecting the charge statement whose prejudicial effect outweighs its probative value.*
>
> 11) *That the Conviction is unsafe and unsatisfactory."*

[24] The first two grounds relate to the admissibility of the charge statement. Although the appellant alleged that the admissions were not voluntary and that the respondent had failed to establish beyond reasonable doubt that they were made voluntarily, there was no independent evidence to support the allegations of assault and or threats. Under those circumstances the trial judge was entitled to rely on the evidence and find beyond reasonable doubt that the admissions were made voluntarily and were as a result admissible. These two grounds are not arguable.

[25] Ground 3 relates to the issue of common purpose and complicity. The directions given to the assessors and to the judge himself at paragraphs 12 and 13 accord with the law and the findings in paragraph 20 of the judgment were open to the judge on the evidence. This ground is not arguable.

[26] Ground 4 relates to the cogency of the reasons stated by the judge for overturning the opinions of the assessors. In my view the admissions made by the appellant in his charge statement were sufficient for the trial judge to disagree with the opinions of the assessors on the basis that the admissions were made by Prasad and were true. Those admissions, however, were not evidence as against any of the co-accused. This ground in respect of the appellant Prasad, is not arguable.

[27] Ground 5 claims that the appellant's conviction was based on circumstantial evidence. However the appellant's admissions in the charge statement were sufficient to convict and this ground is not arguable. See **Kean –v- The State** [2013] FJCA 117; AAU 95 of 2008, 13 November 2013.

[28] Ground 6 claims that the admissions alone were not sufficient to convict the appellant. However the admissions ruled as admissible evidence were sufficient to convict and this ground is not arguable.

[29] Ground 7 claims that there were misdirections in the summing up that constituted a miscarriage of justice. However the learned judge has properly directed the assessors and himself as to how they should consider the admissions made by Prasad that were admitted into evidence. This ground is not arguable.

[30] Ground 8 again seeks to challenge the admission into evidence of the appellant's charge statement. Once again there was no independent evidence to support the allegations. The learned trial judge was entitled to find on the evidence before the Court that the admissions were made voluntarily. It was a matter of credibility and the trial judge accepted the prosecution evidence as he was entitled to do. He was satisfied beyond reasonable doubt that the admissions had been made voluntarily.

[31] Ground 9 relates to the application of English legislation to Fiji and is not arguable.

[32] Ground 10 has already been adequately considered and is not arguable.

[33] In relation to ground 11, it is a matter for the Court of Appeal to consider whether the conviction should be set aside. Unsafe and unsatisfactory are not grounds for setting aside a verdict or a conviction under section 23 of the Court of Appeal Act. The ground is not arguable.

[34] Leave to appeal against conviction is refused.

[35] The appellant Prasad has also applied for bail pending appeal. The application is supported by a document that purports to be an affidavit that has been signed by the appellant but has not been sworn before a Commissioner for Oaths and is undated. The principles that are considered in an application for bail pending appeal were fully

discussed in the decision of **Zhong –v- The State** [2014] FJCA 108; AAU 41 of 2013, 15 July 2014. In this case neither the material before the Court nor the grounds of appeal satisfy the threshold of exceptional circumstances. The application is refused.

FOURTH APPELLANT – DUTT

[36] Leave to appeal against conviction and sentence has been granted to the fourth appellant (Dutt) in a separate ruling delivered on 27 January 2016. The appellant has subsequently filed an application for bail pending appeal together with an affidavit sworn on 26 February 2016 by the appellant in support of his application. On 6 May the appellant filed written submissions on bail and the respondent filed its submissions on 3 June 2016. Although there has not been a hearing, the application can be determined on the papers. The principles that are considered in an application to bail pending appeal were fully discussed in the decision of **Zhong –v- The State** [2014] FJCA 108. AAU 44 of 2013, 15 July 2014. In this case neither the material in the affidavit sworn by the appellant nor the grounds of appeal upon which the appeal is based and or for which lave has been granted for the appeal to proceed to the Full Court satisfy the threshold of exceptional circumstances. The application is refused.

FIFTH APPELLANT – QURAI

[37] The fifth appellant (Qurai) filed a timely notice of appeal against conviction dated 3 March 2015 and filed on 5 March 2015. On 8 May 2015 the appellant filed an application for bail pending appeal together with a document that purported to be an affidavit signed by the appellant but undated and not sworn before a Commissioner for Oaths.

[38] The appellant subsequently sought to file amended and or additional grounds of appeal. The Legal Aid Commission filed written submissions on behalf of the appellant on 23 April 2018 and the respondent filed its written submissions on the same day. The grounds of appeal relied upon by the appellant in the submissions are:

"1. *That he did not receive a fair trial by reason of the trial judge having tried the offence of receiving stolen property which is a summary offence trial only by a magistrates Court. In doing so, the learned trial judge erred in law in convicting the Appellant without jurisdiction and original power and this resulted in a serious miscarriage of justice.*

2. *That the learned trial judge erred in law when his Lordship did not put to the Appellant the right of election to which Court he desired to have the charge of receiving stolen property tried in, the failure in doing so prejudiced the Appellant's right of election pursuant to Section 4(1)(b) of the Criminal Procedure Decree as such his right to a fair trial to have the matter tried at the Magistrates Court was deprived of and resulted in his right to a fair trial being prejudiced, violated and infringed which is a serious miscarriage of justice.*

3. *That the judgment of the learned trial judge is flawed in that there is no cogent reasons expressed from differing to the opinions of the assessors and thus the conviction is unsafe and unsatisfactory.*

4. *That the learned trial judge erred in law when his Lordship did not properly exercise his discretions judicially in refusing to admit evidence that had such prejudicial effects which operated unfairly against me and thus had outweighed the probative value of the case. This has resulted in a serious miscarriage of justice (unsigned search warrant and unverified photographs).*

5. *That the learned trial judge erred in law when his Lordship did not afford me and or/deprived me of the right to give evidence on oath in a voir dire to the crucial issue of voluntariness of the search list without subjecting myself to other issues which is a serious miscarriage.*

6. *That the learned trial Judge erred in law and in fact when his Lordship wrongly admitted inadmissible evidence of an unsigned search list and unverified photographs, and in doing so his right to a fair trial was denied."*

[39] Grounds 1 and 2 relate to the issue of the trial being conducted in the High Court. Although receiving stolen property is a summary offence under the Crimes Act 2009, section 60 of the Criminal Procedure Act 2009 permits the joinder of persons in one charge or information and for persons accused of different offences committed in the course of the same transaction to be tried together. However it is arguable whether the charge of receiving stolen property and the aggravated robbery offence occurred in the course of the same transaction. These grounds are at least arguable.

[40] As with some of the other appellants the cogency of the reasoning for overturning the opinions of the assessors is raised by ground 3. It is necessary to consider the appeal record for this ground and leave is granted for that to happen.

[41] In relation to grounds 4, 5, and 6 to the extent that it is suggested that material in the caution/charge statements of the co-accused was relied upon against the fifth appellant Qurai, the issue is arguable. However the remainder of the issues raised by the grounds are too vague for further comment.

[42] In summary leave to appeal is granted on grounds one to three and on the limited issue stated above in relation to grounds four to six.

[43] As for the bail pending appeal application the principles that are considered in such an application were considered in detail in the decision of **Zhong –v- The State** [2014] FJCA 108; AAU 44 of 2013, 15 July 2014. In this case neither the material in the documents filed nor the grounds of appeal upon which the appeal is based satisfy the threshold of exceptional circumstances. The application is refused.

SIXTH APPELLANT – QARANIQIO

[44] The sixth appellant (Qaraniqio) filed a notice of appeal against conviction and sentenced that is undated but was filed within time on 1 May 2015. In the notice there are no

proposed grounds against sentence. A notice of fresh additional grounds of appeal against conviction and sentence was filed on 28 July 2015.

[45] Although directions were given on 17 March 2016 and 2 March 2017 for the appellant to file written submissions, he had failed to do so when the matter was listed for mention on 2 May 2018. On that day the Court was informed that the appellant had been discharged from prison.

[46] As a result of his not proceeding to prosecute the appeal by filing written submissions when directed to do so the appeal is dismissed under section 35(2) of the Court of Appeal Act.

[47] In summary the orders of the Court are:

1. <u>Usumaki</u> *(1st Appellant/1st accused)*
    - *Leave to appeal against conviction is granted on the grounds stated in this Ruling*
    - *The appeal is dismissed on ground 3 under section 35(2) of the Court of Appeal Act*
    - *Application for bail pending appeal is refused.*

2. <u>Sugu</u> *(2nd Appellant/4th accused)*
    - *Leave to appeal against conviction is granted.*
    - *Application for enlargement time to appeal against sentence is refused.*

3. <u>Prasad</u> *(3rd Appellant/2nd accused)*
    - *Leave to appeal against conviction is refused*
    - *Application for bail pending appeal is refused.*

4. *<u>Dutt</u> (4th Appellant/6th accused)*

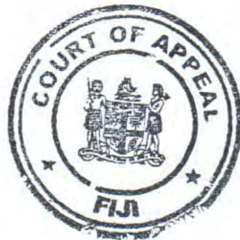
   - *Leave to appeal against conviction is granted*
   - *Leave to appeal against sentence is granted*
   - *Application for bail pending appeal is refused.*

5. *<u>Qurai</u> (5th Appellant/3rd accused)*

   - *Leave to appeal against conviction on grounds stated in this ruling*
   - *Bail pending appeal is refused.*

6. *<u>Qaraniqio</u> (6th appellant/5th accused)*

   - *Appeal dismissed under section 35(2) of the Court of Appeal Act.*



W. Calanchini

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