

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

**CRIMINAL APPEAL NO. AAU 0077 OF 2018**  
**[Criminal Action No: HAC 172 of 2015]**

**BETWEEN** : **TUI LESI BULA**

**Appellant**

**AND** : **THE STATE**

**Respondent**

**Coram** : **Mataitoga, JA**  
**Qetaki, JA**  
**Kumarage, JA**

**Counsel** : **Appellant in person**  
**Mr R Kumar for the Respondent**

**Date of Hearing** : **9<sup>th</sup> May and 17<sup>th</sup> May, 2023**

**Date of Judgement** : **6<sup>th</sup> June, 2023**

**JUDGEMENT**

**Mataitoga, JA**

[1] I have read the final draft judgment of Qetaki JA. I agree with his reasons and conclusions.

**Qetaki, JA**

- [2] The appellants was charged with two others by the Director of Public Prosecutions for aggravated robbery contrary to section 311 (1) of the Crimes Act. The following information was filed against them:

**“FIRST COURT**

*Statement of Offence*

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

*Particulars of Offence*

***KELEPI SALAUCA, VERETI WAQA & TUI LESI BULA in the company of another on the 11<sup>th</sup> October, 2015 at Sigatoka in the Western Division robbed KAVITESH KIRIT PRASAD of the following items: Nissan Navara (Registration HA 448) valued at \$60,000.00, \$300.00 cash, Assorted cards namely Westpac, Westpac Debit Card, Australian Master Card, Australian Drivers Licence, Joint FNP/FIRCA, Black SFIDA pair of canvas, Gym Gloves, White iPod, Nokia Lumia Phone, Euphoria Calvin Klein Perfume, Encounter Fresh Calvin Klein perfume, Mangal Sutra valued at \$10, 000.00, Bangles valued at \$6,000.00, Hair set valued at \$9,000.00, Bracelet valued at \$2,000.00, Ear ring valued at \$3,000.00, Bedstone Necklace valued at \$900.00, Wedding Ring (Female) valued at \$2,000.00, Wedding Ring (Male) valued at \$1,200.00, Gold Chain (22 carat) valued at \$1,200.00, Wrist Watch (Fossil-Citizen) valued at \$800.00, Ladies Watch (Pulsar) valued at \$300.00, Black Label (x 15 bottles) valued at \$1,350.00, Bombay Sapphire (x 5 bottles) valued at \$400.00, Galaxy Samsung S5(x2) valued at \$2,400.00, ITB Hardware (x2) valued at \$1,000.00, 1 Flash Drive valued at \$500.00, 1 Toshiba laptop valued at \$1,800.00 and assorted branded BLK Clothing valued at \$80.00 all to the **Total Value of Approximately \$93, 930.00.**”***

[3] **THE FACTS**

The facts are briefly as follows:

On 11 October, 2015 the complainant and his wife (husband and wife) were asleep in their house at Malaqereqere, Sigatoka. At about 2.00 a.m. they were awoken by the sound of someone breaking into their bedroom. Three persons of iTaukei origin in the company of each other and another had broken into the house of the victims. The victims were asked to cooperate so that no one was harmed, blankets were thrown over them, curtains drawn and the lights in the house turned on.

- [4] The victims were questioned regarding the whereabouts of their valuables in the house. The pregnant wife of the complainant was grabbed by her hair and dragged from one room to the other so that she could show them where the valuables were. The house was searched for about an hour and the intruders fled from the scene having stolen the following properties belonging to the victims namely Nissan Navara vehicle (registration no. HA 448), mobile phone, assorted jewellery, assorted liquor, wallet with cash of \$300.00, credit cards, perfumes, laptops, BLK clothes, shoes, black and white SFIDA canvas, watches etc. all to the value of about \$93,000.00. Upon police investigation the accused were found to be in possession of most of the items stolen from the complainants. They were arrested and charged.
- [5] The issue or dispute before the Learned Trial Judge was whether the three accused persons were involved in the aggravated robbery under the circumstances laid in the Police information or charges and particulars of offence
- [6] There was no eye witness who saw the accused at the scene of the crime or actually committing the robbery. The prosecution relied on the doctrine of **recent possession** and **circumstantial evidence** to prove that the accused persons in the company of each other had committed the offence.
- [7] At joint the trial the prosecution called fifteen (15) witnesses The Appellant gave evidence but did not call any witness. After the trial the three assessors had returned with a unanimous opinion that all the accused were guilty of the single count of aggravated robbery. The learned High Court Judge had agreed with the unanimous opinion of the assessors and convicted all the accused, on the same count on 15 June 2018 and sentenced them on 10 July 2018. For his part in the commission of the offence the appellant was sentenced to 12 years 02 months and 21 days imprisonment with a non-parole period of 11 years.

#### **Application for leave to appeal**

- [8] The appellant had filed a timely application for leave to appeal conviction only under section 21(1) (a) and (b) of the Court of Appeal Act and filed additional grounds of appeal against conviction on 23 July 2019. He filed written submissions on all grounds

of appeal against conviction on 23 August 2019. The State tendered its written submission on 27 January 2019.

[9] Section 21 of the Act provides:

*“21. -(1) A person convicted on a trial held before the [High Court] may appeal under this Part to the Court of Appeal –*

- (a) against his conviction on any ground of appeal which involves a question of law alone;*
- (b) with the leave of the Court of Appeal or upon the certificate of the judge who tried him that it is a fit case for appeal against his conviction on any ground of appeal which involves a question of fact alone or a question of mixed law and fact or any other ground which appears to the Court to be a sufficient ground of appeal; and*
- (c) with the leave of the Court of Appeal against the sentence passed on his conviction unless the sentence is one fixed by law.*

*(2) The State on a trial held before the High Court may appeal under this Part to the Court of Appeal –*

- (a) against the acquittal of any on any ground of appeal which involves a question of law alone;*
- (b) with the leave of the Court of Appeal or upon the Certificate of the judge who tried the case that it is a fit case for appeal against the acquittal on any ground of appeal which involves a question of fact alone or a question of mixed law and fact or any other ground which appears to the Court to be a sufficient ground of appeal; and*
- (c) with the leave of the Court of Appeal against the sentence passed on the conviction of any person unless the sentence is one fixed by law.*

*(3) The Court of Appeal may, if it gives leave, entertain an appeal from the High Court against the grant or refusal of bail, including any conditions or limitations attached to a grant of bail, upon the application either of the person granted or refused bail or of the Director of Public Prosecutions.”*

### **Application for leave**

[10] In timely leave applications the Court of Appeal has raised the bar by applying a test of **reasonable prospect of success** to determine whether leave to appeal should be granted (see **Caucau v State** AAU 0029 of 2016; 4 October 2018 [2018 FJCA 171, **Navuka v State** AAU 0038 of 2016; 4 October 2018 [2018] FJCA 172, **State v Vakarau** AAU 0052 of 2017; 4 October 2018 [2018] FJCA 173 and **Sadrugu v The State** Criminal Appeal No.0057 of 2015; 6 June 2019 FJCA 87.

[11] All the accused persons were convicted together and they had all appealed their conviction and sentence filing for leave to appeal in accordance with section 21 (1) of the Court of Appeal Act. By a direction of a judge all the accused's application for leave to appeal had been taken up together before the Single Judge of appeal as they arise from one and the same High Court trial. The appellants appeal were heard on 18 March 2020 and a Ruling made on each of them on 20 April 2020. The appeal in this court is from the decision of the Single Judge.

[12] The grounds of appeal before Single Judge are set out below:

*“Grounds of Appeal*

*Ground 1*

*That the learned Trial Judge erred in law and in fact in not analyzing the facts before him before he made a decision that the Appellant was guilty as charged on the charge of Aggravated Robbery. Such error of the learned trial judge in law by failing to make an independent assessment of the evidence before affirming a verdict which was unsafe, unsatisfactory and unsupported by evidence has given rise to a grave miscarriage of justice.*

*Ground 2*

*The learned Trial Judge seriously erred in law when he stated in paragraph 184 of the summing up in regard to the alibi in the defence case. Alibi put forward by the appellant.*

*Ground 3*

*That the summing up was unfairly put to the assessors, the summing up is unusual, the transcript running some 40 typed written pages exceeding 215 paragraphs and is not clear and intelligible, it is confusing and fails to clearly identify the issues that the assessors have to decide within a 30 minutes break resulting in the appellant's conviction caused a substantial miscarriage of justice.*

*Ground 4*

*That the learned Trial Judge erred in law and in fact when he unfairly summed up as follows:*

*That the learned trial judge failed by not properly and adequately give a warning and caution to the assessors as to the reliability of the evidence given by the State witnesses and in particular on the fact that there was no*

*eye witnesses who saw any of the accused persons at the scene of the crime or actually committing the robbery. Failure to do so caused a substantial miscarriage of equality to justice.*

#### Ground 5

*That the learned Trial Judge failed to sum up to the assessors on the Turnbull special guidance as articulated in the R v Turnbull (1977) QB 224 (1976) 3 WLR 445 (1977) 65 or App 242 in support to his summing up in paragraph 20, on the correctness of the circumstances on the case in which the identification by each witness came to be made towards the appellant. Failure to direct the assessors of the Turnbull guidelines, as implicated in this case the conviction quash.*

#### Ground 6

*That the learned trial Judge erred in law and in fact when he unfairly summed up as follows:*

*Unfairly stated at paragraph 189 of the summing up that the stolen items belonging to the complainant were recovered from three accused persons when the evidence crystal clearly shows such few items were not the properties named in the charge particulars that all the accused have no knowledge to the bags contained the two phones and the stolen items prescribed in the count as charged. Therefore there was a grave miscarriage of justice.*

#### Ground 7

*That the learned trial Judge failed to direct the assessors and himself regarding the effect or conscious of omission. What his Lordship direction was only in consistent evidence, he failed to direct the assessors and himself on contradiction and omission [Please view Nadim v. State; [2015] FJCA 130, AAU 0080.2011 (2 October 2015)].*

#### Ground 8

*Incorrectly stated in paragraph 193, line 6-8 and mislead the assessors that the contents of the two bags were checked by police the items found in both the bags were identified by the complainant as stolen from his house when these items are not included as the stolen properties implicated in this crime when connote to the charges particulars.*

#### Ground 9

*The learned trial judge has erred in law and in fact in not directing and/or adequately directing the assessors and himself on the inconsistent statement of prosecution witness Manoa Dugulele. The learned Judge ought to have directed the assessors and himself that when a witness is shown to have made previous statements at trial, he ought to have directed*

*the assessors that the evidence given at the trial should be regarded as unreliable. The failure to do so caused a substantial miscarriage of justice (full particulars will be given after recap of court record).*

Ground 10

*The learned trial judge has erred in law when he misdirected himself in his judgment where he stated at paragraph 31 “That the defence failed to create reasonable doubt” thus shifting the burden and onus of proof. This so called misdirection was capable of affecting the trial judges judgment in properly assessing the defence case.*

Ground 11

*The learned trial judge has erred in law and in fact in not directing himself and or the assessors to refer to n the summing up the possible defence on evidence and as such by his failure there has occurred a substantial miscarriage of justice.”*

[13] At the hearing before a Single Judge the grounds of submission were consolidated and argued by the appellant in the following order and manner:

- (i) grounds of appeal 1-3; The Learned Trial Judge having considered these grounds held that the grounds have no reasonable prospect of success.
- (ii) grounds of appeal 4 and 5; The Learned Trial Judge having considered the grounds held that they have no reasonable prospect for success.
- (iii) grounds of appeal 6 to 11. The Learned Trial judge having considered these grounds held that the grounds have no reasonable prospect of success.

None of the grounds urged by the appellant has a reasonable prospect of success and leave was refused.

**Renewal grounds of appeal and New grounds**

[14] The appellant had filed Renewal Grounds of Appeal and Application for Leave to Appeal on New Grounds

“Renewal Grounds of Appeal

- (1) *That the Learned Trial Judge erred in law in not analyzing the facts before him before he made a decision that the Appellant was guilty as charged on the charge of aggravated robbery. Such error of the learned trial Judge in law by failing to make an independent assessment of the*

*evidence before affirming a verdict which was unsafe, unsatisfactory and unsupported by evidence has given rise to a grave miscarriage of Justice.*

- (2) *That the Learned Trial Judge erred in law when he unfairly summed up as follows:*

*That the Learned Trial Judge failed by not properly and adequately give a warning and caution to the Assessors as to the reliability of the evidence given by the state witnesses and in particular on the fact that there was no eye witnesses who saw any of the Accused persons at the scene of the crime to actually committing the robbery. Failure to do so caused a substantial miscarriage of justice (equality of Justice).*

- (3) *The Learned Trial Judge has erred in law when he misdirected himself in his judgment where he stated at paragraph 31 “That the defence failed to create reasonable doubt . . .” thus shifting the burden and onus of proof. This so called misdirection was capable of affecting the trial judges Judgment in properly assessing the defence case.*

*Application for Leave to Appeal on New Grounds*

- (4) *That the Learned Trial Judge erred in law and in fact in failing to;*
- (i) *Remind the Assessors and himself where a witness (PW7 and PW5) was intoxicated at the happening of the events in issue (the judge should direct the Assessors that) the evidence may not be reliable (in R v. Salih (2005) 160 A. Crim.R310 (A).*
  - (ii) *Balance his Summing Up and to fully and properly put to the Assessors the defence main arguments.*
  - (iii) *Remind the assessors to be cautious in considering PW7’s evidence about the search list he sign for the possession of the bags as the bag was search without his present and he did not know the contents of the bag only the police knew. PW7 is a suspect witness.*
- (5) *That the Learned Trial Judge erred in law in misdirecting the Assessors and himself that the stolen item was found in the possession of the Appellant. (reference to para.189 of the Summing Up).*
- (6) *That the Learned Trial Judge erred in law in failing to warn the Assessors and himself to be cautious about PW7’s evidence as it was tainted on the following;*
- (i) *That PW7 was responsible for the possession of the stolen items and he was required by police to give explanation about it.*
  - (ii) *That there is a possibility to save himself (PW7) from getting charged, as he was also arrested as a suspect.*
- (7) *That the Learned Trial Judge erred in law by failing to direct the assessors the danger and irregularity involved in the dock investigation.”*



[15] **Analysis of grounds of appeal**

**Ground 1 - Error of Analysis in law and fact:**

It alleges that the learned Trial Judge erred in law and in fact in not analyzing the facts before he made a decision that the appellant was guilty as charged on the charge of aggravated robbery. Such error of the learned trial judge in law by failing to make an independent assessment of the evidence before affirming a verdict which was unsafe, unsatisfactory and unsupported by evidence has given rise to a grave miscarriage of justice.

It is alleged that the learned trial Judge failed to make proper analysis of the facts before making his decision. That he failed to carry out an independent assessment of the evidence. That the verdict arrived at as a consequence was unsafe, unsatisfactory and unsupported by evidence and has given rise to a grave miscarriage of justice. It raises issues against the summing up.

[16] I have observed that the summing up made by the learned trial judge on 14 June 2018 and set out in pages 168 to 207 of the Record of the High Court of Fiji Vol 1 of Vol 11 was extensive and thorough with 201 paragraphs and covering the following subjects: Role of judges and assessors (paragraphs 2-7); Burden of proof and standard of proof (paragraphs 8-14); Information (paragraphs 15 to 20); Recent possession (paragraphs 21 to 25); Circumstantial evidence (paragraphs 26 to 32); Joint enterprise (paragraphs 33 to 37); Prosecution case (paragraphs 38 to 141); Defence Case, which included paragraphs focusing on each of the accused (paragraphs 142 to 183); Defence of alibi (paragraphs 184 to 187); Analysis paragraphs 188 to 198, and Conclusion (paragraphs 199 to 215).

[17] The summing up by the trial judge in my view may be regarded in many respects as the result or product or manifestation of the judge's independent, meticulous and careful analysis of the evidence where his knowledge and understanding of the evidence adduced at the trial, the relevant laws, and the role of the jury in determining the facts to assist him in making his determination on the guilt or otherwise of an accused, and the judge's communication skills to impart all the information gathered in an adversarial environment to ensure that the fact finders are fully appraised and informed, in simple,

plain and clear language ,ensuring the assessors are empowered to make their own decision on the guilt or otherwise of the accused.

[18] It is clear and evident that the learned trial judge had analysed the evidence well, as it covers all the essential areas in a criminal trial that assessors need to be aware of before they make their decision on the guilt or otherwise of the accused. While the ground of appeal has generally incorrectly in my view attributed the alleged lack of independent analysis of the trial judge as leading to his affirmation of a verdict which the appellant urges was unsafe, unsatisfactory and unsupported by evidence and has given rise to a grave miscarriage of justice, there are no specific examples raised by the appellant in that regard.

[19] In contrast, the learned trial judge, in summing up had communicated relevant important information on the case for the assessors to understand in paragraphs as he had done in 15, 18 19 and 20, as examples:

Paragraph 15

*“There are three accused persons who are each charged with (1) count of aggravated robbery. You must consider the evidence against each accused separately because you may think that one accused is guilty, it does not mean the others are. This also applies with findings of not guilty.”*

Paragraph 18

*For all accused persons to be found guilty of the offence of aggravated robbery the prosecution must prove, beyond reasonable doubt the following elements:*

- (a) The accused;*
- (b) in company with one or more persons;*
- (c) dishonestly appropriates the complainant’s properties;*
- (d) with the intention of permanently depriving him of the ownership of those properties and*
  - (i) immediately before committing theft uses force on another person; or,*
  - (ii) threatens to use force then and there on another person with intent to commit theft; or escape from the scene;*
  - (iii) at the time of committing theft or immediately after committing theft, he or she;*
  - (iv) uses force on another person; or*

- (iv) *threatens to use force then and there on another person with intent to commit theft or to escape the scene.*”

Paragraph 19

*‘...there is no dispute that on 11 October, 2015 there was a robbery at the house of the complainant where four people with knives and golf-clubs after threatening the complainant and his wife dishonestly appropriate the complainant’s properties with the intention of permanently depriving them of the ownership of those properties.*

Paragraph 20

*What is in dispute is whether each of the three accused persons was involved in the robbery. There are no eye witnesses who saw any of the accused persons at the scene of the crime or actually committing the robbery. The prosecution relies on the principle of recent possession and circumstantial evidence to prove that the accused persons in the company of each other had committed the offence.”*

- [20] The learned trial Judge clearly spelt out the principle of recent possession; the concept of circumstantial evidence and the prosecution case as illustration. The ground and the allegations made therein are unfounded as shown in the above passages from the summing up. Also, it ignores the very clear analysis of the principle of recent possession, as set out by the trial Judge in the paragraphs below:

Paragraph 21

*“The principal of recent possession means if someone is found in possession of property soon after it has been stolen and he fails to give a credible or reasonable explanation of the manner in which he came into possession of it, it is justifiable to infer that he was either the thief or else a guilty receiver of that stolen property.*

Paragraph 22

*In view of the above principle of recent possession it is for the prosecution to prove beyond reasonable doubt that:*

- (a) *The offence of aggravated robbery has actually taken place, where properties worth \$93,000.00 was stolen;*
- (b) *The accused persons were found in possession of the stolen items within a few hours after the offence of aggravated robbery was committed.*

Paragraph 23

*If you are satisfied that the prosecution has proven beyond reasonable doubt the above mentioned two limbs of the principle of recent possession then the accused persons have the burden of giving an explanation of how they came into possession of the properties in question.*

Paragraph 24

*Possession in the context of the principle of recent possession is for the prosecution to prove beyond reasonable doubt that the accused person had some form of control over the stolen properties.”*

- [21] The learned trial Judge instructed the jury on circumstantial evidence and issues related to it in paragraphs 26 to 32 of the Summing Up:

Paragraph 26

*“The prosecution also relies on circumstantial evidence since there is no eye witness to prove that the accused persons were responsible for the theft of properties stolen from the house of the complainant and that there is no other reasonable explanation for the theft of the stolen properties other than the accused persons have stolen it.*

Paragraph 27

*The law on circumstantial evidence is that if, upon considering a series of pieces of evidence, you are satisfied beyond reasonable doubt that the only reasonable inference to be drawn is the guilt of the accused persons, and there is no other reasonable explanation for the circumstances which is consistent with the accused persons innocence, then you may find the accused persons guilty of the offence charged.”*

- [22] The learned trial Judge in paragraphs 28 to 30 illustrated the nature of circumstantial evidence and affirmed the position of assessors in relation to such evidence by stating in paragraph 31:

Paragraph 31

*“Remember that in considering circumstantial evidence you must be satisfied beyond reasonable doubt that the only reasonable inference you can draw which are consistent with the accused’s innocence or if you have a reasonable doubt about it, then you should find the accused persons guilty.”*

## **Joint enterprise**

- [23] The learned trial Judge clearly explained the concept and nature of Joint Enterprise as the prosecution is alleging that the accused persons committed the offence of aggravated robbery jointly as a group, at paragraphs 33 to 37.

### *Paragraph 34*

*“Joint enterprise is when an offence is committed not just by the person who actually does that act, but also by the person who assists him to commit the offence. Here all the accused persons have been jointly charged with the offence of aggravated robbery. The law is if two or more people jointly commit a crime, each one is responsible and liable for the actions of another. “(an example follows)*

## **Prosecution case**

- [24] The learned trial Judge was able to put across his analysis of the prosecution case. The prosecution called (15) witnesses to prove its case against all the accused persons. The learned Judges Summing Up referred to the appellant’s own involvement in the joint enterprise in paragraphs 69 in connection with PW5’s evidence ;82 in relation to PW7 evidence ;82, 83 and 84 in relation to PW7’s evidence; 88, 89 and 92 also in relation to PW7’s (Etuwini Sivo) evidence. At paragraph 84 made reference to the appellant as follows- *“Tau from Lau carried the black Canterbury bag...”* Paragraph 88 referred to the appellant jumping off the boat with others.” ...

### *Paragraph 85*

*“The witness brought the boat it was high tide Kelepi boarded the boat, Tau with his black Canterbury bag, and the man from Tailevu carried his blue Canterbury bag and he was also holding the bolt cutter which was covered with a black jacket.*

### *Paragraph 92*

*When they boarded the boat from the bridge one bag belonged to Tau and the other bag belonged to the man from Tailevu and apart from the two bags the bolt cutter was found in the boat The witness also saw the man from Tailevu carrying the bolt cutter but he did not know who owned it.”*

**Paragraph-PW9 Paras 105-110 related to bags ceased and contents**

[25] The learned trial Judge had comprehensively and meticulously analysed the evidence in summing up, there was no error in that regard that make the verdict unsafe, and unsatisfactory. The verdict was supported by evidence and no miscarriage of justice had occurred. This ground is misconceived and with no prospects of success. It has no merit and is dismissed.

[26] **Ground 2 - Lack of warning and caution to assessors:** *alleges that in his summing up the Learned Trial judge erred when he failed by not properly and adequately give a warning and caution to the assessors as to the reliability of the evidence given by the state witnesses and in particular on the fact that there were no eye witnesses who saw any of the accused persons at the scene of the crime to actually committing the robbery. Failure to do so caused a substantial miscarriage of justice.*

This ground is also misconceived. Although the accused were charged under section 311(1) of the Crimes Act 2009, the prosecution, as clearly explained by the learned trial Judge at the summing up and in the Judgement that, the prosecution is relying on the principles of **recent possession** and **circumstantial evidence** to prove its case. The elements and nature of these principles were clearly articulated before the assessors in the summing up. In his conclusion he stated that some witnesses react differently when giving evidence. That the assessors have to have to decide which witnesses are reliable and which are not. In the context of the issues of credibility of witnesses and reliability of evidence on the facts.

[27] The Learned Trial Judge stated at Paragraph 201 of the summing up:

Paragraph 201:

*“In deciding the credibility of witnesses and the reliability of their evidence it is for you to decide whether you accept the whole of what a witness says, or only part of it. You may accept or reject such parts as you think fit. It is for you to judge whether a witness is telling the truth and is correctly recalling the facts about which he or she has testified. You can accept part of a witness’s evidence and reject other parts. A witness may tell the truth about one matter and lie about another, he or she may be accurate in saying one thing and not be accurate in another.”*

## **Judgement**

[28] In his Judgement the learned trial judge stated:

*“2. The three assessors had returned with a unanimous opinion that all the accused persons are guilty of one count of aggravated robbery as charged.”*

*“3.I adjourned overnight to consider my judgment direct myself in accordance with my summing up and the evidence adduced at the trial”*

*“31.I reject evidence of both the accused persons and their witnesses as unreliable and untruthful. The defence has not been able to create any doubt in the prosecution case.”*

*“32.I am satisfied beyond reasonable doubt that all the accused persons in the company of each other on 11 October, 2015 at Malaqereqere, Sigatoka had dishonestly appropriated the complainant’s properties with the intention of permanently depriving them of the ownership of those properties and immediately before committing theft had threatened to use force on the complainants.”*

*“33. In view of the above, I find all the accused persons guilty as charged and I convict them accordingly.”*

[29] The summing up by the learned trial Judge was a balanced and not unfair as alleged. The summing up in its totality had been comprehensive and fair equally and adequately covering both the cases for the prosecution and the defence. No miscarriage of justice has occurred as a result. This ground has no reasonable prospects of success. It has no merit and is dismissed.

[30] **Ground 3. Misdirection leading to shift in onus and burden of proof.** *Alleges that the learned trial judge erred in law when he misdirected himself in his judgement in paragraph 31. In doing so he had shifted the burden and onus of proof from the State to the accused, and so on.*

Paragraph [31] of the judgement states:

*“31. I reject the evidence of the accused persons and their witnesses as unreliable and untruthful. The defence has not been able to create any doubt in the prosecution case.”*

[31] The judgement was delivered on 15 June 2018 and summing up was on 14 June 2018 a day earlier. The judgement was delivered after the assessors had returned with a unanimous verdict of guilty for all accused persons. The trial judge in the first line of paragraph 31(which the appellant did not include in the ground of appeal only citing the second limb to the paragraph) had emphatically stated that he rejected the evidence of the accused persons and their witnesses as unreliable and untruthful.

[32] That is from the learned trial judge who was present throughout the trial and had the benefit of not only listening to the accused giving evidence but also seeing and observing their conduct and demeanour in court, as well as those of the prosecution witnesses. How the contents of paragraph [ 31] in the judgement has been perceived as a misdirection by the trial judge and leading to a shift in the onus and burden of proof has not been explained. There was no misdirection as alleged that shifted the burden of proof influencing the assessor's verdict. No miscarriage of justice occurred. The ground has no reasonable prospects of success, It has no merit and is dismissed.

[33] **Ground 4.** *Alleges that the learned trial judge erred in fact and in law in failing to (i) Remind the assessors of the un- reliability of evidence given by PW7 and PW 5 due to intoxication during relevant events; that the trail judge should direct the assessors that their evidence was unreliable;(ii) Putting a balanced summing up on the defence main arguments; (iii) Remind the assessors to be cautious as to PW7s evidence in connection with the search list.*

The learned trial judge's summing up on PW7s evidence are contained in paragraphs [81] to [95] of the summing up. In relation to PW5, the summing up of his evidence are contained in paragraphs [ 60] to [77]. The learned trial judge did not, as the appellant urges, remind the assessors that their evidence may not be reliable. What effect would that have on the totality of PW7s and PW5s evidence. The appellant did not elaborate on that but cited **R v Salih** (2005) 160 A.Crim. R310(A).

[34] The complaint that the learned trial judge did not provide a balance in summing up to properly put to the assessors the defence main arguments have been substantially covered in this judgement with respect to ground one. In fact, the summing up covered



the **Defence Case** extensively commencing from paragraph [142] to paragraph [187]. He concluded in paragraphs 186 and 187, stating:

*“186. Even if you conclude that the defence put forward by both the accused persons have not been made out that does not entitle you to convict the accused persons. The prosecution must still satisfy you beyond reasonable doubt of their guilt.*

*187. The accused persons have denied any wrong doing their defence is they did not commit the offence of aggravated robbery as alleged.”*

[35] The evidence of the appellant (Third accused) is discussed commencing from paragraph [175] to paragraph [184] and it is a balanced account of his evidence at the trial. I find that the summing up was fair and reasonable under the circumstances and the trial judge has properly put the case for the defence before the assessors as clearly evidenced by paragraphs [142] to [187], and especially in paragraphs [186] and [187] (see above) when he concluded his remarks on the Defence.

[36] On PW7s evidence on the search list and the allegations that PW7 was a suspect witness, the trial judge’s Analysis from paragraphs [188] to [198] better explains the evidence. Paragraphs [193] and [194] links the appellant (Third accused) to the black bag. In paragraph [196] the prosecution termed the alibi that the appellant relied on as unreliable and should be rejected.

It is pertinent to emphasise that in his judgement the learned trial judge accepted the evidence of the prosecution as truthful and reliable (paragraph [23]). There were some inconsistencies in their evidence but those were not significant to affect the credibility and reliability of their evidence. The totality of the evidence showed the defence witnesses to be unreliable and untruthful, and the prosecution witnesses as honest and reliable. The summing up was fair covering both the prosecution and defence cases equally comprehensively.

This ground fails as there are no reasonable prospects of success. It has no merit and is dismissed.

[37] **Ground 5 - Misdirection:** *Alleges misdirection in that the trial judge erred in law and in fact in misdirecting the assessors and himself that the stolen item was found in the possession of the appellant (reference to para. 189 of Summing Up).*

Paragraph [189] of the Summing Up, states:

*“189. The stolen car of the appellant was found abandoned in the interior of Rakiraki and also some of the stolen items belonging to the complainant were recovered from the three accused persons.”*

The appellant has not explained why he considered this direction a misdirection for a proper reading of the summing up of the whole evidence adduced at the trial fully support the statement captured in this paragraph.

This ground fails as there is no reasonable prospects of its success. It lacks merit and is dismissed.

[38] **Ground 6 - Warning to assessors in summing up;** *Allegations that the learned trial judge erred in law in failing to warn the assessors and himself to be cautious about PW7’s evidence as it is tainted on the following: (i) PW7 was responsible for possession of stolen items and he was required by police to give explanation about it ,(ii)that there is possibility to save himself (PW7) from getting charged, as he was also arrested as a suspect.*

There is no evidence that PW7 lied or that he stole items or was being implicated in the aggravated robbery charge. There is no evidence that PW7 was arrested to be charged for the same aggravated robbery incident. On the contrary, the trial judge believed in the prosecution witnesses as credible and reliable witnesses unlike the accused persons. This ground is misconceived and has no reasonable prospect for success in the appeal. It has no merit and is dismissed.

[39] **Ground 7 - Dock Investigation;** *Allegation that the learned trial judge erred in law in failing to direct the assessors the danger and irregularity involved in dock investigation.*

The appellant has failed to explain or give examples connected to this ground of appeal. This is an aspect like most of the grounds of appeal that could have been addressed at the trial stage or by asking for redirection in the summing up stage. This issue was not

raised at the trial nor in the application for leave to appeal before a single Judge The appellant's identity was not raised in cross-examination of prosecution witnesses by the appellant. On the totality of the evidence the appellant was not disadvantaged and no miscarriage of justice had occurred. This ground has no reasonable prospect for success. It lacks merit and is dismissed.

**Conclusion**

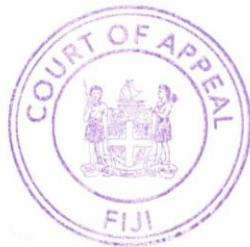
[40] All of the grounds of appeal lack merit. They have no prospects of succeeding and are dismissed. In considering the application for leave to appeal, I have also considered the merits. The appellant's appeal is dismissed and the conviction is affirmed.

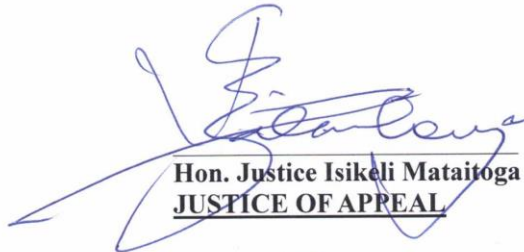
**Dr. Kumarage, JA**

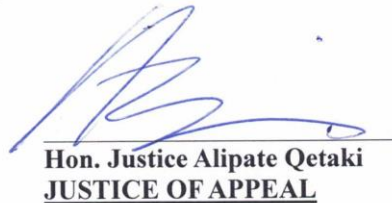
[41] I have read the final draft judgment of Qetaki JA. I agree with the analysis and conclusions.

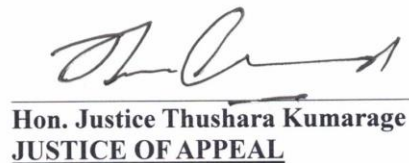
**Order of the Court**

1. Appeal against conviction is dismissed.
2. Conviction affirmed.



  
**Hon. Justice Isikeli Maitoga**  
**JUSTICE OF APPEAL**

  
**Hon. Justice Alipate Qetaki**  
**JUSTICE OF APPEAL**

  
**Hon. Justice Thushara Kumarage**  
**JUSTICE OF APPEAL**