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

CRIMINAL APPEAL NO.AAU 0080 of 2021
[In the High Court at Lautoka Case No. HAC 44 of 2019]

BETWEEN : **AKSHAY NAWAL RAJU**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Mr. M. Yunus for the Appellant**
: **Ms. R. Use for the Respondent**

Date of Hearing : **13 January 2023**

Date of Ruling : **16 January 2023**

RULING

[1] The appellant had been charged with 03 others in the High Court at Lautoka on a single count of aggravated robbery committed on 20 February 2019 at Nadi in the Western Division in the company of each other on Ratan Devi Chand of $10,874.50 cash, $5,000.00 of cash cheque and $64,185.95 of dated cheques, all to the total value of $80,060.45, the property of Yees Cold Storage contrary to section 311 (1) (a) of the Crimes Act 2009.

[2] After trial, the appellant had been found guilty by the trial judge. He had been sentenced on 03 December, 2021 to 8 years and 5 months imprisonment for one count of aggravated robbery with a non-parole period of 6 ½ years.

[3] The appellant's appeal only against conviction is timely. In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court (unless it is on a question of law alone). For a timely appeal, the test for leave to appeal against conviction is **'reasonable prospect of success'** [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) that will 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 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[4] The appellant urges the following grounds of appeal against conviction:

> ***Ground 1***
>
> *THAT the Learned Trial Judge erred in law and fact to convict the appellant for the offence of aggravated robbery, when the evidence in totality only supports a charge of theft.*
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> ***Ground 2***
>
> *THAT the Learned Trial Judge erred in law and in fact when in the interest of justice and fairness he should have recused from the trial, after the summary of facts of the case was adduced to him on the 16th November 2021 when Mr Ram pleaded guilty to the charge, but he failed to do so thereby breaching section 15 (1) of the Constitution.*
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> ***Ground 3***
>
> *THAT the Learned Trial Judge erred in law and in fact when he allowed the confession statement contained in the caution interview of the appellant to be part of prosecution evidence despite the appellant at the time of arrest not being promptly informed in the language he understood the reasons for his detention and the nature of any charge that may be brought against him, the right to remain silent and the consequences of not remaining silent thereby allowing substantial miscarriage of justice to occur.*

Ground 4

THAT the Learned Trial Judge erred in law and in fact when he allowed the confession statement contained in the caution interview of the appellant to be part of prosecution evidence despite the appellant at the time of record of interview and during the charging process not being promptly informed in the language he understood the right to remain silent and the consequences of not remaining silent thereby allowing substantial miscarriage of justice to occur.

Ground 5

THAT the Learned Trial Judge erred in law and in fact when he failed to consider that none of the prosecution witnesses positively identified the appellant as the driver of the getaway vehicle on the day of the incident therefore the appellant's conviction is not prima facie supported by evidence.

[5] The High Court judge had set out the brief facts as follows in the sentencing order:

> *1. The brief facts were as follows:*
>
> *On 20th February, 2019 at about 2.30pm the victim Ratan Devi, Head Cashier of Yees Cold Storage went to the ANZ Bank, Namaka to bank the company's cash and cheques to the total value of $80,060.45. As the victim was about to enter the bank the first accused came and grabbed the money bag from the victim's hands and ran to a waiting car.*
>
> *The getaway car was driven by the fourth accused who drove the first accused away, some people tried to catch the first accused but were not successful.'*

01st ground of appeal

[6] The contention of the appellant here is that there is no evidence that force was used on the complainant and therefore aggravated robbery was not made out and the evidence supported only a charge of theft. It is also submitted that the appellant was not in the company of the 01st accused when he grabbed the bag.

[7] The evidence had not revealed that the complainant had handed over the bag to the 01st accused voluntarily or she had dropped it by accident. Thus, if not for the force used on her she would not have parted with it. She did so clearly against her will due to the force exerted on her by the 01st accused. Causing any injury to the victim is not required. Even the slightest force is sufficient under section 310 of the Crimes Act,

2009 to constitute robbery and when it is committed in the company of another it becomes aggravated robbery under section 311.

[8] The appellant was the getaway driver. The prosecution sought to make him liable on the basis of joint enterprise.

[9] 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 (*vide* section 46 of the Crimes Act).

[10] The first question is whether the appellant had formed a common intention with other accused to prosecute an unlawful purpose (see **Vasuitoga v State** [2016] FJSC1; CAV001 of 2013 (29 January 2016. Such a common purpose arises where a person reaches an understanding or arrangement amounting to an agreement between that person and another or others that they will commit a crime. The undertaking or arrangement need not be express and may be inferred from all the circumstances.

[11] If two people jointly commit an unlawful act, each is equally liable no matter who did what. There does not have to be any prior agreement either written or oral. It can be spontaneous (see **Rasaku v State** [2013] FJSC 4; CAV0009, 0013.2009 (24 April 2013)]. If one or other of the parties does, or they do between them, in accordance with the continuing understanding or arrangement, all those things which are necessary to constitute the crime, they are all equally guilty of the crime regardless of the part played by each in its commission. Further, each party is guilty of any other crime falling within the scope of the common purpose which is committed in carrying out that purpose, the scope of that purpose being determined by what was contemplated by the parties sharing that common purpose [see **Rokete v State** [2019] FJCA 49; AAU0009 of 2014 (07 March 2019) and **Sean Patrick McAuliffe v The Queen** [1995] HCA 37; 183 CLR 108; 69 ALJR 621; 130 ALR 26]. Common intention could be proved by inference from conduct alone without words but that inference should be sufficiently strong to satisfy the high degree of certainty which

criminal law requires (vide **Henrich v State** [2019] FJCA 41; AAU0029 of 2017 (07 March 2019).

[12] *'In company with one or more other persons'* in section 311(1)(a) does not mean that all accused should be seen together or they should be physically present together at the crime scene itself. It is very clear from evidence that the appellant was acting in a joint enterprise with the other accused.

02nd ground of appeal

[13] The 01st accused had pleaded guilty on 25 October 2021 and admitted the summary of facts. He was sentenced on 16 November 2021. The summary of facts read *inter alia* as follows.

> *'……..The complainant saw the accused run to the bus bay and get into the waiting getaway grey hybrid car. The bank security officer and another person tried to catch the accused by giving a chase but were not successful. Before the incident, the accused was seen standing near ANZ Bank, Namaka, and had been in communication with the other co-accused persons via call conferencing.*
>
> *The matter was reported at the Namaka Police Station, upon investigation the CCTV footage clearly showed the accused crossing and running with the money bag towards the bus bay where he boarded the waiting car…….'*

[14] The appellant complains that as the trial judge had read the summary of facts relating to the 01st accused, he should have recused himself from hearing the appellant's case. There is no reference whatsoever in the summary of facts that the appellant was the gateway driver. No application for recusal had been made. There would have been absolutely no basis for the trial judge to recuse himself even if any such application had been made. There is no question of depriving the appellant of a fait trial guaranteed by section 15(1) of the Constitution. This ground of appeal is frivolous.

03rd and 04th grounds of appeal

[15] The appellant contends that at the time of arrest and recoding of the cautioned interview he was not informed of the reason for the arrest, detention and the nature of the charge and was not explained his right to remain silent and therefore the cautioned interview should not have been admitted in evidence in view of section 13 of the Constitution.

[16] Reading through the *voir dire* ruling, I do not find that the appellant represented by his counsel had raised any of the above concerns. His challenge to the admissibility of the caution statement had, by and large, been based on the issue of voluntariness. It is clear from the cautioned statement itself that the appellant had been told of the charge and his right to remain silent and the prosecution witnesses had confirmed this at the trial. The appellant had not given evidence at the trial but at the *voir dire* inquiry he had only spoken to the alleged police assault. Thus, at no stage had the appellant taken up the position that at the time of arrest he was not informed of the charge and not given the right to be silent either.

05th ground of appeal

[17] The appellant argues that none of the prosecution witnesses positively identified the appellant as the driver of the getaway vehicle on the day of the incident and therefore the appellant's conviction is not *prima facie* supported by evidence.

[18] However, when the cautioned interview was admitted in evidence, it provided ample evidence to implicate the appellant as the driver of the getaway vehicle after the robbery. His conviction is largely dependent on the confessions made by him at the cautioned interview and the charge sheet and circumstantial evidence of PW6 whose car, which was the getaway vehicle, was being used by the appellant at the relevant time.

[19] In **Usumaki v State** [2018] FJCA 72; AAU0025.2015 (31 May 2018), the Court of Appeal said:

> '*[27] …….the appellant's admissions in the charge statement were sufficient to convict……. See* ***Kean –v- The State*** *[2013] FJCA 117; AAU 95 of 2008, 13 November 2013.*
>
> *'[28] Ground 6 claims that the admissions alone were not sufficient to convict the appellant. However the admissions ruled as admissible evidence were sufficient to convict…….'*

[20] It was held in **Kaiyum v State** [2014] FJCA 35; AAU0071 of 2012 (14 March 2014) that when a verdict is challenged on the basis that it is unreasonable, the test is whether the trial judge could have reasonably convicted on the evidence before him.

[21] Therefore, there is no reasonable prospect of success in any of the appeal grounds.

Order of the Court:

1. Leave to appeal against conviction is refused.

COURT OF APPEAL FIJI

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