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

CRIMINAL APPEAL NO.AAU 18 of 2018
[High Court of Suva Criminal Case No. HAC 217 of 2015]

BETWEEN

: **LEONE ROKOMARAIVALU**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Appellant in person**
: **Mr. Y. Prasad for the Respondent**

Date of Hearing : **25 May 2020**

Date of Ruling : **01 June 2020**

RULING

[1] The appellant had been indicted in the High Court on one count of aggravated robbery contrary to section 311(1)(a) of the Crimes Decree, 2009 and one count of theft of motor vehicle contrary to section 291(1) of the Crimes Decree, 2009. The charges against the appellant were as follows.

"Count 1

Statement of Offence

Aggravated Robbery: Contrary to section 311(1)(a)of the Crimes Decree No.44 of 2009.

Particulars of Offence

Leone Rokomaraivali and others on the 28th day of May, 2015 at Visama, in the robbed DEO KUMAR of 3 gold diamond rings valued $3000.00, mangul sutra valued at $3000.00, 7 gold bangles worth $4500.00 and $9000.00 cash all to the total value $32,847.00 and immediately before committing such robbery, personal violence was used on the said ANILA SINGH.

Count 2

Statement of offence

Theft of Motor vehicle: Contrary to section 291(1) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

LEONE ROKOMARAIVALU and others on the 28th day of May, 2012 at Visama in the Central Division stole a motor vehicle registration number EG 075 valued at $12,000.00 the property of DEO KUMAR."

[2] After trial, the assessors had expressed a unanimous opinion of guilty against the appellant and the learned High Court Judge had agreed with the assessors and convicted him of both counts in his judgment dated 29 June 2017. The appellant was sentenced on 31 July 2017 to imprisonment of 12 years and 10 months with a non-parole period of 11 years on the first count and 05 years of imprisonment on the second count and both sentences were directed to run concurrently on the totality principle of sentencing.

[3] The appellant had appealed in a timely manner against conviction and sentence on 07 August 2017. He had tendered further grounds dated 14 March 2018 and an application for bail pending appeal on 16 March 2018. The same further grounds dated 14 March 2018 had been resubmitted to the CA registry on 21 March 2018. He had filed submissions dated 23 January 2019 regarding the application for bail pending appeal and a note containing case laws dated 18 February 2019.

[4] In terms of section 21(1)(b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence only with leave of court. The threshold test

applicable is **'reasonable prospect of success'** to determine whether leave to appeal should be granted (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). This threshold is the same with timely leave to appeal applications against conviction as well as sentence.

[5] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled. In **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14 the Supreme Court following the decisions in **House v The King** [1936] HCA 40; (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011 set out the sentencing errors that could trigger the leave to appeal decision. The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of ***Kim Nam Bae's*** case. **For a ground of appeal against sentence in a timely appeal to be considered arguable there must be a reasonable prospect of its success in appeal.** The said guidelines are as follows.

> *(i) Acted upon a wrong principle;*
> *(ii) Allowed extraneous or irrelevant matters to guide or affect him.*
> *(iii) Mistook the facts;*
> *(iv) Failed to take into account some relevant consideration.*

Law relating to bail pending appeal

[6] In **Tiritiri v State** [2015] FJCA 95; AAU09.2011 (17 July 2015) the Court of Appeal reiterated the applicable legal provisions and principles in bail pending appeal applications as earlier set out in **Balaggan v The State** AAU 48 of 2012 (3 December 2012) [2012] FJCA 100 and repeated in **Zhong v The State** AAU 44 of 2013 (15 July 2014) as follows.

[5] There is also before the Court an application for ***bail pending appeal*** *pursuant to section 33(2) of the Act. The power of the Court of Appeal to grant* ***bail pending appeal*** *may be exercised by a justice of appeal pursuant to section 35(1) of the Act.*

[6] In ***Zhong –v- The State*** *(AAU 44 of 2013: 15 July 2014) I made some observations in relation to the granting of* ***bail pending appeal****. It is appropriate to repeat those observations in this ruling:*

> *"[25] Whether* ***bail pending appeal*** *should be granted is a matter for the exercise of the Court's discretion. The words used in section 33 (2) are clear. The Court may, if it sees fit, admit an appellant to* ***bail pending appeal****. The discretion is to be exercised in accordance with established guidelines. Those guidelines are to be found in the earlier decisions of this court and other cases determining such applications. In addition, the discretion is subject to the provisions of the Bail Act 2002. The discretion must be exercised in a manner that is not inconsistent with the Bail Act.*
>
> *[26] The starting point in considering an application for* ***bail pending appeal*** *is to recall the distinction between a person who has not been convicted and enjoys the presumption of innocence and a person who has been convicted and sentenced to a term of imprisonment. In the former case, under section 3(3) of the Bail Act there is a rebuttable presumption in favour of granting bail. In the latter case, under section 3(4) of the Bail Act, the presumption in favour of granting bail is displaced.*
>
> *[27] Once it has been accepted that under the Bail Act there is no presumption in favour of bail for a convicted person appealing against conviction and/or sentence, it is necessary to consider the factors that are relevant to the exercise of the discretion. In the first instance these are set out in section 17 (3) of the Bail Act which states:*
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> *"When a court is considering the granting of bail to a person who has appealed against conviction or sentence the court must take into account:*
>
> *(a) the likelihood of success in the appeal;*
>
> *(b) the likely time before the appeal hearing;*
>
> *(c) the proportion of the original sentence which will have been served by the appellant when the appeal is heard."*
>
> *[28] Although section 17 (3) imposes an obligation on the Court to take into account the three matters listed, the section does not preclude a court from taking into account any other matter which it considers to be relevant to the application. It has been well established by cases*

*decided in Fiji that **bail pending appeal** should only be granted where there are exceptional circumstances. In **Apisai Vuniyavawa Tora and Others –v- R** (1978) 24 FLR 28, the Court of Appeal emphasised the overriding importance of the exceptional circumstances requirement:*

"It has been a rule of practice for many years that where an accused person has been tried and convicted of an offence and sentenced to a term of imprisonment, only in exceptional circumstances will he be released on bail during the pending of an appeal."

*[29] The requirement that an applicant establish exceptional circumstances is significant in two ways. First, exceptional circumstances may be viewed as a matter to be considered in addition to the three factors listed in section 17 (3) of the Bail Act. Thus, even if an applicant does not bring his application within section 17 (3), there may be exceptional circumstances which may be sufficient to justify a grant of **bail pending appeal**. Secondly, exceptional circumstances should be viewed as a factor for the court to consider when determining the chances of success.*

*[30] This second aspect of exceptional circumstances was discussed by Ward P in **Ratu Jope Seniloli and Others –v- The State** (unreported criminal appeal No. 41 of 2004 delivered on 23 August 2004) at page 4:*

*"The likelihood of success has always been a factor the court has considered in applications for **bail pending appeal** and section 17 (3) now enacts that requirement. However it gives no indication that there has been any change in the manner in which the court determines the question and the courts in Fiji have long required a very high likelihood of success. It is not sufficient that the appeal raises arguable points and it is not for the single judge on an application for **bail pending appeal** to delve into the actual merits of the appeal. That as was pointed out in Koya's case (**Koya v The State** unreported AAU 11 of 1996 by Tikaram P) is the function of the Full Court after hearing full argument and with the advantage of having the trial record before it."*

*[31] It follows that the long standing requirement that **bail pending appeal** will only be granted in exceptional circumstances is the reason why "the chances of the appeal succeeding" factor in section 17 (3) has been interpreted by this Court to mean a very high likelihood of success."*

[7] In **Ratu Jope Seniloli & Ors. v The State** AAU 41 of 2004 (23 August 2004) the Court of Appeal said that the likelihood of success must be addressed first, and the two remaining matters in S.17(3) of the Bail Act namely *"the likely time before the appeal hearing"* and *"the proportion of the original sentence which will have been served by the applicant when the appeal is heard"* are directly relevant *' only if the Court accepts there is a real likelihood of success'* otherwise, those latter matters *'are otiose'* (See also **Ranigal v State** [2019] FJCA 81: AAU0093.2018 (31 May 2019)

[8] In **Kumar v State** [2013] FJCA 59; AAU16.2013 (17 June 2013) the Court of Appeal said *'This Court has applied section 17 (3) on the basis that the three matters listed in the section are mandatory but not the only matters that the Court may take into account.'*

[9] In **Qurai v State** [2012] FJCA 61; AAU36.2007 (1 October 2012) the Court of Appeal stated

> *'It would appear that exceptional circumstances is a matter that is considered after the matters listed in section 17 (3) have been considered. On the one hand exceptional circumstances may be relied upon even when the applicant falls short of establishing a reason to grant bail under section 17 (3).*
>
> *On the other hand exceptional circumstances is also relevant when considering each of the matters listed in section 17 (3).'*

[10] In ***Balaggan*** the Court of Appeal further said that *'The burden of satisfying the Court that the appeal has a very high likelihood of success rests with the Appellant'*

[11] In ***Qurai*** it was stated that:

> *"... The fact that the material raised arguable points that warranted the Court of Appeal hearing full argument with the benefit of the trial record does not by itself lead to the conclusion that there is a very high likelihood that the appeal will succeed...."*

[12] Justice Byrne in **Simon John Macartney v. The State** Cr. App. No. AAU0103 of 2008 in his Ruling regarding an application for bail pending appeal said with reference to arguments based on inadequacy of the summing up of the trial [Also see **Talala v State** [2017] FJCA 88; ABU155.2016 (4 July 2017)].

> *"[30].....All these matters referred to by the Appellant and his criticism of the trial Judge for allegedly not giving adequate directions to the assessors are not matters which I as a single Judge hearing an application for* ***bail pending appeal*** *should attempt even to comment on. They are matters for the Full Court ... ."*

[13] ***Qurai*** quoted **Seniloli and Others v The State** AAU 41 of 2004 (23 August 2004) where Ward P had said

> *"The general restriction on granting* ***bail pending appeal*** *as established by cases by Fiji is that it may only be granted where there are exceptional circumstances. That is still the position and I do not accept that, in considering whether such circumstances exist, the Court cannot consider the applicant's character, personal circumstances and any other matters relevant to the determination. I also note that, in many of the cases where exceptional circumstances have been found to exist, they arose solely or principally from the applicant's personal circumstances such as extreme age and frailty or serious medical condition."*

[14] Therefore, the legal position appears to be that the appellant has the burden of satisfying the appellate court firstly of the existence of matters set out under section 17(3) of the Bail Act and thereafter, in addition to that the existence of exceptional circumstances. However, an appellant can even rely only on 'exceptional circumstances' including extremely adverse personal circumstances when he cannot satisfy court of the presence of matters under section 17(3) of the Bail Act.

[15] Further, out of the three factors listed under section 17(3) of the Bail Act, 'likelihood of success' would be considered first and if the appeal has a 'very high likelihood of success' then the other two matters in section 17(3) need to be considered, for otherwise they have no practical purpose or result.

[16] Therefore, when this court considers leave to appeal or leave to appeal out of time (*i.e.* enlargement of time) and bail pending appeal together it is only logical to consider leave to appeal or enlargement of time first, for if the appellant cannot reach the threshold for either of them he cannot then obviously reach the much higher standard of 'very high likelihood of success' for bail pending appeal. If an appellant fails in that respect the court need not go onto consider the other two factors under section 17(3). However, the court would still see whether the appellant has shown other exceptional

circumstances to warrant bail pending appeal independent of the requirement of 'very high likelihood of success'.

Grounds of appeal

[17] The grounds of appeal urged by the appellant are as follows.

<u>Grounds of appeal against conviction</u>

(1) That trial Judge erred in law when he failed to disallow the confession that was obtained through the breach of the appellant's constitutional rights and or through force or oppressive or trick.

(2) That the trial Judge erred in law when he convicted the Appellant for aggravated robbery rather than aggravated burglary.

(3) That the trial Judge erred in law regarding his direction as far as Aggravated Robbery concern and further erred when he failed to hold or direct the Assessors that the Offence if any committed by the Appellant was Aggravated Burglary.

(4) That the trial judge erred in law when he directed the assessors to convict the appellant on his confession and charge statement without first directing the Assessors if they are satisfied that Appellant's confession and charge statement were voluntarily obtained.

(5) That the trial judge erred in law when he directed the assessors as "When a prima facie case was found against him, at the end of the prosecution, wherein he was called upon to make his defence, he chooses to give sworn evidence and called witness. That was his right. "implied to the assessors that the court had found evidence against the appellant to be guilty of the offence.

(6) That the trial judge erred in law is directing the assessors that if you accept the confession is a strong evidence against the Appellant.

(7i) That the trial Judge erred in law when he directed the assessors that if they accept the accused confession then he should be guilty of the offence without directing that confession itself was not sufficient to convict the Appellant for the offence.

<u>Additional Grounds of appeal against conviction</u>

(8) That the learned High Court judge erred in law and in fact when he failed to direct the assessors that the truthfulness and voluntariness of confession was a matter for them to decide in the light of all evidence in the matter.

(9) That the learned High Court Judge had summed up the assessors on the following terms on the caution interview. The judge had not addressed the assessors on the caution interview anywhere else in the summing up.

(10) That the learned High Court judge had failed to give any direction to the assessors regarding the alleged confession contained in the caution interview in particular as to how to approach it and that the weight to be attached to the disputed confession was a matter for them to decide along with other evidence.

(11) The learned trial Judge has failed to give any direction to the assessors regarding the confession contained in the caution interview in particular as to how to approach it and that the weight to be attached to the disputed confession was a matter for them to decide along with all other evidence according to the appellant. The High Court judge out to have warned the assessors that they could use the statement in the caution interview against the appellant only if they were satisfied that it was made by him and it was truthful and accurate.

Grounds of appeal against sentence

(12) That the trial Judge erred in law regarding the principle of sentencing when he failed to consider the mitigating factors.

(13) That the sentence is harsh and excessive in all the circumstances.

(14) That the trial judge erred in law by not deducting the period of remand from the sentence.'

01st ground of appeal

[18] The appellant has not demonstrated any particular constitutional rights allegedly violated in the recording of his cautioned interview. Nor has he elaborated as to why he says that it had been obtained through fear, force or under oppression or threat. His position had been that he was deceived into making the confession.

[19] In the *voir dire* ruling dated 07 March 2017 the learned trial judge had stated as follows.

> *'2. During the police investigation, the accused was caution interviewed by police at the crime office at Nausori Police Station, on 2 and 3 June 2015. In his caution interview statements, the accused allegedly admitted the above*

offences. On 3 June 2015, the accused was also formally charged by police. In his charge statement, the accused also allegedly admitted the offences.

3. In a voir dire hearing on 6 and 7 March 2017, the accused formally challenged the admissibility of his alleged above admissions, on the ground that the police tricked him into making the above confessions on the ground that they will grant him immunity from prosecution.

6. I had carefully listened to and considered the evidence of the prosecution and defence's witnesses. The accused alleged the police promised him immunity from prosecution in exchange for his alleged confession. He also said, the police gave him 7 body punches when he was arrested on 1 June 2015 at Makoi Service Station. He appeared to say that because of the above, he did not give his alleged confession voluntarily.

7. The police, on the other hand, said, the accused was not assaulted, threatened or made false promises while he was in their custody. They said, he gave his caution interview and charge statements voluntarily and out of his own free will. The police said he was given all his legal rights when caution interviewed and when formally charged. They said, he was formally cautioned and given his rest and meal breaks. They said, when he first appeared in the Nausori Magistrate Court on 4 June 2015, he never complained to the Magistrate of any untoward police behaviour. They also said, he did not complain to the High Court of any police misbehaviour on 12 June 2015 when he first appeared there.

8. I have carefully considered and compared the parties' evidence. I find the prosecution's witnesses' evidence credible, and I accept them. I find that the police did not assault, threaten or made false promises to the accused during his interview and when formally charged. I find he gave his caution interview and charge statements voluntarily and I declare the same as admissible evidence in the trial proper.

9. Despite making the above decision, my mind is not closed. Depending on the parties' performance in the trial proper and the opinions of the assessors, the acceptance or otherwise of the above alleged confessions in the trial proper, will be a matter for the assessors. I rule so accordingly.'

[20] The learned trial judge in paragraphs 19 and 30 put to the assessors the appellant's position that his confession had been obtained by promising immunity from prosecution.

[21] Accordingly, I find no merit in this ground of appeal.

02nd and 03rd grounds of appeal

[22] The appellant has not substantiated his argument that the learned trial judge had erred in his directions on aggravated robbery, he should have directed the assessors on aggravated burglary and also erred in convicting him of aggravated robbery rather than aggravated burglary.

[23] The appellant's confession seems to establish elements of a clear case of aggravated robbery and therefore, there was no need to address the assessors on aggravated burglary.

[24] There two grounds are without merit.

04th and 08th to 11th grounds of appeal *(Respondent's submissions have not addressed 08th to 11th grounds of appeal)*

[25] All these grounds relate to the alleged failure on the part of the learned trial judge in the summing-up on different aspects concerning the appellant's confession namely its voluntariness, truthfulness and weight.

[26] In **Tuilagi v State** [2017] FJCA 116; AAU0090.2013 (14 September 2017) the Court of Appeal analyzing previous decisions stated the correct approach to be adopted by trial judges regarding a confession as follows.

> *'The correct law and appropriate direction on how the assessors should evaluate a* ***confession*** *could be summarised as follows.*
>
> *(i) The matter of admissibility of a confessional statement is a matter solely for the judge to decide upon a voir dire inquiry upon being satisfied beyond reasonable doubt of its voluntariness (vide* ***Volau v State*** *Criminal Appeal No.AAU0011 of 2013: 26 May 2017 [2017] FJCA 51).*
>
> *(ii) Failing in the matter of the voir dire, the defence is entitled to canvass again the question of voluntariness and to call evidence relating to that issue at the trial but such evidence goes to the weight and value that the jury would attach to the* ***confession*** *(vide* ***Volau****).*
>
> *(iii) Once a* ***confession*** *is ruled as being voluntary by the trial Judge, whether the accused made it, it is true and sufficient for the conviction (i.e. the weight*

or probative value) are matters that should be left to the assessors to decide as questions of fact at the trial. In that assessment the jury should be directed to take into consideration all the circumstances surrounding the making of the ***confession*** *including allegations of force, if those allegations were thought to be true to decide whether they should place any weight or value on it or what weight or value they would place on it. It is the duty of the trial judge to make this plain to them. (emphasis added) (vide* ***Volau*****).**

(iv) Even if the assessors are sure that the defendant said what the police attributed to him, they should nevertheless disregard the ***confession*** *if they think that it may have been made involuntarily (vide* ***Noa Maya v. State*** *Criminal Petition No. CAV 009 of 2015: 23 October [2015 FJSC 30])*

(v) However, ***Noa Maya*** *direction is required only in a situation where the trial Judge changes his mind in the course of the trial contrary to his original view about the voluntariness or he contemplates that there is a possibility that the confessional statement may not have been voluntary. If the trial Judge, having heard all the evidence, firmly remains of the view that the* ***confession*** *is voluntary, Noa Maya direction is irrelevant and not required (vide* ***Volau*** *and* ***Lulu v. State*** *Criminal Appeal No. CAV 0035 of 2016: 21 July 2017 [2017] FJSC 19.'*

[27] Upon a perusal of the summing-up, I find that the learned trial judge had dealt with the issues highlighted by the appellant in the following manner which amount to substantial compliance with the legal requirements of directions when a confession of the accused is relied upon by the prosecution. There is no incantation which must be read in a summing-up and the required guidance need not be formulaic (see **Khan v State** [2014] FJSC 6; CAV009.2013 (17 April 2014).

> *'28. In any event, when considering the above alleged confession by the accused, I must direct you as follows, as a matter of law. A confession, if accepted by the trier of fact – in this case, you as assessors and judges of fact – is strong evidence against its maker. However, in deciding whether or not you can rely on a confession, you will have to decide two questions. First, whether or not the accused did in fact make the statements contained in his police caution statements and charge statements? If your answer is no, then you have to disregard the statements. If your answer is yes, then you have to answer the second question. Are the confessions true? In answering the above questions, the prosecution must make you sure that the confessions were made and they were true. You will have to examine the circumstances surround the taking of the statements from the time of his arrest to when he was first produced in court. If you find he gave his statements voluntarily and the police did not assault, threaten or made false promises to him, while in their custody, then you might give*

more weight and value to those statements. If it's otherwise, you may give it less weight and value. It is a matter entirely to you.

29. If you accept the accused's above confession, then you will have to find the accused guilty as charged on both counts. If you don't accept the same, then you will have to find the accused not guilty as charged on both counts. It is a matter entirely for you.

31. If you accept the accused's sworn denial, then you will have to find him not guilty as charged on both counts. If you reject his sworn details, then you will have to consider his alleged confessions. It is a matter entirely for you.'

[28] Therefore, these are not grounds that have a reasonable prospect of success in appeal.

05th ground of appeal

[29] The appellant's complaint is based on paragraph 18 of the summing-up where the learned trial judge had *inter alia* said *"When a prima facie case was found against him, at the end of the prosecution, wherein he was called upon to make his defence, he chooses to give sworn evidence and called witness. That was his right.'*

[30] The appellant argues that the above statement may have been interpreted by the assessors to the effect that the judge had already found him guilty or at least made up his mind.

[31] **Raqio v State [2017] FJCA 82; AAU0061A.2015 (23 June 2017)** Gounder J. made some observations on a similar complaint as follows.

> *'[6] In paragraph 25 of the summing up, the learned trial judge informed the assessors that a prima facie case was found against the appellant at the end of the prosecution's case while directing on the options that were available to the appellant after that ruling was made. Counsel for the appellant submits that the disclosure of the no case to answer ruling to the assessors was wholly in appropriate and prejudicial to the appellant. A similar disclosure of the no case to answer ruling was made to the jury by the trial judge in the English case of R v Smith and Doe 85 Cr App R 197 CA. In that case, Watkins LJ said at p 200:*
>
> *The question as to whether or not there is a sufficiency of evidence is one which is exclusively for the judge following submissions made to him in the*

> *absence of the jury. His decision should not be revealed to the jury lest it wrongly influences them. There is a risk that they might convict because they think the judge's view is sufficient indication that the evidence is strong enough for that purpose.*

[32] However, in **R v Smith and Doe** 85 Cr App R 197 CA Watkins LJ also said as follows implying that miscarriage of justice had not occurred by disclosing the trial judge's decision to the jury.

> *'That, however, would not in the circumstances of this case, be a reason standing by itself, having regard to the other directions given to the jury on identification, for declaring that these verdicts are unsafe and unsatisfactory.*

[33] ***Raqio*** and ***Smith and Doe*** have to be considered in the background of the settled law in Fiji that the verdict, that is, the decision to convict or acquit in a case is always that of the judge (vide **Joseph v The King** [1948] AC 21and **Ram Dulare & Or v R** [1955] 5 FLR 1). The assessors only give an opinion which the trial judge may or may not accept (vide section 237 (2) of the Criminal Procedure Act). The observations of Watkins LJ in ***Smith and Doe*** are applicable to a system of jury whose members are the ultimate judges of facts as in the UK but in Fiji it is the trial Judge who is the ultimate authority on facts and law and the assessors only express non-binding opinions [see also **Prasad v R** (1980) 72 Cr. App. R 2018 for valuable observations in regard to the functions of assessors in Fiji as opposed to jury members in UK and how the arena of a judge's comments on facts in a summing-up in Fiji differs from that of a trial judge in UK].

[34] However, it is always desirable that the trial judges avoid such pronouncements in the summing-up. Nevertheless, in the light of all other directions and particularly paragraphs 6 and 38 of the summing-up, any adverse impact arising from the trial judge's impugned comments on the assessors has been almost negated. Therefore, I do not think that the impugned statement would have caused a miscarriage of justice (see ***Raqio*** and **Balekivuya v State** [2016] FJCA 16; AAU0081.2011 (26 February 2016)'.

[35] Therefore, I hold that there is no reasonable prospect of success in the appeal as far as the fifth appeal ground is concerned.

06th ground of appeal

[36] I do not think that there is anything wrong in the learned trial judge's statement in paragraph 28 ' *A confession, if accepted by the trier of fact – in this case, you as assessors and judges of fact – is strong evidence against its maker*'. There no merit in this ground of appeal.

07th ground of appeal

[37] The appellant complains that the statement in paragraph 29 of the summing-up '*If you accept the accused's above confession, then you will have to find the accused guilty as charged on both counts.*' is an error of law. The trial judge proceeded further and said '*If you don't accept the same, then you will have to find the accused not guilty as charged on both counts. It is a matter entirely for you.*'

[38] The trial judge also said in paragraph 30 ' *If you accept the accused's sworn denial, then you will have to find him not guilty as charged on both counts. If you reject his sworn details, then you will have to consider his alleged confessions. It is a matter entirely for you.* '

[39] In the light of the fact that the only evidence against the appellant came from his confession the above directions cannot be criticized. There is no merit in this ground of appeal.

Grounds of appeal against sentence

12th ground of appeal

[40] What mitigating factors the trial judge had ignored in the sentencing order by the learned trial judge have not been highlighted by the appellant. There is no merit in the appellant's complaint.

13th ground of appeal

[41] The maximum sentence for aggravated robbery under section 311(1)(a) of the Crime Decree, 2009 is 20 years. The sentence of 12 years and 10 months with a non-parole period of 11 years is well within the sentencing tariff of 08-16 years of imprisonment set in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) for aggravated robbery in the form of a home innovation in the night with accompanying violence perpetrated on the inmates. The appellant was found guilty of exactly a similar type of offence. Therefore, there is no merit in the appellant's argument.

14th ground of appeal

[42] The learned trial judge has deducted 2 years and 02 months on account of the period of remand as stated in paragraph 8 of the sentencing order and therefore there is no merit in the appellant's complaint.

> *'On count no. 1 (aggravated robbery), I start with a sentence of 12 years imprisonment. I add 3 years for the aggravating factors, making a total of 15 years imprisonment. I deduct 2 years 2 months for time already served, while remanded in custody, leaving a balance of 12 years 10 months imprisonment.'*

[43] Therefore, none of the grounds urged by the appellant has any reasonable prospect of success to be given leave to appeal. Nor do they, logically have a 'high likelihood of success' to consider bail pending appeal.

[44] The appellant has not submitted any other exceptional circumstances for this Court to consider his bail pending appeal application favourably.

Orders

1. Leave to appeal against conviction and sentence is refused.
2. Bail pending appeal is refused.

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL