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

CRIMINAL APPEAL NO.AAU 0044 of 2020
[In the High Court at Lautoka Case No. HAC 49 of 2014]

BETWEEN	**:**	**JANARDHAN**	
			Appellant
AND	**:**	**THE STATE**	
			Respondent

Coram	**:**	**Prematilaka, RJA**
Counsel	**:**	**Appellant in person**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	**:**	**05 June 2023**
Date of Ruling	**:**	**06 June 2023**

RULING

[1] The appellant had been charged with another and found guilty in the High Court at Lautoka on a single count of aggravated robbery contrary to section 311(1) (a) and 45(1) of the Crimes Act, 2009. The charge is as follows:

Statement of Offence

AGGRAVATED ROBBERY*: Contrary to section 311(1) (a) and section 45 (1) of the Crimes Act, 2009.*

Particulars of Offence

Janardhan and Ronil Kumar *on the 16th day of April 2014 at Lautoka in the Western Division, robbed Atishma Devi and Shaiyum Shiraj of $35,000.00 cash and $5,000.00 worth of cheques, the property of Shiu Prasad & Sons Limited.*

[2] The assessors had expressed a unanimous opinion that the appellant was guilty as charged. The learned High Court judge had agreed with the assessors' opinion, convicted him and sentenced the appellant on 28 February 2020 to a period of 06 years' imprisonment (effective period being 05 years and 11 months) with a non-parole period of 04 years (effective period being 03 years and 11 months).

[3] The appellant's appeal filed in person against conviction is out of time by about 03 months but the State had informed that it would regard it as a timely appeal.

[4] In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. 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)].

[5] Roneel Kamal Sen (PW1) was a director of Shiu Prasad & sons Limited. On 16 April 2014, by about 10.00 am he had prepared his banking roll consisting of $35,000.00 in cash and $5,000.00 in cheques, packed it in a brown paper bag and put into a plastic bag together with the deposit book and given it to his accountant, Atishma Devi (PW2) to bank the same with driver Shaiyum Ali (PW3). As soon as Atishma and Shaiyum went out of the office, PW1 had heard a cry '*chor, chor'* and on the CCTV screen, he had seen two of his workers running out of his office and he too had come out soon to find Shaiyum bleeding from the head and Atishma lying down on the ground, hurt and the banking she carried, robbed. He knew the appellant as he was working for him for about 4-5 years as a sales person and a driver. At the time of the robbery, the appellant had been in the office. When PW2 was taking the banking

money, she was behind PW3 and while PW3 went to open her the vehicle door, someone had come from behind and pushed PW2 and snatched the plastic bag containing the money and the cheques. She had tumbled and got herself injured and then shouted for help. She had seen four robbers getting into a black car and fleeing. PW3 had heard her cries and ran after the robbers. PW3 had confirmed that he had come out of the office to go to the bank with PW2 and while opening the vehicle door, he had heard PW2 shouting that she had been robbed. PW3 had chased the robbers but he was suddenly hit with something from the side and he had fallen down. When he got up, he had seen a black car being driven away very fast.

[6] None of the prosecution witnesses had identified the perpetrators and the identity of the appellant had been established through his confessional statement and charge statement. The appellant had not given evidence; nor had he called any other witnesses on his behalf at the trial. He, however, had given evidence at the *voir dire* inquiry.

[7] The grounds of appeal against conviction are as follows:

> *'**Ground 1***
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> *THAT the Learned Trial Judge may have fallen into an error of law when his Lordship's direction in respect to the Burden of Standard of Proof is inadequate in sufficient and improper.*
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> ***Ground 2***
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> *THAT the Learned Trial Judge may have fallen into an error of law when he failed to direct himself and the assessors on the weight to be given to the opinion of the assessors during his judgment.*
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> ***Ground 3***
>
> *THAT the Learned Trial Judge may have fallen into error of law when His Lordship misdirected himself and the assessors on the principles of joint enterprise on paragraph 21 of the Summing Up.*
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> ***Ground 4***
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> *THAT the Learned Trial Judge may have fallen into an error of law when His Lordship's direction to the assessors regarding the alleged confession contained in the Caution Interview, in particular as to how to approach and the weight to*

be attached to it and if they were satisfied that it was made by the appellant and whether it was truthful and accurate.

Ground 5

THAT the Learned Trial Judge may have fallen into an error of law when His Lordship admitting the confession in the Voir Dire.

Ground 6

Misdirection on the elements of the offence.

Ground 7

Elements of Aggravated Robbery and Theft.

Ground 8

Absence of witnessing officer during caution interview and inconsistent evidence in respect to it.'

Ground 9

THAT the Learned Trial Judge erred in law when His Lordship admitted the police records of caution and charge interview statement without independent corroboration to its making.

Ground 10

THAT the Learned Trial Judge erred in law when His Lordship failed to exercise his judicial discretion to direct the assessors warning them to view with caution the danger of convicting on uncorroborated police records of confessional statement as to its making.

Ground 11

THAT the conviction was a miscarriage of justice when the Learned Trial Judge state that the prosecution had proved beyond reasonable doubt all the elements of the offence. However, prosecution had failed to prove the identity of the accused and thus the conviction miscarriage.

Ground 12

THAT I did not receive affair trial by reasons of the post charge delay/ and inordinate and unreason able delay – attributed by the state amounting to an abuse of process and resulting in a miscarriage of justice in the circumstances of the case and to the appellant.

Ground 13

THAT the Learned Trial Judge erred in law by directing the assessors on his decision to rule admissible the confessional records of police interview statement. In evidence which he made in the absence of the assessors in a voir dire. By doing so, the discretion was such that it amounted to a miscarriage of justice in the circumstance of the case and to the appellant.

Ground 14

THAT the Learned Trial Judge erred in law not directing the assessors to consider the voluntariness of the police records of interview statements and what weight should be given, in light of police thread, assault, intimidation and oppressive treatments before, during and after the making of the records of interview statement. In doing so, the appellant was prejudiced and was denied a fair trial.

Ground 15

THAT the Learned Trial Judge erred in law in not exercising his judicial discretion to exclude the police records of interview statements without independed corroboration as to its making.

Ground 1

[8] The trial judge had directed the assessors on both burden of proof and standard of proof adequately at paragraphs 14 and 15 respectively.

Ground 2

[9] The trial judge at a trial with assessors *i.e.* 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) & **Fraser v State** [2021] FJCA 185; AAU128.2014 (5 May 2021)].

[10] Therefore, the trial judge was under no obligation to give a particular weight to the assessors' opinion. In any event, the assessors were unanimous that the appellant was guilty.

Ground 3

[11] The trial judge appears to have described how an accused could be made liable for an offence even if he himself has not committed the offence. Joint enterprise in one such situation. However, in this case the appellant was sought to be made liable not on the basis of joint enterprise but on the basis that he had aided and abetted the doers of the offending in terms of section 45(1) of the Crimes Act, 2009. Thus, there is no inadequacy in the directions on a joint enterprise.

Ground 4 & 14

[12] This ground of appeal is concerned with the directions as to how the assessors should have approached the appellant's cautioned stamen and the charge sheet. The directions are at paragraphs 23 of the summing-up.

> *[23] 'When you consider the issue of identification, you must remember that the prosecution relies entirely on the caution interviews of the accused for that purpose. The records of caution interviews were considered separately before the commencement of this trial, by this court on their voluntariness and admissibility as evidence. The court having considered the evidence and the relevant factors has ruled that those statements given at the caution interviews of these two accused are made voluntarily, hence admissible. Yet, my direction is for you to consider the two caution interviews and the charge statement marked PE1, PE2 and PE3 as to the credibility of their contents and satisfy your selves as to whether the accused took part in committing the alleged offence.*

[13] The trial judge had informed the assessors that the court had earlier ruled the cautioned statement and the charge statement voluntary and therefore admissible but directed them to consider the credibility of the contents to decide whether the appellant had taken part of the offending.

[14] The law relating to directions on confessional statements was stated succinctly in **Tuilagi v State** [2017] FJCA 116; AAU0090.2013 (14 September 2017) as follows:

> *'[26] Unfortunately, it is clear that the trial Judge had directly placed the issue of voluntariness of the confessions before the assessors when they had already been ruled voluntary and admitted in evidence as part of the judge's function. It is only the making of it, truthfulness/weight and probative value/sufficiency for the conviction that should have gone before the assessors. The correct law and appropriate direction on how the assessors should evaluate a confession could be summarised as follows:*
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> *(i) The matter of admissibility of a confessional statement is a matter solely for the judge to decide upon a voir dire inquiry upon being satisfied beyond reasonable doubt of its voluntariness (vide **Volau v State** Criminal Appeal No.AAU0011 of 2013: 26 May 2017 [2017] FJCA 51).*
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> *(ii) Failing in the matter of the voir dire, the defence is entitled to canvass again the question of voluntariness and to call evidence relating to that issue at the trial but such evidence goes to the weight and value that the jury would attach to the confession (vide **Volau**).*
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> *(iii) Once a confession is ruled as being voluntary by the trial Judge, whether the accused made it, it is true and sufficient for the conviction (i.e. the weight or probative value) are matters that should be left to the assessors to decide as questions of fact at the trial. In that assessment the jury should be directed to take into consideration all the circumstances surrounding the making of the confession including allegations of force, if those allegations were thought to be true to decide whether they should place any weight or value on it or what weight or value they would place on it. It is the duty of the trial judge to make this plain to them. (emphasis added) (vide **Volau**).*
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> *(iv) Even if the assessors are sure that the defendant said what the police attributed to him, they should nevertheless disregard the confession if they think that it may have been made involuntarily (vide **Noa Maya v. State** Criminal Petition No. CAV 009 of 2015: 23 October [2015 FJSC 30])*
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> *(v) However, **Noa Maya** direction is required only in a situation where the trial Judge changes his mind in the course of the trial contrary to his original view about the voluntariness or he contemplates that there is a possibility that the confessional statement may not have been voluntary. If the trial Judge, having heard all the evidence, firmly remains of the view that the*

*confession is voluntary, Noa Maya direction is irrelevant and not required (vide **Volau** and **Lulu v. State** Criminal Appeal No. CAV 0035 of 2016: 21 July 2017 [2017] FJSC 19.'*

[15] Upon reading the *voir dire* ruling and the summing-up, it is clear that there had not been any fresh material led in the course of the trial forcing the trial Judge to change his mind contrary to his original view about the voluntariness or that the trial judge had contemplated during the trial proper that there was a possibility that the confessional statement and charge statement may not have been voluntary. Therefore, the trial judge need not have directed the assessors to decide whether both confessional statements were voluntary or not. Since the trial judge, having heard all the prosecution evidence and the suggestions on behalf of the appellant on alleged police assault (appellant did not give or lead evidence), had firmly remained of the view that the confessions were voluntary, ***Noa Maya*** direction was irrelevant and not required.

[16] However, the trial judge had not directed the assessors to consider whether the appellant made PE1 and PE2 and whether PE1 and PE2 were true and sufficient for the conviction (i.e. the weight or probative value) but only asked them to consider PE1 & PE2 as to the credibility of their content which means only the probative value of them. The trial judge had also not directed the assessors to take into consideration all the circumstances surrounding the making of the confession including allegations of force, if those allegations were thought to be true to decide whether they should place any weight or value on PE1 and PE2 or what weight or value they would place on PE1 and PE2.

[17] Nevertheless, the trial judge had drawn the assessors' attention to the inconsistency in the appellant's suggestions to PW4 (interviewing officer) that he was slapped 6-7 times before the interview in contrast to his subsequent position that during the interview when he answered in the negative question 28 he was assaulted by 10-12 police officers. The confessions appear to be from question 28-106 of PE1. The judge had also pointed out to the assessors that the appellant's answers prior to and after question 28 have flown in a natural sequence and not taken an abrupt change showing no significant turning point due to an assault.

[18] Further, the trial judge had given his mind in the judgment once again to the contested aspect of identity established only through the appellant's confessions and concluded that the contents of PE1 and PE2 fit well with the rest of the evidence on many important aspects including as to the vehicle they used and the description of the robbers and those material managed to fill in the gaps of the prosecution case which could not have been explained otherwise. In consideration of all the material before him, the judge was convinced without any reasonable doubt that the appellant actively took part in the alleged robbery.

[19] Therefore, in my view, the deficiency highlighted above in the summing-up had not resulted in a substantial miscarriage of justice and the proviso to section 23(1) of the Court of Appeal may apply. However, it is a matter for the full court to do so if it thinks fit. In the circumstances, I would be inclined to grant leave to appeal on this ground of appeal. Ground 14 also could be considered under this ground of appeal.

Ground 5

[20] The trial judge had considered the question of voluntariness in a comprehensive *voir dire* ruing where he had ruled out the confession of the 05th accused but admitted those of the appellant and the 02nd accused.

Ground 6 & 7

[21] The trial judge had properly directed the assessors on the elements of the offence at paragraphs 20 – 29 of the summing-up.

Ground 8

[22] The appellant submits that there was a clear contradiction between the evidence of PW3 and PW4 in that as per paragraph 35(d) of the summing-up, during cross-examination PW4 Cpl 2932 Mohammed Shamin had informed Court that there was no witnessing officer as they were short of manpower at the time of interview whereas at paragraph 37 (f) PW5 DC 3824 Vedh Prakash stated in evidence that though a

witnessing officer has signed the charged statement, his name or details were not mentioned and that he could not recollect who the witnessing officer was.

[23] It is very clear that PW3 had referred to the recording of the cautioned interview on 18 April 2014 while PW4 was referring to the recording of the charge statement on 19 April 2014. There is no contradiction between them.

Ground 9 and 10

[24] There is no requirement in law that before admitting a confessional statement the trial judge should look for independent corroborative evidence or the trial judge should warn the assessors of the danger of convicting an accused on a confession without such independent corroborative evidence.

[25] In fact, according to the summing-up, the overall narrative in the cautioned statement of the appellant is consistent with the evidence of PW2 & PW3 whose evidence is independent of the cautioned interview statements.

Ground 11 and 15

[26] It is trite law that an accused could be convicted on his confession alone without any other evidence. The appellant's cautioned statement and charge statement prove beyond reasonable doubt his identity.

Ground 12

[27] There is no material to show that there has been such an inordinate delay that would amount to abuse of process or was oppressive or prejudicial to the appellant where a fair trial was no longer possible. Neither could it be said that the appellant's conviction brought the administration of justice to disrepute [vide **Ram v State** [2023] FJCA 66 (25 May 2023) and **Navunisaravi v The State** AAU 0150 of 2017 (25 May 2023]

Ground 13

[28] The trial judge had said in the summing-up that the record of caution interview (and charge statement) was considered separately before the commencement of this trial for voluntariness and admissibility and that the court having considered the evidence and the relevant law had ruled that those statements were made voluntarily and therefore admissible. Yet the trial judge had proceed to tell the assessors that they should consider the caution interview and the charge statement marked PE1 & PE2 as to the credibility of the contents and satisfy themselves as to whether the appellant took part in committing the alleged offence.

[29] Although, it would have been desirable if the trial judge had avoided mentioning his decision on voluntariness and admissibility, nevertheless it cannot be said to have caused a miscarriage of justice.

Order of the Court:

1. Leave to appeal against conviction is allowed only on the 04th ground of appeal.

COURT OF APPEAL FIJI

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

Solicitors:

Appellant in person
Office for the Director of Public Prosecutions for the Respondent