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

CRIMINAL APPEAL NO. AAU 121 OF 2015
(High Court Action No: HAC 59 of 2010)

BETWEEN : **VERESA NACENO**

Appellant

AND : **THE STATE**

Respondent

Coram : **Chandra, RJA**

Counsel : **Mr S Waqainabete for the Appellant**

Ms S Tivao for the Respondent

Date of Hearing : **10 June, 2019**

Date of Ruling : **17 July, 2019**

RULING

[1] The Appellant with three others was charged with two counts of Aggravated Robbery, one count of theft of a motor vehicle and one count of wrongful confinement contrary to Section 311(1)(a), 311(1)(b),291(1), and 286 of the Crimes Act 2009.

[2] He was convicted and sentenced on 2nd December 2011 to 15 years imprisonment with a non-parole period of 13 years imprisonment.

[3] The Appellant had sent a letter to the Court of Appeal seeking leave to appeal out of time on 23rd September 2015.

[4] The Appellant sought the assistance of Legal Aid in 2016 and an application was made seeking to amend the notice for leave to appeal against conviction and sentence setting out the following grounds of appeal:

> *Appeal against Conviction*
>
> 1. *The Learned Trial Judge erred in law and in principle when he made inadequate directions on accomplice evidence in his summing up to the Assessors.*
>
> 2. *The learned Trial Judge erred in law and in fact when he failed to consider the evidence under cross examination of the two prosecution witnesses namely Mr.Tevita Seru and Mr.Waqa when they said that the person who robbed "looks like me".*
>
> *Appeal against Sentence*
>
> 3. *The Learned Trial Judge erred in law when he did not deduct the time spent in remand from the head sentence.*

[5] The application seeking extension of time for leave to appeal is late by about 4 years. The reasons given by the Appellant in his affidavit, are that he had no access to the documents as he was incarcerated at the Minimum Correction Center and had no lawyer to assist him.

[6] The reason for the substantial delay is not satisfactory and it has to be seen whether the grounds of appeal adduced have any merit.

[7] The first ground of appeal against conviction is that the learned Trial Judge had made inadequate directions on accomplice evidence in his summing up to the Assessors.

[8] In the submissions that have been made in this regard, decisions regarding the manner in which directions should be made regarding accomplice's evidence have been cited. However, as to who the accomplice was and whether there was an accomplice has not been addressed in the submissions, therefore the need for giving directions regarding accomplice's evidence would not have arisen.

[9] This ground of appeal has no merit.

[10] The second ground of appeal is regarding the consideration of the evidence of the prosecution witnesses under cross-examination in relation to identification.

[11] The case for the prosecution was based on circumstantial evidence and identification evidence. There was no identification parade held and the identification evidence relied on by the prosecution was the dock identification.

[12] The two witnesses who identified the Appellant when he was in the dock during the trial were Jone Waqa and Tevita Seru. Jone Waqa's evidence was that he had seen the Appellant armed with a cane knife smashing the car window with it and which hit the driver's head. The Appellant had been in the company of two others. After smashing the car window, they had taken a black briefcase which was in the car and fled. He had identified the Appellant as the person who was armed with the cane knife and smashing the car window when the Appellant was in the dock.

[13] The Appellant and the other co-accused had gone to Tevita Seru's house and he had seen them taking the money from the black bag and sharing the money among themselves. He had identified the Appellant as one of the persons who was there in his house, when he was in the dock during the trial.

[14] The learned Trial Judge in his summing up referred to the evidence of these two witnesses and cautioned them about the weaknesses of dock identification when there had been no identification parade held in great detail in paragraphs 34, 37, 40, 43.

[15] In his judgment where the learned Trial Judge concurred with the opinion of the Assessors, he stated at paragraph 3 that the Assessors had accepted the evidence of the prosecution witnesses regarding identification.

[16] In the above circumstances it cannot be said that the learned trial Judge had erred in law and fact when considering the evidence of the prosecution witnesses. Therefore this ground of appeal has no merit.

[17] The third ground of appeal is regarding sentence on the basis that the learned Trial Judge had not deducted the period that the Appellant had spent in remand from the head sentence.

[18] In the sentencing judgment the learned Trial Judge had taken into account the fact that the Appellant had spent 1 year and 7 months in remand, and had considered same as part of mitigation for which a discount of 2 years had been given.

[19] For this ground to succeed, it has to be shown that there was an error in the sentencing judgment when a separate discount was not given regarding the period spent in remand.

[20] In **Solomone Qurai v The State** FJSC 15; CAV 24 of 2014 (20 August 2015) the Supreme Court had stated that the Sentencing and Penalties Decree (now Act) does not provide any specific guideline regarding the methodology to be adopted by the sentencing court in computing the sentence and that a certain amount of flexibility is left to the sentencing judge regarding the sentencing methodology which might depend on the complexity or otherwise of every case.

[21] In the present case, the mitigating factors adduced had been the fact that he was 34 years old and married with 3 young children and that he had been in remand for 1 year and 7 months.

[22] The learned sentencing Judge gave a discount of 2 years for the mitigating factors thus subsuming the period in remand in that discount of 2 years.

[23] I do not see any error in the methodology adopted in the sentencing judgment and therefore there is no merit in this ground.

Orders of court:

Application for extension of time seeking leave to appeal is refused.

Hon. Justice Suresh Chandra
RESIDENT JUSTICE OF APPEAL