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

CRIMINAL APPEAL NO.AAU 157 of 2020
[High Court at Suva Case No. 63 of 2018]

BETWEEN

: **RUSIATE ROKOBULOU**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Appellant in person**
: **Mr. E. R. V. Samisoni for the Respondent**

Date of Hearing : **02 August 2023**

Date of Ruling : **04 August 2023**

RULING

[1] The appellant had been convicted with three others in the High Court at Suva on a single count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009 on 24 January 2018 at Nasinu in the Central Division. The charge read as follows.

'Statement of Offence

Aggravated Robbery: *contrary to Section 311(1)(a) of the Crimes Act 2009.*

Particulars of Offence

ARTHUR APOROSA VUALIKU, GAUNAVOU DELAI and RUSIATE ROKOBULOU with another *on the 24th day of January, 2018 at Nasinu in the Central Division, in the company of each other, robbed* ***NARAYAN PRASAD*** *of 1x TFL Switch Board set, 1x TFL handset phone, 1x router internet connection, 12x 300ml cans of Coca Cola, 1x TG silver hard drive, 1x tablet red bag, 1x pinch bar, 1x digital camera, 1x pair of black safety boots and $75.00 cash the property of* ***DIGNIFIED CREMATORIUM.***

[2] After the assessors' unanimous opinion of guilty, the learned High Court judge had convicted him as charged and sentenced the appellant on 07 December 2020 to an imprisonment of 13 years with a non-parole period of 12 years. After his remand period was discounted the actual sentence became 10 years, 08 months and 05 days with a non-parole period of 09 years, 08 months and 05 days.

[3] The appellant in person had timely appealed against conviction and sentence. He urged the following grounds of appeal against conviction and sentence at the leave to appeal hearing.

'**Conviction:**

Ground 1

THAT the appellant blood was already present in the form of blood stains (as blood stains) on the appellant's t-shirt that was stolen from the appellant on the evening of 23.01.18. The stains were the result of fist fight with the first accuse at F.T.G ground in the afternoon of the same day. The same t-shirt with the blood stains was volunteered by the first accuse to the police. There is a high probability that the blood stains on the t-shirt were the ones from which the sample was taken.

Ground 2

THAT the learned trial Judge erred in law and in fact when he relied on the circumstantial evidence provided by the prosecution to convict the appellant when the totality of the evidence is not sufficient enough to justify a conviction.

Ground 3

THAT the prosecution fabricated the appellant.

Ground 4

THAT the learned trial Judge erred in law and in fact when he relied on the fabricating evidence tendered by the prosecution to convict the appellant.

Ground 5

THAT the learned trial Judge erred in law and in fact when he removed the assessors and adequately direct the prosecution on the chain of evidence leading to the conviction which was prejudice to the defence case.

Ground 6

THAT the learned trial Judge erred in law and in fact when he denied a fair trial from the appellant that clearly breaches the constitution rights of the appellant.

Ground 7 (sentence)

The sentence is too harsh and excessive.

[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. For a timely appeal, the test for leave to appeal against conviction and sentence 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)].

[5] Further guidelines to be followed when a sentence is challenged in appeal are whether the sentencing judge (i) acted upon a wrong principle; (ii) allowed extraneous or irrelevant matters to guide or affect him (iii) mistook the facts and (iv) failed to take into account some relevant considerations [vide **Naisua v State** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **House v The King** [1936] HCA 40; (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015].

[6] The facts have been narrated by the learned trial judge briefly in the sentencing order as follows.

> 2. *Briefly, you with three others entered the premises of Dignified Cremations Crematorium at Davuilevu around 1.45am on 24/01/18 and assaulted PW1 who was the security guard on duty. One of the four broke one leg of PW1 by hitting with a piece of timber. Then the hands and the legs of PW1 were tied and was carried to the back of the building. Thereafter while one of the assailants remained with PW1, you and two others broke into the crematorium. You broke a glass window to enter into the building. Either when breaking the window or while entering through the broken window, you sustained a cut injury that resulted in leaving your blood stains at the said point of entry and inside the building. You and the two others who entered the building*

then stole certain items that were inside the building. Thereafter you and the others left the premises leaving PW1 at the back of the building with his hands and legs tied. Only one item, the internet router was recovered.

[7] The prosecution had called ten witnesses. The appellant had given evidence and called one witness in his defence. He had not disputed the fact that the offence of aggravated robbery was committed at the material time and place but taken up an *alibi*. The prosecution relied on DNA evidence to place the appellant at the crime scene at the material time.

01st ground of appeal

[8] The appellant, who voluntarily defended himself after jettisoning his counsel from Legal Aid Commission, submits that he had a fist fight with the first accused (the appellant was the third accused at the trial) in the evening of 23 January 2018 and there were blood stains on the white T-shirt he was wearing which went missing from the cloth-line. He does not say where he was injured and bleeding from. He argues that the T-shirt somehow ended up in the hands of the police (most probably given to them by the 01st accused on 27 January 2018) and the police had got the blood stains on the T-shirt (not blood stains found at the crime scene) examined alongside his buccal swab for DNA analysis proving the appellant's presence at the crematorium.

[9] From the summing-up and the judgment, it does not appear that this defence theory had been advanced at all by the appellant at the trial. His defence had been simply an alibi. Therefore, this is clearly an afterthought unfounded on any factual basis, at least in the form of suggestions to the police officers. It carries little or no credibility.

[10] On the other hand, the prosecution had got the appellant's buccal sample tested with blood stains found at the point of entry into the crematorium (where the broken glass was located), the reception area, control room and the director's room. Blood stains had been on the doors and the floor. A few drops of blood on a T-shirt (which would have absorbed them anyway) would not be enough for the police to spread blood over such a large area in the crematorium.

[11] There does not appear to have been any possibility of the blood samples extracted from the crime scene on 24/01/18 (exhibits 01 to 04) to be replaced with the appellant's blood samples from the so-called T-shirt allegedly received by the police on 27/01/18 as the DNA profiles from the samples from the crime scene were extracted by 27/01/18 as evidenced by PE04 dated 27/01/18. The appellant had been arrested on 30/01/18. There was no possibility for the police to have access to the appellant's blood by 25/01/18 to introduce it on the swabs handed over to the lab as exhibits on that day, when he was arrested on 30/01/18.

02nd ground of appeal

[12] The appellant's complaint has to be considered in the relevant legal context. when the trial judge agrees with the majority of assessors, the law does not require the judge to spell out his reasons for agreeing with the assessors in his judgment but it is advisable for the trial judge to always follow the sound and best practice of briefly setting out evidence and reasons for his agreement with the assessors in a concise judgment for the appellate courts to understand that the trial judge had given his mind to the fact that the verdict of court was supported by the evidence and was not perverse. The judgment of a trial judge cannot be considered in isolation without necessarily looking at the summing-up, for in terms of section 237(5) of the Criminal Procedure Act, 2009 the summing-up and the decision of the court made in writing under section 237(3), should collectively be referred to as the judgment of court. A trial judge therefore, is not expected to repeat everything he had stated in the summing-up in his written decision as long as he had directed himself on the lines of his summing-up to the assessor. 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 [see paragraphs [23], [25] and [26] of **Fraser v State** [2021] FJCA 185; AAU128.2014 (5 May 2021)]

[13] The trial judge having dealt with the prosecution evidence and the defence evidence in extensor had drawn the attention of the assessors to the totality of circumstantial evidence including DNA evidence at paragraphs 41- 55 and directed them on how to

approach circumstantial evidence at paragraph 56-57 of the summing-up. The judge had also directed himself on the summing-up and still considered the totality of evidence in particular the DNA evidence in his judgment and concluded as follows

> *10. The strong circumstantial evidence in this case leads to the irresistible inference that the accused was one of the four individuals who took part in committing the offence of aggravated robbery on 24/01/18 as charged. Therefore, I am satisfied that the prosecution has proved the case against the accused beyond reasonable doubt.*

03rd and 04th grounds of appeal

[14] Both grounds of appeal is based on the recovery of an internet router lost from the crematorium and marked at the trial by the prosecution as PE1. It does not appear from the summing-up or the judgment that the prosecution had relied on the recovery PE1 to prove its case against the appellant as it was not recovered from his possession. In the overall prosecution case against the appellant based largely on DNA evidence PE1 pales into insignificance.

05th ground of appeal

[15] The appellant complains of the trial judge addressing the prosecuting counsel after retiring the assessors during the trial which, he submits, demonstrates bias on the part of the trial judge against him.

[16] I cannot see any evidence of such an event from the summing-up or the judgment. According to the state counsel, this had happened during the evidence of a witness from Fiji Forensic and Biology Lab. However, there must arguably be a real possibility of actual or apparent bias and threshold of such bias is very high. The test for apparent bias was expounded in **R v. Gough** [1993] UKHL 1; [1993] AC 646 by the House of Lords and as against that it was once again expounded by the High Court of Australia in **Webb v. The Queen** (1994) ALJR 582.

[17] The Supreme Court in Fiji in **Amina Koya v. The State** [1998] FJSC2 said of the deference between the tests in ***Gough*** and ***Webb*** as follows:

*"Subsequently, the New Zealand Court of Appeal, in **Auckland Casino Ltd v. Casino Control Authority** (1995) 1 NZLR 142, held that it would apply the Gough test. In reaching that conclusion, the Court of Appeal considered that there was little if any practical difference between the two tests, a view with which we agree, at least in their application to the vast majority of cases of apparent bias. That is because there is little if any difference between asking whether a reasonable and informed person would consider there was a real danger of bias and asking whether a reasonable and informed observer would reasonably apprehend or suspect bias."*

[18] I see no basis to infer actual or apparent bias on the part of the trial judge. Allowing the prosecution to call PW10 after PW7 cannot be considered as trial judge's bias against the appellant. Nor do I find any recusal application made by the appellant at any stage of the trial.

06th ground of appeal

[19] The appellant submits that he was deprived of a fair trial as guaranteed by the Constitution [section 15(1)] in that the trial judge gave him two days to prepare for the trial by reading the bundle of disclosures returned to him by his previous counsel. The Court of Appeal in **Cakau v State** [2022] FJCA 29; AAU049.2016 (3 March 2022) dealt with the right to fair trial in some detail in a different context though.

[20] Paragraph 10 of the sentencing order sheds some light on this matter.

> *'10. ……….. you were initially represented by the Legal Aid Commission. Despite the repeated advice given by this court, you decided to withdraw your instructions from the said Commission and to appear in person……'.*

[21] While it could be reasonably argued that the bright to fair trial includes the right to have adequate time and facilities to prepare a defence, there has been no judicial attempt to list exhaustively the attributes of a fair trial. That is because, in the ordinary course of the criminal appellate process, an appellate court is generally called upon to determine, as here, whether something that was done or said in the course of the trial, or less usually before trial, resulted in the accused being deprived of a fair trial and led to a miscarriage of justice and what is fair very often depends on the circumstances of the particular case, and notions of fairness are inevitably bound up with prevailing racial values [vide **Dietrich v The Queen** (1992) 177

CLR 292, 300)]. The right to fair trial requires a substantive, rather than a formal or textual approach. It is clear also that fairness is not a one way street conferring an unlimited right on an accused to demand the most favourable possible treatment. A fair trial also requires fairness to the public as represented by the State. It has to instil confidence in the criminal justice system. It is '*not a one way street'*[*vide* **Shaik v State** [2007] 2 ACC, 19; 2008 (2) SA 208 (CC)].

[22] When determining whether the proceedings as a whole have been fair, the weight of the public interest in the investigation and punishment of the particular offence in issue may be taken into consideration (**Ibrahim and Others v. The United Kingdom** (Applications nos. 50541/08, 50571/08, 50573/08 and 40351/09)

[23] It is clear that the appellant, for reasons best known to him, had decided to withdraw himself from the counsel of the Legal Aid Commission and taken his defence into his own hands. Therefore, it cannot be said that the appellant was not getting ready for the trial until then. On the other hand, it was in the interest of justice and fairness to the public including the witnesses that the perpetrators were tried and trial concluded as scheduled. When I consider whether the proceedings as a whole have been fair, I do not see a breach of right to fair trial or miscarriage of justice as far as the appellant was concerned.

07th ground of appeal (sentence)

[24] The appellant argues that it was wrong for the trial judge to have applied sentencing tariff set in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) which is between 08-16 years for aggravated robberies in the form of home invasions in the night (or other aggravated robberies of similar nature).

[25] I agree with the following sentiments expressed by the trial judge in the sentencing order on this aspect of the appellant's complaint.

> *'[4]………..There is no gainsaying that there is not much of a difference between a home invasion and the invasion of business premises. Central to both types of offending is the conduct of breaking into a building that belongs to someone, an act that instils fear and a sense of insecurity in the minds of the members of the community. Therefore,*

the tariff of 08 to 16 years imprisonment should apply to cases where any building has been broken into, in committing the offence of aggravated robbery.'

[26] In **Cikaitoga v State** [2020] FJCA 99; AAU141.2019 (8 July 2020), the appellant and the other three had forcefully entered Comsol Moive Shop at Centerpoint, Nasinu and robbed one of the traders of his mobile phone valued at $200.00. Whilst inside they had assaulted and locked another trader in the toilet and stolen $950.00 in cash, one Nokia N65 brand mobile phone valued at $400.00 all to the value of $1,350.00 from him. A judge of this court held that

'[18] ……….in Wise v State [2015] FJSC 7; CAV0004.2015 (24 April 2015) where the sentencing tariff was set at 08-16 years of imprisonment for aggravated robbery in a situation where the accused had been engaged in home invasion in the night with accompanying violence perpetrated on the inmates in committing the robbery. I do not see why the same tariff should not apply to the current case involving an invasion of business premises in broad daylight with accompanying violence.'

[27] There is no demonstrable sentencing error here.

[28] Calanchini, P said in **Tora v State** [2015] FJCA 20; AAU0063.2011 (27 February 2015) on fixing the non-parole in relation to the main sentence as follows.

[2] The purpose of fixing the non-parole term is to fix the minimum term that the Appellant is required to serve before being eligible for any early release. Although there is no indication in section 18 of the Sentencing and Penalties Decree 2009 as to what matters should be considered when fixing the non-parole period, it is my view that the purposes of sentencing set out in section 4(1) should be considered with particular reference to re-habilitation on the one hand and deterrence on the other. As a result the non-parole term should not be so close to the head sentence as to deny or discourage the possibility of re-habilitation. Nor should the gap between the non-parole term and the head sentence be such as to be ineffective as a deterrent. It must also be recalled that the current practice of the Corrections Department, in the absence of a parole board, is to calculate the one third remission that a prisoner may be entitled to under section 27 (2) of the Corrections Service Act 2006 on the balance of the head sentence after the non-parole term has been served.

[3] In my view the non-parole term of seven years on a head sentence of 8 years does not promote or facilitate conditions which might assist the

> *re-habilitation of the Appellant. I note that the previous criminal history of the Appellant may lead to the conclusion that the prospect of rehabilitation is unlikely. However even a prisoner with the Appellant's record should not be deprived or denied the chance or the opportunity to re-habilitate himself or to be rehabilitated. Although relatively long as a ratio of the head sentence, a non-parole term of six years represents a balance between re-habilitation and deterrence in this case.*

[29] The sentencing Judge would be in the best position in the particular case to decide on the non-parole period depending on the circumstances of the case (**Natini v State** AAU102 of 2010: 3 December 2015 [2015] FJCA 154). However, in the absence of any indication as to why the trial judge fixed the non-parole period at 09 years, 08 months and 05 days when the head sentence was 10 years, 08 months and 05 days (only one year gap) and in view of observations in ***Tora***, though the non-parole itself is lawful in terms of section 18 of the Sentencing and Penalties Act 2009, I am inclined to allow leave to appeal on that aspect of the sentence to be considered by the full court.

Orders

1. Leave to appeal against conviction is refused.
2. Leave to appeal against sentence is allowed only in relation to the non-parole period.

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

COURT OF APPEAL FIJI