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

CRIMINAL APPEAL NO.AAU 113 of 2019
[High Court of Suva Case No. HAC 362 of 2017S]

BETWEEN : **ARVIND CHAND**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Mr. J. Rabuku 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 (01st 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 15th 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 15th 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 15th 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 15th 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 also had 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.*
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> *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.*
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> *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 12 ½ years of imprisonment with a non-parole period of 10 years.

[4] The appellant had timely appealed against conviction and sentence on 02 August 2019. Law Solutions had filed amended grounds of appeal and leave to appeal application against conviction only and written submissions on behalf of the appellant on 18 September 2020. The state had tendered written submissions on 28 October 2020. 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 Learned Trial Judge erred in law when he misdirected the Assessors and himself regarding the law of joint enterprise (paragraph 20 and 21 of the summing up) and erred in fact when fining that the Appellant was in a joint enterprise with Accused 2 and 3 when in fact there was no direct evidence or compelling circumstantial evidence against the Appellant being party to the joint enterprise.

Ground 2

THAT the Learned Trial Judge erred in law in his directions on circumstantial evidence and he failed to apply the proper test for guilt of the Appellant on a case entirely based on circumstantial evidence.

Ground 3

THAT the Learned Trial Judge erred in law in his directions to the Assessors in respect of how the agreed facts were to be considered and in so doing misled the Assessors as to the level of proof and the correlating evidence required to prove the charges beyond reasonable doubt against the appellant resulting in the verdict not being supported by the evidence before the Court.

01st ground of appeal

[7] The appellant argues that the trial judge had misdirected the assessors and himself regarding the law of joint enterprise at paragraphs 20 and 21 of the summing-up.

> *"[20] Joint enterprise" is "when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed, of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence" (Section 46, Crimes Act 2009). In considering each accused, you will have to ask yourselves the following questions. Did each of them form a common intention with each other, to violently rob Mr. Suruj Prasad (PW1) of the properties mentioned in count no. 1? If so, did each of them acted together in violently robbing PW1 and later burgled and stole from Ms. Rohini Lata Nandan's (PW3) house, and later violently robbed Uma Kumari Mishra (PW2)? When PW2 and PW3 were offended against, were these episodes a probable consequence of them violently robbing PW1? If your answer to a particular accused was yes, and you are sure that the elements of the offences described in paragraphs 13 to 18 hereof are satisfied, the particular accused was guilty as charged. If it was otherwise, he was not guilty as charged.*
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> *21. Furthermore, in this case, there are three accused on trial. Each of them is entitled to be tried solely on the evidence that is admissible against them. This means that you must consider the position of each accused separately, and come to a separate considered decision on each of them. Just because they are jointly charged, does not mean that they must all be guilty or not guilty. Most evidence in this case are admissible against all accused. However, regarding their police caution interview statements, which may contain their alleged confessions, the statements therein are only admissible against the maker of the statements, and on no other. In other words, in each of the accused's' police caution interview statements, you must totally disregard what the accused said about his co-accused on the commission of the offence, because these are inadmissible evidence. You can only take into account what he said about himself, regarding his role in the commission of the crime, because this is admissible evidence against him.*

[8] The appellant has, however, not demonstrated which part of the judge's directions is erroneous in law. In fact what is required to be jointly liable under section 46 of the

Crimes Act is for two or more persons to form a common intention to prosecute an unlawful purpose which may or may not be a particular offence. However, in the end an offence must have been committed which was a probable consequence of the prosecution of such unlawful purpose. A person is said to have an intention under any of the situations described in section 19(1), (2) or (3) of the Crimes Act, 2009. When two more people share it, it becomes a common intention.

[9] The issue was whether the appellant could be said to have formed a common intention with the others to prosecute an unlawful purpose which in this instance could have been acts of theft, burglary or robbery. As succinctly discussed in **Naitini v State** [2020] FJCA 20; AAU135 of 2014, AAU145 of 2014 (27 February 2020) intention has to be ascertained or inferred from the conduct and any other circumstantial evidence. It would very rare to have direct evidence of a common intention. Similarly, the necessary contemplation too, more often than not, has to be inferentially ascertained from attendant circumstances.

[10] Evidence had indicated that the appellant had in the early hours of the day had transported the other accused in his car which, according to the prosecution, was neither a taxi nor a rental vehicle to the crime destinations and while they were on their way back the car had got a flat tyre just 10 meters away from the last attacked property. The police who had been altered by the inmates of the houses subjected to attacks one after the other, had stopped the car driven by the appellant while it was speeding past them with a flat tyre. Three i-taukei youths who were inside the vehicle (two of them are the other accused) had fled the vehicle and the police had arrested the appellant. The loot from all three properties along with a pinch bar had been found inside the car. The prosecution had alleged that the appellant's role in the spate of offending was that of the getaway driver.

[11] The appellant having admitted that the car belonged to him had taken up the position that he had no knowledge that the property found inside the car had been robbed. He had also claimed that he hired the car out to one of the co-accused in exchange for money. In the agreed facts submitted on his behalf it had been recorded that the stolen items from the three properties attacked were found in his vehicle.

[12] The state argues that the fact that the appellant had picked the co-accused, transported them to Bau road in the dead of the night (1.30 - 2.15 a.m.) and drove them from one place to another where each time the co-accused returned with stolen goods to the car. When the police stopped the car driven by the appellant they were on their way back and the stolen items and the appellant were found inside it while the others fled. In one house a female had screamed and in another the car alarm had set off. The state submits that these circumstances were sufficient for the assessors and the judge to conclude that the appellant was liable on the basis of a joint enterprise regarding the offences.

[13] The trial judge had placed all the relevant evidence for the prosecution and the appellant before the assessors from paragraphs 23-42 of the summing-up and given his own mind to them in his judgment at paragraphs 11-14 before agreeing with the assessors.

[14] In the circumstances, I do not see any reasonable prospect of success in appeal as far as the first ground of appeal is concerned.

02nd ground of appeal

[15] The appellant argues that the trial judge had erred in his directions on circumstantial evidence. Those directions are found at paragraph 34 and 35 of the summing-up.

> [34] *To connect Accused No. 1 to the crimes alleged in count no. 1, 2, 3 and 4, the State is relying on what is commonly called circumstantial evidence. Reference has been made to the type of evidence which you have received in this case. Sometimes assessors are asked to find some fact proved by direct evidence. For example, if there is reliable evidence from a witness who actually saw a defendant commit a crime; if there is a video recording of the incident which plainly demonstrates his guilt; or if there is reliable evidence of the defendant himself having admitted it, these would all be good examples of direct evidence against him. On the other hand it is often the case that direct evidence of a crime is not available, and the prosecution relies upon circumstantial evidence to prove guilt.* ***That simply means that the prosecution is relying upon evidence of various circumstances relating to***

the crime and the defendant which they say when taken together will lead to the sure conclusion that it was the defendant who committed the crime. *It is not necessary for the evidence to provide an answer to all the questions raised in a case. You may think it would be an unusual case indeed in which assessors can say "We now know everything there is to know about this case".* ***But the evidence must lead you to the sure conclusion that the charge which the defendant faces is proved against him.*** *Circumstantial evidence can be powerful evidence, but it is important that you examine it with care, and consider whether the evidence upon which the prosecution relies in proof of its case is reliable and whether it does prove guilt.* ***Furthermore, before convicting on circumstantial evidence you should consider whether it reveals any other circumstances which are or may be of sufficient reliability and strength to weaken or destroy the prosecution case.*** *Finally, you should be careful to distinguish between arriving at conclusions based on reliable circumstantial evidence, and mere speculation. Speculating in a case amounts to no more than guessing, or making up theories without good evidence to support them, and neither the prosecution, the defence nor you should do that.*

'[35] We will now look at and consider the evidence of various circumstances relating to the crimes and the defendant which the prosecution says when taken together will lead to the sure conclusion that it was the defendant who committed the crimes. We will first consider the time in which the three complainants were attacked in their own house, and their properties stolen.'

[16] The appellant relies on **Didigogo v State** [2017] FJCA 15; AAU43 of 2012 (23 February 2017) to buttress his argument.

'[31] In ***Nadim & Anor v. The State*** *Cr. Appeal No.AAU 0080 of 2011 (2 October 2015) the Court of Appeal cited with approval the direction endorsed in* ***Lole Vulaca and 2 Others v. The State*** *Cr. App. No.AAU0038/08.29 August 2011 regarding circumstantial evidence as follows:*

"Remember that in considering circumstantial evidence you must be satisfied beyond reasonable doubt that the only reasonable inference available to you is the guilt of the Accused before you can find them guilty. If you find that there are other reasonable inferences you can draw which are consistent with the Accused's innocence or if you have a reasonable doubt about it, then you should find each not guilty."

[32] The Supreme Court in ***Senijieli Boila v. The State*** *(Cr. App. No.CAV005 of 2006S. 25 February 2008) observed in respect of a direction regarding circumstantial evidence:*

*"What is required is a clear direction that the tribunal of fact must be satisfied of the guilt of the accused beyond reasonable doubt (****McGreevy v Director of Public Prosecutions*** *[1973] 1 WLR 276,*

*applied **Kalisogo v. R** Criminal Appeal No.52 of 1984)See also R v Hart [1986] 2NZLR 408 . The adequacy of the particular direction will necessarily depend on the circumstances of the case."*

[17] The trial judge had addressed the assessors on the burden and standard of proof at paragraphs 4 and 5 of the summing-up. His directions on circumstantial evidence have to be considered not in isolation but in conjunction with the directions on the burden and standard of proof where he had made it clear that the standard of proof is beyond reasonable doubt. The trial judge had then proceeded to itemise the circumstantial evidence from paragraphs 36-41 and directed the assessors at paragraph 42 that if they accept them they should find the appellant guilty or otherwise find him not guilty.

[18] The trial judge had summarised the burden of proof once again in his summing-up as follows at paragraph 50.

> *'[50] Remember, the burden to prove the accused's' guilt beyond reasonable doubt lies on the prosecution throughout the trial, and it never shifts to the accused, at any stage of the trial. The accused are not required to prove their innocence, or prove anything at all. In fact, they are presumed innocent until proven guilty beyond reasonable doubt. If you accept the prosecution's version of events, and you are satisfied **beyond reasonable doubt** so that you are sure of the accused's' guilt, you must find them guilty as charged. If you do not accept the prosecution's version of events, and you are not satisfied beyond reasonable doubt so that you are not sure of the accused's' guilt, you must find them not guilty as charged.*

[19] There is no incantation to be chanted with a stereotype regarding circumstantial evidence. I think the trial judge had given adequate directions on circumstantial evidence and he himself had given his mind to them in the judgment. In **Naicker v State** [2018] FJSC 24: CAV0019.2018 (1 November 2018)] the Supreme Court held

> *'[33] There is no prescribed form of direction when the prosecution's case against the defendant is based on circumstantial evidence alone. So long as the judge gets the essence of it, that is sufficient. The essence of it is that the prosecution is relying on different pieces of evidence, none of which on their point directly to the defendant's guilt, but when taken together leave no doubt about the defendant's guilt because there is no reasonable explanation for them other than the defendant's guilt. Although I may have used slightly different language from that which the judge used in this case, it sufficiently*

captured the essence of what the assessors had to be sure of before they were able to express the opinion that Naicker was guilty.'

[20] There is no reasonable prospect of success in appeal for this ground of appeal.

03rd ground of appeal

[21] The appellant criticises the trial judge's directions on the agreed facts at paragraphs 40 and 41 of the summing-up.

> *[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.*
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> *41. Accused No. 1 had submitted an Agreed Facts with the State, dated 7 June 2019. Read it carefully. In the Agreed Facts, Accused no. 1 had basically admitted that he was in physical possession of stolen goods, in his car, at the time police (PW4) arrested him.* ***Accused No. 1 said, he had no knowledge that the stolen properties were in his car, at the material time. He said, he was only hiring out his vehicle to Accused No. 2 for money.*** *Note his car was neither a taxi nor a rental vehicle. The State asks you to disregard his excuse, because according to them, he was part of the group and his role was to provide the transport for the thieves and the stolen goods, and also as the getaway vehicle.*

[22] The appellant's argument is that the trial judge should have directed the assessors that being found with stolen goods in his vehicle was not enough to prove that the appellant in fact was a party to the offences particularly in the light of his position that he had no knowledge that the goods were stolen.

[23] When considering the totality of circumstantial evidence, it is clear that the stolen goods being in the appellant's car driven by him at the time of his arrest soon after the spate of offences on three properties was only one of the items of circumstantial evidence. The other several pieces of circumstantial evidence had already been referred to earlier. The trial judge had also placed the appellant's explanation that he had no knowledge that they were stolen goods alongside his possession of them. The trial judge had also considered not only this piece of evidence but all the circumstantial evidence along with the agreed facts presented by the appellant in agreeing with the assessors. The trial judge had not removed the appellant's explanation form the consideration of the assessors.

[24] There is no reasonable prospect of success in appeal in this ground of appeal.

[25] In any event the appellant's counsel should have sought redirections in respect of the complaints now being made on the summing-up under all three grounds of appeal as held in **Tuwai v State** [2016] FJSC35 (26 August 2016) and **Alfaaz v State** [2018] FJCA19; AAU0030 of 2014 (08 March 2018) and **Alfaaz v State** [2018] FJSC 17; CAV 0009 of 2018 (30 August 2018). The deliberate failure to do so would disentitle the appellant even to raise them in appeal with any credibility.

[26] In Fiji, the assessors are not the sole judge of facts. The judge is the sole judge of fact in respect of guilt, and the assessors are there only to offer their opinions, based on their views of the facts and it is the judge who ultimately decides whether the accused is guilty or not (vide **Rokonabete v State** [2006] FJCA 85; AAU0048.2005S (22 March 2006), **Noa Maya v. The State** [2015] FJSC 30; CAV 009 of 2015 (23 October 2015] and **Rokopeta v State** [2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26 August 2016).'

[27] 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 when it considers whether verdict is reasonable or can be supported by evidence under section 23(1)(a) of the Court of Appeal Act.

> '............Having considered the evidence against this appellant as a whole, we cannot say the verdict was unreasonable. There was clearly

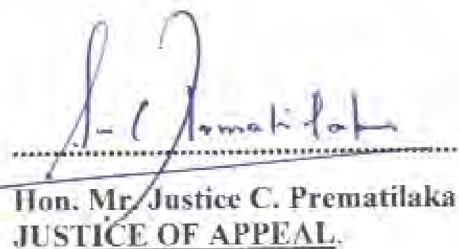
> *evidence on which the verdict could be based…….. Neither can we, after reviewing the various discrepancies between the evidence of the prosecution eyewitnesses, the medical evidence, the written statements of the appellant and his and his brother's evidence, consider that there was a miscarriage of justice.'*

[28] A more elaborate discussion on this aspect can be found in **Rayawa v State** [2020] FJCA 211; AAU0021.2018 (3 November 2020) and **Turagaloaloa v State** [2020] FJCA 212; AAU0027.2018 (3 November 2020).

[29] In **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013) the Court of Appeal had said that when a verdict tested on the basis that it is unreasonable the test is whether the trial judge could have reasonably convicted on the evidence before him (see **Singh v State** [2020] FJCA 1; CAV0027 of 2018 (27 February 2020)].

Order

1. Leave to appeal against conviction is refused.



Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL