IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO.AAU 0021 of 2018
[High Court of Suva Case No. HAC 022 of 2017S]

BETWEEN	:	**SELA RAYAWA**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Ms. S. Nasedra for the Appellant**
	:	**Ms. E. Rice for the Respondent**
Date of Hearing	:	**30 October 2020**
Date of Ruling	:	**03 November 2020**

RULING

[1] The appellant had been charged along with another (appellant in AAU 27 of 0218) in the High Court of Suva with three counts of aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009 committed on 06 January 2017 at Rifle Range Road, Vatuwaqa in the Central Division (count 01) and on 07 January 2017 at Laucala Beach Estate in the Central Division (counts 02 and 03). He was acquitted of count 01 and convicted of counts 02 and 03.

[2] The particulars of counts 02 and 03 were as follows.

Count 02

Statement of Offence

AGGRAVATED ROBBERY: *Contrary to Section 311(1)(a) of the Crimes Act, 2009.*

Particulars of Offence (b)

KAMINIELI TURAGALOALOA *and* ***SELA RAYAWA*** *on the 7TH day of January, 2017 at Laucala Beach Estate in the Central Division stole cash in the sum of $464.78, assorted cigarettes valued $247.40 and assorted recharge cards valued $2,571.00; all to the total value of $3,283.18, the property of TOTAL SERVICE STATION*

Count 03

Statement of Offence

AGGRAVATED ROBBERY: *Contrary to Section 311(1)(a) of the Crimes Act, 2009.*

Particulars of Offence (b)

KAMINIELI TURAGALOALOA *and* ***SELA RAYAWA*** *on the 7TH day of January, 2017 at Laucala Beach Estate in the Central Division stole a hand bag containing wallet, $20 cash, assorted identification cards and car keys; all to the total value of $20 the property of AACHAL MAHARAJ j*

[3] After the summing-up on 16 February 2018 the assessors had expressed a unanimous opinion of guilty on count 02 and 03 and not guilty on count 01. The learned trial judge had agreed with the assessors and found the appellant guilty and convicted him on 19 February on the second and third counts and acquitted him of the first count. On 23 February 2018, he had been sentenced to imprisonments of 07 years each on the second and third counts. Trial judge had not imposed a non-parole period on the appellant.

[4] The Legal Aid Commission had appealed against conviction and sentence within time on 13 March 2018. Thereafter, the Legal Aid Commission had filed an amended notice of appeal containing a single ground of appeal against conviction and written submissions on behalf of the appellant on 04 September 2020. The State had tendered written submissions on 06 October 2020. The appellant had filed a Form 3 application dated 30 October 2020 to abandon his sentence appeal.

[5] In terms of section 21(1)(b) of the Court of Appeal Act, the appellants could appeal against conviction only with leave of court. The test for leave to appeal is **'reasonable prospect of success'** (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018]

FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019) in order to distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 and **Naisua v State** [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.

[6] The ground of appeal urged by the appellant.

> *Ground 1- 'That the learned trial judge erred in law and in fact when he convicted the Appellant on count 2 and 3 on evidence that raised a reasonable doubts and could not support a conviction.*

[7] The brief summary of facts as narrated by the High Court judge in the summing-up is as follows.

> *1) 'The prosecution's case was as follows. On 6 January 2017 at 6.30pm, Mr Ravin Nilesh Singh (PW1) was at Rodwell Road Suva, beside R.B. Supermarket. According to the prosecution, the two accused and two others alleged approached PW1. PW1 was at the time driving his father's taxi, registration number LT 3854. The taxi was a grey silver Toyota probox type. According to the prosecution, the accused alleged asked PW1 to be "dropped off" at Vatuwaqa. PW1 later took his customers to Vatuwaqa roundabout, and then to Rifle Range Road. PW1 said he only knew his passengers as i-taukei boys, but could not identify them.*
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> *2) According to the prosecution, the accused and his friends alleged attacked and overpowered PW1. They alleged held him by the neck and forced him out of the taxi. They later allegedly stole his taxi and the items mention in count no. 1. They allegedly drove away in PW1's taxi and left him at Vatuwaqa (count no. 1). According to the prosecution, this taxi was allegedly parked at the exist to Total Service Station at Laucala Beach Estate on 7 January 2017 after 11.15pm. According to the prosecution, at about the same time, four masked men attached the cashier (PW3) at the service station. Two masked men, armed with a knife, attacked PW3 at the cash counter and allegedly stole the items mentioned in count no. 2 (count no. 2).*
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> *3) Accordingly to the prosecution, while two robbers were in the Total Service Station shop, with another one guarding the front door, the fourth robber was walking around the bowser area. He allegedly approached PW4 and forcefully stole her hand bag, containing the items mentioned in count no. 3 (count no. 3). The robbers later fled in the waiting taxi, PW5, who was a customer at the service at the time, witnessed the robbery. He followed the*

robbers in the taxi through Ratu Dovi Road, Kings Road and Khalsa Road. He was driving his private car. A police patrol car later followed PW5's car, and later chased the robber's taxi through Kings Road, Khalsa Road, Princess Road and to Naisogo Road.

4) At Naisogo Road, the taxi bumped an oncoming vehicle, and the police vehicle bumped the taxi. The alleged robbers fled into the bush. According the prosecution, both accused, who alleged fled from the taxi, were caught and arrested by police. Items allegedly stolen from the Service Station and PW4 were found in the taxi. The accused were arrested and later charged with the offences in the information. Because of the above, the prosecution is asking you, as assessors and judges of fact, to find both accused guilty as charged. That was the case for the prosecution.'

[8] The appellant's complaint directly relates to or based on the evidence led at the trail whether the verdict of guilty is unreasonable or cannot be supported having regard to the evidence. His concern flows from his acquittal of count 01 and he argues that due to lack of proof of the connection between the Toyata Probox taxi robbed and the Toyata Probox taxi used as the getaway vehicle after the robbery on consecutive days, the second and third counts could not be considered as proved beyond reasonable doubt. The appellant's position is that the prosecution had not proved that the Toyata Probox taxi allegedly robbed on the 06 January 2017 was the one used as the getaway vehicle after the robbery on the 07 January 2017 and without establishing the said chain of events the conviction of counts 2 and 3 cannot stand.

[9] In **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992) the Court of Appeal stated as to what approach the appellate court should take in the face of a similar argument.

'That leaves us to consider the evidence, including the statements, in relation to each of the two counts appealed on the ground that it does not support the convictions. How is the Court to approach this?

Section 23(1)(a) of the Court of Appeal Act sets out our powers:

"23-(1) The Court of Appeal -

(a) on any such appeal against conviction shall allow the appeal if they think the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the Court before whom the appellant was convicted should be set aside on the grounds of a wrong decision of any question of law or that on any ground there was a miscarriage of justice and in any other case shall dismiss the appeal."

The present wording is from the Court of Appeal (Amendment) Decree 1990 but, in this part, follows exactly the wording of the previous section.

It also follows the wording of the English Court of Appeal Act 1907 and authorities under that section suggest the question the appellate Court should ask itself is whether there was evidence before the Court on which a reasonably minded jury could have convicted.

Authorities in England since the passing of the 1966 Act are based on the requirement that the Court shall consider whether the verdict is unsafe or unsatisfactory. That test has given a number of appeal decisions based on a wide ranging consideration of the evidence before the lower Court and the views of the appellate Court on it. We were urged to make it the basis of our consideration of the present case but section 23 does not allow us that liberty and the powers of this Court are limited by the statute that created it. The difference of approach between the two tests was concisely stated by Widgery LJ in the final passages of his judgment in ***R v Cooper*** *(1968) 53 Cr. App. R 82.*

Having considered the evidence against this appellant as a whole, we cannot say the verdict was unreasonable. There was clearly evidence on which the verdict could be based. Neither can we, after reviewing the various discrepancies between the evidence of the prosecution eyewitnesses, the medical evidence, the written statements of the appellant and his and his brother's evidence, consider that there was a miscarriage of justice.

It has been stated many times that the trial Court has the considerable advantage of having seen and heard the witnesses. It was in a better position to assess credibility and weight and we should not lightly interfere. There was undoubtedly evidence before the Court that, if accepted, would support such verdicts.

We are not able to usurp the functions of the lower Court and substitute our own opinion.

The appeal is dismissed.'

[10] I shall now examine the evidence in relation to the charges No.2 and No.3. From paragraph 24 of the summing-up it is clear that the fact that three robberies had been committed on the 06 January 2016 and 07 January 2017 had not been a contested fact during the trial and the trial judge had therefore directed the assessors to treat them as established on the evidence led of the victims.

[11] The spate of robberies mentioned in the information had started on 06 January with the robbery of the Toyota Probox taxi from PW1 at Rifle Range Road, Vatuwaqa. The robbers were unidentified. Then on 07 January after 11.15 p.m. a Toyota Probox taxi

without a registration number plate was seen by PW2-PW5 waiting at the exit to Total Service Station at Laucala Beach Estate. All these witnesses saw four masked i-taukei youths robbed PW3 and PW4 at the service station and fled in the Toyota Probox taxi.

[12] PW5 who had come to buy a recharge and saw the robbery at the service station and the robbers fleeing in the Toyota Probox taxi started giving chase in his car while PW2 had informed the police of the robbery. The police party also joined the chase behind Toyota Probox taxi and PW5's car. At a certain point PW5 had left the chase to the police party and after the police continued with the case for some distance the getaway Toyota Probox taxi had collided with an oncoming vehicle and the police vehicle had hit the Toyota Probox taxi from behind to prevent it escaping.

[13] All the passengers in the Toyota Probox taxi had got out of it and run in different directions. PW6 had managed to arrest the appellant while another had been arrested by PW8. Both had been assisted by other police officers in the police party.

[14] PW11 who had searched the Toyota Probox taxi had found a black bag inside it. A bold cutter and a wheel spanner also had been found inside the vehicle. Inside the black bag were assorted coins, cigarettes, re-charge cards and a lady's hand bag. PW4 had identified the ladies handbag as the one stolen from her at the Total Service Station earlier in the day. PW3, the cashier at the Total Service Station had testified that the robbers stole coins, cigarettes and re-charge cards from her during the robbery. PW5 had seen the robbers putting money and cigarettes into a black bag.

[15] PW1 had recognised at the police station the Toyota Probox taxi which was the getaway vehicle as his taxi robbed on 06 January.

[16] The appellant had given evidence and denied the allegation against him. He had also denied being in the taxi the robbers used to flee from the crime scene but had admitted being present at Naisogo Road where the chase came to a halt at the material time. His explanation was that he had come there to buy some marijuana.

[17] Therefore, I have no doubt that as stated in **Sahib v State** (supra) having considered the above evidence against the appellant as a whole, it cannot be said that the verdict was unreasonable. There was clearly evidence on which the verdict could be based. No miscarriage of justice had occurred.

[18] There was no necessity for the prosecution to establish the nexus between the Toyota Probox taxi robbed on 06 January and the one used as the getaway vehicle on 07 January, in that both were one and the same, in order to prove the charges mentioned in the second and third counts. The evidence regarding those counts could stand on its own. The chain of evidence the appellant is contemplating was required to prove that it was the appellant who robbed the Toyota Probox taxi on 06 January. However, both the assessors and the trial judge had thought that the available evidence was insufficient to connect the appellant with the robbery on 06 January. The trial judge had made this clear in paragraphs 7 and 8 of the judgment. He had dealt with counts 2 and 3 in paragraph 9-12. In other words, on the available evidence it could not be inferred that it was the appellant who must have been involved in the robbery on 06 January. The appellant had got the benefit, as he should, of the insufficiency of evidence in that regard and a deserving acquittal.

[19] Therefore, there is no reasonable prospect of success in this appeal ground.

Some observations on section 23 of the Court of Appeal Act.

[20] In the U.K. the statutory test for quashing a conviction was originally set out in section 4 of the Criminal Appeal Act 1907: the court could allow the appeal

> *'if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice.'*

[21] There was also a proviso to section 4 which allowed the court to dismiss the appeal if it considered that no substantial miscarriage of justice had actually occurred.

"Provided that the Court may, notwithstanding that they are of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

[22] This purpose of the proviso was described in an early case as being that it *'enables the court to go behind technical slips and do substantial justice'* (see **R v Meyer** (1908) 1 Cr. App. R. 10)

[23] Thus, the legal regime in the U.K. under Criminal Appeal Act 1907 was similar to section 23 of the Court of Appeal Act in Fiji except that the trial is both by the assessors and the judge in Fiji where the ultimate decider of facts and law is the judge whereas the in UK trials were by jury. How section 4 was interpreted in the U.K. could be seen from the following decisions.

[24] **R v Williamson** (1908) 1 Cr. App. R 3, Lord Alverstone, the Lord Chief Justice, stated

'It must be understood that we are not here to re-try the case where there was evidence proper to be left to the jury upon which they could come to the conclusion at which they arrived.'

[25] Similarly, in **R v Simpson** (1909) 2 Cr. App. R 129, Darling J stated

'the jury are the judges of fact. The Act was never meant to substitute another form of trial for trial by jury. The case was not a strong one. It would have been open to the jury to acquit and no one could have called the verdict perverse. But the verdict which the jury have given must stand.'

[26] Similarly, in **R v Graham** (1910) 4 Cr. App. R. 218 Channell J stated

'unless we are to retry cases we can do nothing in a case like this. It is not because the jury might properly have found the other way that we can do anything. We are not authorised to retry the case.'

[27] This attitude was not just limited to the early years of the court. In 1921 in the case of **R v Cotton** (1921) 15 Cr. App. R. 142 Avory J stated that the Court *'sits only to determine whether justice has been done and not for the retrial of criminal cases.'*

[28] In 1949 in the case of **R v McGrath** (1949) 2 All ER 495 at 496 the then Lord Chief Justice, Lord Goddard said that the Court was:

'Frequently asked to reverse verdicts in cases in which a jury has rejected an alibi, but this court cannot interfere in those cases in the ordinary way, because to do so would be to usurp the function of the jury. Where there is evidence on which a jury can act and there has been a proper direction to the jury this court cannot substitute itself for the jury and re-try the case. That is not our function.'

[29] Then, in the U.K. the test whether a verdict of guilty was 'unsafe or unsatisfactory' was adopted with the passing of Criminal Appeal Act 1968. **R v Cooper** (1969) 53 Cr.App.R. 82 interpreted the new 'unsafe and unsatisfactory' ground. Lord Widgery stated the pre 1968 situation as follows:

"'.....it is, therefore, a case in which every issue was before the jury and in which the jury was properly instructed, and, accordingly, a case in which this Court will be very reluctant indeed to intervene. It has been said over and over again throughout the years that this Court must recognise the advantage which a jury has in seeing and hearing the witnesses, and if all the material was before the jury and the summing-up was impeccable, this Court should not lightly interfere. Indeed, until the passing of the Criminal Appeal Act 1966 it was almost unheard of for this Court to interfere in such a case.

[30] Then, Lord Widgery went onto describe the change introduced to the test by post 1969 approach in the following words.

'However, now our powers are somewhat different, and we are indeed charged to allow an appeal against conviction if we think that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe and unsatisfactory. That means that in cases of this kind the Court must ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the Court experiences it.

[31] In the U.K. the Court's decision to quash the convictions of the Birmingham Six and the Guildford Four finally led to the reforms in the 1995 Criminal Appeal Act. The new statutory test for quashing convictions was set out in s.2 of the Criminal Appeal Act 1968 as amended by the Criminal Appeal Act 1995 which stated that the Court of Appeal (a) shall allow an appeal against conviction if they think that the conviction is

unsafe; and (b) shall dismiss such an appeal in any other case. The proviso was now repealed as it was not considered necessary under the amended test.

[32] Nevertheless, the legislative frame work in Fiji *i.e.* section 23 of the Court of Appeal Act is still the same as that was prevalent under Criminal Appeal Act 1907 in the UK. Hence the approach taken in **Sahib v State** (supra).

[33] In **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015) the Court of Appeal confirmed this position.

> *'[54] In attempting to obtain guidance on the application of section 23(1) of the Court of Appeal Act from the English decisions, reliance can only be placed on those decisions prior to 1968. Section 23(1) is in virtually identical terms to section 4(1) of the Criminal Appeal Act 1907 (UK) which remained in force until 1966. From 1968 the bases upon which the English Court of Appeal must allow an appeal have changed in substance to the point where since 1995 the only test to be applied is whether the conviction is unsafe. This is not the law in Fiji. In addition since 1995 in England there is no longer any provision for the application of the proviso. As a court created by statute the powers of the Court of Appeal in criminal appeals are derived from and are confined to those given in Part IV of the Court of Appeal Act Cap 12. The Court of Appeal does not have an inherent jurisdiction in relation to criminal appeals since the appeal itself is a creation of statute: (See **R –v- Jeffries** [1969] 1 QB 120 and **R –v- Collins** [1970] 1 QB 710).*

Order

1. Leave to appeal against conviction is refused.

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL.