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

CRIMINAL APPEAL NO. AAU 160 OF 2016
AAU 165 OF 2016
AAU 168 OF 2016
AAU 170 OF 2016
AAU 175 OF 2016
(High Court HAC 202 of 2015)

BETWEEN : **MOSESE TARAU** *(First)*
TEVITA QAQANIVALU*(Second)*
UATE BALEIONO*(Third)*
SEREMAIA MUDURA*(Fourth)*
JEKE VAKARARAWA*(Fifth)*

Appellants

AND : **THE STATE**

Respondent

Coram : **Calanchini P**

Counsel : **Mr M Fesaitu for the First, Third, Fourth and Fifth Appellants**
Second Appellant in person
Ms W Elo for the Respondent

Date of Hearing : **16 October 2019**

Date of Ruling : **27 November 2019**

RULING

[1] Following a trial in the High Court the first, second, fourth and fifth appellants were convicted on two counts of aggravated robbery and one count of act with intent to cause grievous harm. The third appellant was convicted on one count of aggravated robbery and one count of act with intent to cause grievous harm. On 11 November 2016 the appellant Tarau was sentenced to 15 years imprisonment with a non-parole term of 14 years to be served concurrently with any existing sentence. The appellant Qaqanivalu was sentenced to 15 years imprisonment with a non-parole term of 14 years to be served concurrently with any existing sentence. The appellant Baleiono was sentenced to 11 years imprisonment with a non-parole term of 10 years. The appellant Mudura was sentenced to 13 years imprisonment with a non-parole term of 12 years. The appellant Vakararawa was sentenced to 9 years imprisonment with a non-parole term of 8 years.

[2] This is their applications for leave to appeal pursuant to section 21(1) of the Court of Appeal Act 1949 (the Act). Section 35(1) of the Act gives to a single judge of the Court power to grant leave to appeal. The test for leave to appeal against conviction is whether the appeal is arguable before the Court of Appeal and the test for granting leave to appeal sentence is whether there is an arguable error in the exercise of the sentencing discretion: **Naisua –v- The State** [2013] FJSC 14, CAV 10 of 2013, 30 November 2013.

Leave to appeal against conviction

[3] The grounds of appeal relied upon by the appellants Mosese Tarau, Uate Baleiono, Seremaia Mudura and Jeke Vakararawa were the same and Counsel for those appellants relied on the same submissions for each of them. Their grounds of appeal are:

> *"1. That the learned trial Judge erred in law and in fact when he failed to direct and guide the assessors on how to approach the evidence contained in the caution interview and the weight to be attached to the disputed confession.*

2. *That the learned trial Judge erred in law and in fact when he did not put the case of the appellants to the assessors in a fair and balanced and objective manner.*

3. *That the learned trial Judge erred in law and in fact when he failed to give proper directions on alibi evidence of appellants 1,2,3 and 4."*

[4] At the hearing Counsel for the abovenamed four appellants informed the Court that ground 3 was a ground relied upon by the first, third and fourth appellants as the Legal Aid Commission no longer acted for the second appellant (Qaqanivalu) who had decided to represent himself.

[5] The first ground relates to the directions given by the trial Judge to the assessors in his summing up as to how the admissions or the confessions in the caution statements should be considered at the trial stage. However both the directions given by the Judge and the submissions made on behalf of the appellants are framed in a manner that resembles more a trial by Judge and jury rather than a trial by Judge sitting with assessors. Under section 237 of the Criminal Procedure Act 2009 it is quite apparent that the ultimate judge of fact and law is the trial Judge. The opinions of the assessors as to guilt are for the guidance of the trial Judge. He is not bound by those opinions. Whatever the omissions or even errors that may be said to be present in the summing up can be remedied in a reasoned judgment in which the Judge either agrees or disagrees with the opinions of the assessors.

[6] The Judge has carefully analysed the evidence in his judgment at paragraphs 11 to 14. The learned Judge stated that the issue at trial was whether or not the accused did give their caution interviews and charge statements to the police and whether or not they were true. It is arguable that the learned Judge has not applied the correct test that was discussed by the Supreme Court in **Maya –v- The State** [2015] FJSC 30; CAV 9 of 2015, 23 October 2015 and subsequently applied by this Court in **Singh –v- The State** [2018] FJCA 206; AAU 114 of 2014; 29 November 2018. Those decisions are authority for the proposition that the Judge should direct the assessors **AND** (emphasis mine) himself that if either the assessors or the Judge conclude that they are not satisfied

beyond reasonable doubt that the confessions or admissions were made voluntarily then they should attach no weight to and disregard the confession or admissions.

[7] Ground 2 raises a similar issue as ground 1. This ground complains that the Judge has not considered the totality of the evidence in relation to the appellants' claims that their confessions were not made voluntarily. This ground should be considered in conjunction with ground one.

[8] Ground 3 raises concern over the manner in which the trial Judge has directed the assessors on the alibi evidence adduced by the first, third and fourth appellants. There is no reference to alibi evidence in the judgment. The burden on the prosecution is not referred to in the summing up and the ground is arguable.

Leave to appeal against sentence

[9] These four appellants challenge the sentence for the second aggravated robbery on the basis that the starting point of 12 years was higher than the 9 years selected as the starting point for the first aggravated robbery. Although the Judge has selected 12 years as the starting point for the second aggravated robbery without providing any substantive reason, the concurrent sentences imposed are within the tariff of 10 – 16 years for *'a spate of robberies.'* The sentences imposed do not reflect any arguable error in the exercise of the sentencing discretion.

Application for leave to appeal against conviction by the appellant Qaqanivalu

[10] The grounds of appeal against conviction upon which the appellant Qaqanivalu relies are set out in a hand written document dated 1 September and filed on about 6 September 2019 and are reproduced verbatim as:

> *"1. THAT the denial of my constitutional right to have a legal aid Counsel to be present and or to consult with before the conduct of my caution interview leds to the forceful obtained alleged confession not give on my own free will.*

2. *THAT the high possibility of protection and proper safeguard against forcefully obtained alleged confession before the conduct of my caution interview would have been avoided, if I was afforded the opportunity by the police to consult with or to have a legal aid Counsel present before the proceeding of my alleged caution interview. Thus the failure has prejudiced me accordingly.*

3. *THAT the learned Judge erred in Ruling the confessional statement as admissible evidence when (i) there was sufficient suggestion in the medical report that injuries were sustained whilst in police custody thereby negating voluntariness. (Annex. marked T.Q 02 medical report).*

4. *THAT the prosecution failed to establish beyond reasonable doubt the nature of the injury on the appellants right eye was not caused by police assault whilst being interviewed under duress resulting a confessional statement made.*

5. *THAT the prosecution failed to negotiate the atmospheric authorization of fear enhance in mind of the appellant whilst being interviewed that resultant oppressive circumstances.*

6. *THAT the learned prosecution has failed to prove beyond reasonable doubt the elements on the charge of aggravated robbery (count 2) thus causing the conviction to be unsafe.*

7. *THAT the chain of event that leds to the robbery (count 2) at the Wineshop was not proved reasonable doubt causing the charge defective and giving rise to a substantial miscarriage of justice.*

8. *THAT the learned trial Judge erred in law and in fact when he failed to take into fair and proper consideration the unfairness and fundamental breach of my Constitution rights that existed when the police took my caution interview at the police station thus causing a preserve voir dire Ruling made."*

[11] Grounds 1 – 5 and ground 8 are concerned with the circumstances leading up to and the conduct of the caution interview in which it was claimed by the prosecution at the voir dire that the appellant had made admissions voluntarily in the form of a confession.

[12] The first issue concerns the right to communicate with a legal practitioner. This right is included in section 13(1)(c) of the Constitution and is referred to in the preamble to the Judge's Rules. The request was made by the appellant. Whether the reason for not

allowing access to a legal practitioner breached that right and caused prejudice to the appellant is arguable. The second issue is related to the first issue and refers specifically to the issue of prejudice.

[13] The third issue relates to the medical evidence negating the finding by the Judge that he was satisfied beyond reasonable doubt that the appellant's confession had been made voluntarily. The Judge has considered the evidence in his voir dire Ruling and has concluded that the medical evidence does not support the specific allegations of assault by the police. However the report does indicate that there was evidence of bruising and injury. The ground is arguable. The fourth issue is related to the third issue.

[14] The fifth issue raised what the appellant refers to as '*the atmospheric authorization of fear*' leading to oppressive circumstances. Apart from the allegations of assault and being denied the right to communicate with a legal practitioner, the appellant does not identify any specific unusual circumstances that would render this ground arguable. Leave is refused on ground 5.

[15] Ground 6 refers to the conviction for the second aggravated robbery being unsafe. There is no such basis for allowing an appeal against conviction under section 23(1) of the Court of Appeal Act. In any event the learned trial Judge has indicated in paragraph 9 of his written reasons for judgment that the particulars of the offences, including the second aggravated robbery, were not disputed by the appellants at the trial. It was not disputed that on 21 May 2015 between 7.45pm and 8.00pm a group of men burst into Distill Wineshop, threatened staff and stole property. The only issue for determination at the trial was whether the appellants had committed the offences. The issue of identification was dependent upon the confessions in the caution interview. The same issue is raised by ground 7.

[16] In summary, for this appellant, leave to appeal is granted on grounds 1 – 4 and 8. Leave to appeal against conviction is refused on grounds 5, 6 and 7.

Appeal against sentence by Qaqanivalu

[17] In his initial notice of appeal the appellant relied upon 5 grounds of appeal. In the documents that were filed in September of this year there is no reference to the sentence appeal and nor are there any submissions on sentence. Counsel for the Legal Aid Commission who had previously acted for this appellant informed the Court that the issue raised by the appellant was the proximity of the non-parole period to the head sentence. However since the decision of the Supreme Court in **Naitini –v- The State** [2016] FJSC 16; 34 of 2015, 21 April 2016 this issue is no longer considered to be a valid ground of appeal against sentence.

[18] Grounds one and two in the appellant's initial notice of appeal relate to the head sentence and the aggravating factors determined by the learned Judge to enhance the sentence. In my judgment the circumstances of the offending so far as this appellant is concerned were such that the concurrent head sentence dos not indicate an error in the exercise of the sentencing discretion. For his being convicted on two counts of aggravated robbery and for attacking the Police Commissioner this appellant was sentenced to 15 years imprisonment with a non-parole term of 14 years.

[19] Finally the appellant raises an issue concerning the current practice adopted by the Commissioner for Corrections for calculating when a prisoner may be entitled to the one third remission for which provision is made in the relevant legislation. However that issue has been the subject of some discussion in a recent Supreme Court decision (see **Nadan –v- The State** [2019] FJSC 29; CAV 7 of 2019, 31 October 2019) and is an issue that is outside of the jurisdiction of this Court in a criminal appeal. As a result leave to appeal against sentenced is refused.

Orders:

1. *Leave to appeal against convictions is granted to each appellant.*
2. *Leave to appeal against sentences is refused to each appellant.*
3. *The application by Qaqanivalu to adduce fresh evidence is to be listed for mention on 11 December 2019 at 2.30pm.*
4. *The time for lodging the appeal record is extended to 31 January 2020.*

W. Calanchini

Hon Mr Justice W D Calanchini
PRESIDENT, COURT OF APPEAL