

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

**CRIMINAL APPEAL NO.AAU 0092 of 2019**  
**[High Court of Suva Case No. HAC 362 of 2017S]**

**BETWEEN** ; **LIVAI DRIGITA**

**Appellant**

**AND** : **STATE**

**Respondent**

**Coram** : **Prematilaka, JA**

**Counsel** : **Mr. S. Waqainabete for the Appellant**  
: **Ms. E. Rice for the Respondent**

**Date of Hearing** : **10 March 2021**

**Date of Ruling** : **15 March 2021**

## **RULING**

[1] The appellant (03<sup>rd</sup> accused) had been charged with two others in the High Court of Suva with 02 counts of aggravated robbery contrary to section 311(1)(b) and 311(1)(a) of the Crimes Act, 2009, one count of aggravated burglary contrary to section 313 (1) (a) of the Crimes Act of 2009 and one count of theft contrary to section 291 (1) of the Crimes Act, 2009 committed on 15 November 2017 at Nasinu in the Central Division. The information read as follows.

*“First Count*

*Statement of Offence*

**AGGRAVATED ROBBERY: Contrary to section 311 (1) (b) of the Crimes Act of 2009**

*Particulars of Offence*

*ARVIND CHAND, JONETANI ROKOTUINASAU AND LIVAI DRIGITA on the 15<sup>th</sup> day of November, 2017, at Bau Road, Nausori in the Central Division, robbed SURUJ PRASAD of 1 x Nokia mobile phone valued at \$60.00 and cash of \$110.00 all to the total value of \$170.00 the properties of SURUJ PRASAD, and at the same time of such robbery had a pinch bar with them.*

*Second Count*

*Statement of Offence*

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

*Particulars of Offence*

*ARVIND CHAND, JONETANI ROKOTUINASAU AND LIVAI DRIGITA on the 15<sup>th</sup> day of November, 2017, at Bau Road, Nausori in the Central Division, robbed UMA KUMARI MISHRA of 1 x silver and gold ring valued at \$1,600.00, 1 x 22 carat gold chain valued at \$2,000.00, 2 x gold wrist watch valued at \$1,000.00, 2 x Alcatel mobile phone valued at \$210.00, 2 x Dell tablet valued at \$1,000.00, 2 x wrist watches valued at \$1,600.00 and assorted imitation jewelries valued at \$50.00, all to the total value of \$7,460.00 the properties of UMA KUMARI MISHRA, and at the time of such a robbery, did use personal violence on the said UMA KUMARI MISHRA.*

*Third Count*

*Statement of Offence*

*AGGRAVATED BURGLARY: Contrary to section 313 (1) (a) of the Crimes Act of 2009*

*Particulars of Offence*

*ARVIND CHAND, JONETANI ROKOTUINASAU AND LIVAI DRIGITA on the 15<sup>th</sup> day of November, 2017, at Bau Road, Nausori in the Central Division, entered into the house of ROHINI NANDAN as a trespasser with intent to steal.*

*Fourth Count*

*Statement of Offence*

*THEFT: Contrary to section 291 (1) of the Crimes Act of 2009*

### *Particulars of Offence*

*ARVIND CHAND, JONETANI ROKOTUINASAU AND LIVAI DRIGITA on the 15<sup>th</sup> day of November, 2017, at Bau Road, Nausori in the Central Division, stole 5 x pairs of canvas valued at \$700.00, the property of ROHINI NANDAN”.*

- [2] The trial judge had succinctly described the evidence led by the prosecution in the sentencing order as follows. The appellant had not given evidence at the trial.

2. *The brief facts were as follows. On the early morning of 15 November 2017, three complainant's houses in Bau Road, Nausori, were raided by the three accuseds and others. Accused No. 2, 3 and another went to the houses of Mr. Suruj Prasad (PW1), Ms. Uma Kumari Mishra (PW2) and Ms. Rohini Nandan's (PW3), broke into the same, and stole the items mentioned in count no. 1, 2 and 4. PW1 was attacked and his properties stolen between 1.30 am and 2.15 am, on 15 November 2017 (count no. 1). He was attacked with a pinch bar, and had a coffee table thrown at him. He reported the matter to police, by mobile phone, between 2 am and 2.15 am.*

3. *PW3's house was burgled and her properties stolen between 3 am and 3.30 am on 15 November 2017 (count no. 3 and 4). This was approximately 45 minutes after the crime against PW1. PW3 reported the matter to police at about 3.30 am. PW2 was attacked and robbed between 3.45 am and 4 am on 15 November 2017. She reported the matter to police at 4 am. The police responded and a police vehicle and three police officers were dispatched to the crime scenes. Sgt. 2870 Adrian Choy (PW4) saw Accused No. 1's hybrid motor vehicle, registration number JB 405, speeding along Bau Road with a flat tyre.*

4. *PW4 later came to the vehicle, saw Accused No. 1 in the same, and arrested him. Accused No. 2 and 3 were also in the vehicle, but fled from the same, when accused no. 1 was arrested. The police found PW1, PW2 and PW3's stolen items in the car. The court found that all the accuseds acted together as a group in committing the crimes in all the counts against PW1, PW2 and PW3. The court found Accused No. 2, 3 and another did the breaking into the complainants' houses, attacking PW1 and PW2, and stealing their properties, while Accused No. 1 was the transport man and getaway driver.*

- [3] After the summing-up on 28 June 2019 the assessors had unanimously opined that the appellant was guilty. The High Court judge had agreed with the assessors in the judgment delivered on 01 July 2019 and convicted the appellant as charged and

sentenced him on 08 July 2019 to 13 years and 02 months of imprisonment with a non-parole period of 10 years.

- [4] The appellant had timely appealed against conviction and sentence on 18 July 2019. The Legal Aid Commission had filed an amended notice of appeal against conviction and sentence and written submissions on 11 November 2020. The state had tendered written submissions on 03 December 2020 but dealt with not the amended 03 grounds of appeal but with 09 initial grounds of appeal against conviction and 03 grounds of appeal against sentence. It is obvious that the officer in charge of this matter for the state had not looked at the amended notice of appeal or written submissions filed by the LAC in preparing its response. It is totally unsatisfactory and disappointing that the state had not dealt with the grounds of appeal filed by the LAC at least by way of supplemental written submissions before the matter reached the stage of leave to appeal hearing. This court expects the counsel handling appeals before this court to do better, maintain higher standards and exercise due diligence. The appellant tendered an abonnement notice regarding the sentence appeal in Form 3 on 10 March 2021.
- [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 grounds of appeal submitted to this court by the appellant are as follows.

**Ground 1**

*THAT the Appellant's constitutional right as per Article 13(1)(a)(ii)(iii); (b); of the Constitution of the Republic of Fiji had been breached thus causing a miscarriage of justice.*

**Ground 2**

*THAT the Learned Trial Judge may have fallen into an error in fact and law in allowing the admissibility of the Appellant's caution statement when his right to remain silent was breached, thus a miscarriage of justice as the Appellant was prejudiced to the right to a fair trial.*

**Ground 3**

*THAT the Learned Trial Judge may have fallen into an error in law and fact to convict the Appellant by relying on an Agreed Fact that Appellant had not agreed to implicate Appellant thus causing a miscarriage of justice.*

***01<sup>st</sup> and 02<sup>nd</sup> grounds of appeal***

[7] The appellant's argument that he had been deprived of the constitutional safeguards guaranteed by Articles 13(1)(a)(ii)(iii) and 13(1)(b) of the Constitution of the Republic of Fiji arises from the following paragraphs of his cautioned interview.

*a. Caution Interview dated 15 November 2017 commencing 1530 hours and concluding at 1815 hours. Conducted by DC 5057 Apisai Voravora. [Tendered as Prosecution Exhibit 4, Voir Dire].*

***Q11. Mr. Livai Drigita under the provisions of the Constitution, you have a right to remain silent but in that case we would not be able to get your side of the story and as such we may have to proceed further and prosecute you for the allegation with the evidence currently on hand. You shall feel free to make your choice now, are you willing to remain silent or will you make a statement"?***

***Ans. I will answer your questions.***

*b. Caution Interview dated 16 November 2017 commencing 1845 hours and concluding at 2120 hours. Conducted by DC Mesulame Narawa. [Tendered as Prosecution Exhibit 5, Voir Dire].*

***Q8. Mr. Livai Drigita under the provisions of the Constitution, you have a right to remain silent but in that case we would not be able to get your side of***

*the story and as such we may have to proceed further and prosecute you for the allegation with the evidence currently on hand. You shall feel free to make your choice now, are you willing to remain silent or will you make a statement?*

*Ans. Both in some questions I will remain silent and some I will answer your questions.*

*c. Caution Interview dated 15 November 2017 commencing 1540 hours and concluding at 1345 hours on 16 November 2017, Conducted by WDC 4495 Semmili. [Tendered as Prosecution Exhibit 6, Voir Dire].*

*Q8. Mr. Lival Drigita under the provisions of the Constitution, you have a right to remain silent but in that case we would not be able to get your side of the story and as such we may have to proceed further and prosecute you for the allegation with the evidence currently on hand. You shall feel free to make your choice now, are you willing to remain silent or will you make a statement?*

*Ans. Both in some questions I will remain silent and some I will answer your questions.*

- [8] The appellant had admitted in one of the cautioned interviews [P10(B)] that he was riding in the 01<sup>st</sup> accused's car at the material time but denied committing any crime. It has to be remembered that the appellant defaulted appearance at the *voir dire* inquiry and was deemed to have remained silent though his lawyer still appeared for him and made comprehensive written submissions. The trial judge had ruled the cautioned interview to have been made voluntarily on the basis of the evidence led by the prosecution (*i.e.* first limb of **Ganga Ram & Shiu Charan v Reginam** Criminal Appeal No. 46 of 1983- '*the flattery of hope or the tyranny of fear*') and dealt with the submission that there had been general unfairness in the way the cautioned interview was conducted by the police not properly explaining his right to remain silent [*i.e.* second limb of **Ganga Ram & Shiu Charan v Reginam** (*supra*)] in the written reasons dated 12 July 2019 on the *voir dire* ruling on 18 June 2019 where the judge had ultimately rejected the application of the appellant's counsel not to admit the cautioned interview in evidence.



- [9] The first ground of appeal is based not on the first limb of Ganga Ram but on the second limb. The impugned statement in the three cautioned interviews of the appellant is *‘.....as such we may have to proceed further and prosecute you for the allegation with the evidence currently on hand.’*
- [10] It is clear that the police had in plain language explained to the appellant that he had a right to remain silent as stipulated in Article 13(1)(a)(ii) of the Constitution (*‘you have a right to remain silent’*). The police had also explained the consequences of remaining silent (*but in that case we would not be able to get your side of the story*) though Article 13(1) (a)(iii) of the Constitution states that a person arrested or detained has the right to be informed of the consequences of not remaining silent. In other words the police instead of informing that if the appellant were not to remain silent they would have his side of the story had told him what the consequence of his remaining silent would be (*i.e. ‘....we may have to proceed further and prosecute you for the allegation with the evidence currently on hand’*).
- [11] The issue therefore is whether the appellant’s (a) right to be informed of his right to remain silent and (b) the right to remain silent was violated by the use of the words *‘....we may have to proceed further and prosecute you for the allegation with the evidence currently on hand’* if he were to exercise that right and remained silent. In other words whether there was a violation of the right against self-incrimination.
- [12] In State v Fusi; Criminal Case No. HAC 223 of 2017 (15 November 2018), the High Court had in similar circumstances held that the qualification attached to the right to remain silent imposes a condition that if the accused remains silent the police would prosecute him. In State v Matia; Criminal Case No. HAC 260 of 2018 (13 March 2019) on a similar situation it was held by the High Court that that the right to remain silent should be administered in unqualified terms and when it is qualified by an incentive to tell his side of the story to avoid being charged based on the allegation is inappropriate and objectionable. In both instances the cautioned interviews had been held to be inadmissible.

- [13] Having considered both High Court decisions cited above and Articles 3 and 7 of the Constitution the learned trial judge in the instant case had held that there had not been a violation of Article 13 of the Constitution and admitted the appellant's cautioned interview. At first blush, it appears that the impugned statement may have had the effect of inducing the appellant to give up his right to be silent reluctantly though. However, when the entirety of the three cautioned interviews is considered it is clear that the appellant had asserted his right or freedom to be either silent or answer whatever the questions posed by the police.
- [14] However, I am of the view that the questions whether (1) the right to be informed of the right to remain silent, (2) the consequences of not remaining silent and then (3) to remain silent in terms of Article 13(1)(a)(ii), (iii) and 13(1)(b) of the Constitution respectively are absolute rights or not pose important questions of law to be looked into by the full court. Whether the use of the phrase *'...we may have to proceed further and prosecute you for the allegation with the evidence currently on hand'* could in fact have affected the admissibility of the appellant's cautioned interview in the light of the freedom the appellant seemed to have enjoyed to answer some questions and not to answer the other questions as per his choice is a question of mixed law and fact.
- [15] The second ground of appeal is an extension of the first ground of appeal touching on lack of directions to the assessors whether the appellant's right to be informed of the right to be silent and then to remain silent had been breached *vis-à-vis* the weight and probative value to be placed on the cautioned interview. The full court could consider both grounds of appeal together.
- [16] Therefore, I am inclined to allow leave to appeal on the first and second grounds of appeal.

### *03<sup>rd</sup> ground of appeal*

- [17] The appellant complains that the trial judge had used an agreed fact that the appellant had not agreed to convict him. He submits that the only evidence available against



him in addition to the cautioned interview was the first accused's agreed facts. The trial judge at paragraph 45 of the summing-up had directed the assessors that the first accused had identified the appellant in his agreed facts.

*[45] The circumstantial evidence used against Accused No. 1 and 2, could also be used against Accused No. 3. Like Accused No. 2, Accused No. 1 in his 7 June 2019 Agreed Facts, in paragraph 11, identified Accused No. 3 as being in his car JB 405, at the time Sgt Adrian Choy (PW4) arrested him on 15 November 2017. Sgt Choy said the 3 i-taukei boys sitting in Accused No. 1's car fled the same, when he arrested Accused No. 1. The questions posed to Accused No. 2 could also be posed to Accused No. 3. What were the complainants' stolen properties doing in the car where he was in it? Did he steal those properties? Why did he flee from the car? Was he part of the group that attacked and stole from the complainants early that morning on 15 November 2017? As assessors and judges of fact, you will have to answer the above questions.*

- [18] The appellant relies on **Niume v State** [2015] FJCA 132; AAU0106,2011 (2 October 2015) where it was held *inter alia*:

*[16] Counsel for the State submits that the 1st appellant's sole ground of appeal is wholly misconceived. I agree. It is well established law that, while a statement made in the absence of the accused person by one of his co-accused cannot be evidence against him, if a co-accused goes into the witness box and gives evidence in the course of a joint trial, then what he says becomes evidence for all the purposes of the case including the purpose of being evidence against his co-accused (**Leonard Rudd** (1948) 32 Cr App R 138, 140; **Ram Asre v Reginam** [1965] 11 FLR 214, 218).*

*[17] At trial, the appellants were represented by different counsel. Neither was there an application made for a separate trial, nor was the trial judge asked to rule on a mistrial when the 2nd appellant gave incriminating evidence against the 1st appellant. Nevertheless, the trial judge properly warned the assessors to consider the 2nd appellant's evidence with caution because he may have an interest of his own purpose of saving himself.*

- [19] The trial judge had referred to the first accused's agreed facts at paragraph 39 and 40 of the summing-up.

*[39] PW2's report was received by Sgt 2870 Adrian Choy (PW4) at 4.15 am. He went with SC Binesh and WDC 3585 Sisilia (PW10) to Bau Road Nausori. At 4.25 am, they reached Bau Road in their police vehicle. They saw a Silver Grey Hybrid vehicle registration number JB 405 speeding past their vehicle with a flat tyre. This was about 10 meters from PW2's Bau Road*

*house. PW4 said, they followed the vehicle. PW4 said, he stopped the vehicle later, and saw Accused No. 1 was driving the same. PW4 said, he saw 3 i-taukei men sitting in the car. PW4 said, he later arrested Accused No. 1. The 3 i-taukei men fled the vehicle. In paragraph 11 of Accused No. 1's 7 June 2019 Agreed Facts, Accused No. 1 identified two of the i-taukei men who fled, as Accused No. 2 and 3.*

*[40] PW4 later checked the car. In paragraph 10 of Accused No. 1's 7 June 2019 Agreed Facts, Accused No. 1 agreed the car JB 405 was his. He admitted he was driving the same on 15 November 2017 in the early hours and picked Accused No. 2 and 3 from Bau Road, Nausori. When PW4 checked the car, PW1, PW2 and PW3's stolen properties were in the same. In paragraphs 14, 15 and 17 of Accused No. 1's 7 June 2019 Agreed Facts, Accused No. 1 admitted the properties were stolen and PW1, PW2 and PW3 identified the properties as theirs. It must be noted that stolen properties do not have legs. If the same had to travel from the house of their owners to Accused No. 1's car, they had to be taken there by human beings. All three accused were present in the car when PW4 stopped them and arrested Accused No. 1, while Accused No. 2 and 3 fled from the scene. What do these hard facts tell you? Stolen properties do not speak, but they implicate the persons who possess them, at the time the police (PW4) stopped them.*

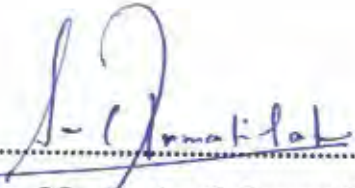
[20] The appellant complains that the trial judge had not even warned the assessors of the danger of relying on the agreed facts of the first accused against the appellant. In my view, there is a more important question in this context namely whether an agreed fact recorded on behalf of one accused could be used against another accused at the trial. If so, should there not be a cautionary warning regarding the possibility of the former implicating the latter to save himself. This to my mind raises a question of law to be clarified by the full court.

[21] Therefore, I am inclined to allow leave to appeal on the third ground of appeal as well.

Orders

1. Leave to appeal against conviction is allowed.



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