IN THE COURT OF APPEAL, FIJI
Appellate Jurisdiction

CRIMINAL APPEAL NO. AAU 061 OF 2022
CRIMINAL APPEAL NO. AAU 01 OF 2023
High Court No. HAC 343 of 2019S

BETWEEN	:	**KILIONI VATUTAQIRI**	
			First Appellant
		LEMEKI BALEITAVUA	
			Second Appellant
AND	:	**THE STATE**	
			Respondent

Corum : **Mataitoga, RJA**

Counsel : **Appellants in person**
Ms. Konrote M. for Respondent [ODPP]

Date of Hearing : **11 April 2024**
Date of Ruling : **4 June 2024**

RULING

1. The appellants were charged in the High Court at Suva with 1 count of Aggravated Robbery. Both pleaded not guilty to the charge. The information was amended a few times over a period of 3 years, before it was finally tried with the charge as stated below:

"Statement of Offence

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

Particulars of Offence

KILIONI VATUTAQIRI, LEMEKI BALEITAVUA and ANOTHER *between the 6th day of September, 2019 and the 7th day of September 2019 at Pacific Harbour, in the Central Division, in the company of each other, stole 1x gold chain; 1x gold earring; 1x white J2 Samsung mobile phone; 2x bottles of whiskey; assorted keys; NZD$25.00 and FJD$500.00 from* ***CORRINE GWENDA ANGUS*** *and* ***GRAHAM ERNEST ANGUS*** *and immediately before stealing from* ***CORRINE GWENDA ANGUS*** *and* ***GRAHAM ERNEST ANGUS****, used force on them".*

2. The appellants were convicted of the charge in the High Court and were sentenced to 12 years 6 months imprisonment with a non-parole period of 11 years imprisonment.

3. The first appellant (Kilione Vatutaqiri) had filed a timely appeal against conviction and sentence on 28 July 2022. He filed amended grounds on 13 July 2023

4. The second appellant (Lemeki Baleitavua) had filed an untimely appeal against conviction and sentence on 17 January 3023. This appeal is out of time by 5 months 4 days.

High Court

5. There were three amendments to the Information filed by the prosecution, allowed by the trial judge over a period of 3 years. The first information with the charge of Aggravated Robbey was first put to the two appellants on 19 February 2019, to which they pleaded not guilty. The information was amended on 13 June 2022 and when the amendment was put to the appellants they pleaded not guilty. The third amendment to the information was made on 28 June 2022 and the appellants pleaded not guilty.

6. In October 2019, while the police were investigating the case, they caution interviewed both appellants at the Pacific Harbour Police Post, between the 1st and 3rd October 2019. According to the police, when the two appellants were caution interviewed by the police, they both confessed voluntarily to the police. They admitted, they were part of the group that violently robbed the elderly complainants of their properties, itemized in the information, between 6 and 7 September 2019, at their villa in Pacific Harbour. The police said, the two appellants admitted the offence out of their own free will.

7. However, the two appellants challenged the admissibility of their caution interview statements. The first Appellant Vatutaqiri claimed that the police, when they caution interviewed him on the 2nd and 3rd October 2019 at Pacific Harbour Police Post, fabricated his alleged confessions. Because his ground of challenge was that of police fabrication, a voir dire was unnecessary, as a matter of law. As for second appellant Baleitavua, he claimed, the police forced the confession out of him. He said, they repeatedly assaulted him, swore at him and threatened him, while he was in their custody from 1st to 3rd October 2019. As a result, a voir dire was held to decide the admissibility of his caution interview statement.

8. The voire dire hearing was held to determine the voluntariness or not of the cautioned interview statements of both appellants. Their respective caution interview statement was determined to have been given voluntarily and the allegation of assault and intimidation etc alleged by the appellants were not supported by any of the evidence they tendered. The court admitted their caution interview statements as evidence at the trial.

Leave to Appeal Hearing

Grounds of Appeal

9. In the case of the first appellant [Kilione Vatutaqiri] he submitted 8 grounds of appeal against conviction, as follows:

> "[1] The Learned Trial Judge erred when he stated that confessed because police rubbed hot chilies on my face, chest and body, it was painful.
>
> [2] That the Learned Trial Judge erred when he did not properly consider that the record of interview notes (both English and Itaukei versions) were not numbered correctly and there was no sufficient reason provided by the interviewing officer and his reason contradicted the witnessing officer.

[3] That the Learned Judge did not consider that there was a discrepancy in timing as outlined in the medical report and at the time the caution interview commenced again.

[4] That the Learned Judge erred when he said that there was no medical evidence to show any bruises or injuries suffered as a result of the police assaults, when I mentioned that I had injuries in my evidence.

[5] That the Learned Judge erred in law when he allowed the medical report to be tendered through me even though my counsel objected to the same.

[6] That the Learned Judge erred in fact when he opted the prosecution versions of event the evidence of the police officers involved in my caution interview and charge statement when the evidence on oath had contradicted each other and was not credible.

[7] That the Learned Trial Judge erred in law and in fact when he failed to consider that the accused had voluntarily confessed, there was no need for him to be taken to Raiwaqa, Nabua Police Station before finally cautioned at the Pacific Harbour Police Post. This is a miscarriage of justice and prejudice to the Appellant.

[8] That the Learned Trial Judge erred in law and in fact when he stated at paragraph 17, line 11 of his judgment that there was no credible medical evidence to show any injuries suffered by the accused, even though the accused have a medical report to prove injuries on his first appearance thus negates and challenges the credibility of the Prosecution evidence thus, resulting in a substantial injustice and prejudice to the Appellant.

Leave to Appeal of First Appellant – Lemeki Vatutaqiri

10. All the 8 grounds of appeal submitted by the first appellant, set out in paragraph 9 above, allege errors of law and fact by the trial judge. This being the case, leave to appeal is required under section 21(1)(b) of Court of Appeal Act 2009.

11. For a timely appeal like this one, the test for leave to appeal against conviction and sentence is **'reasonable prospect of success'**: **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: **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

12. The grounds of appeal submitted by the first appellant may be consolidated for ease of reference and assessment for determining whether leave to appeal may be granted or not. Grounds 1, 4 and 6 cover claims pertaining to the circumstances in which the caution interview statements were obtained. These grounds are misconceived because the issue pertaining to his caution interview is not whether voluntariness was challenged, rather that the answers to the questions asked of him were fabricated. The issue of the assault by the police on the first appellant allegedly took place before the caution interview, were not raised by him during the trial.

13. The trial judge stated at paragraph 3 of the judgement as follows:

> *'2. Both the accuseds said they understood the charge and pleaded not guilty to the same. In October 2019, while the police were investigating the case, they caution interviewed both accuseds at the Pacific Harbour Police Post, between the 1st and 3rd October 2019. According to the police, when the two accuseds were caution interviewed by the police, they both confessed voluntarily to the police. They admitted, they were part of the group that violently robbed the elderly complainants of their properties, itemized in the information, between 6 and 7 September 2019, at their villa in Pacific Harbour. The police said, the two accuseds admitted the offence out of their own free will, and the same were true.*
>
> *3. However, the two accuseds challenged the admissibility of their caution interview statements. However, Accused No. 1 said that the police, when they caution interviewed him on the 2nd and 3rd October 2019 at Pacific Harbour Police Post, fabricated his alleged confessions. Because his ground of challenge was that of police fabrication, a voir dire was unnecessary, as a matter of law. As for Accused No. 2, he said, the police forced the confession out of him. He said, they repeatedly assaulted him, swore at him and threatened him, while he was in their custody from 1st to 3rd October 2019. As a result, a voir dire was mandatory to decide the admissibility of his caution interview statement.'*

14. And further at paragraph 17, the trial Judge held:

> *'The court had carefully considered all the evidence put before the court. The court had carefully observed the demeanours of all the witnesses. As far as the two accuseds' alleged confessions contained in their police caution interview statements were concerned, the court was of the view that the two accuseds did in fact make those statements. They both signed their caution interview notes and the same were counter-signed by the*

interview and witnessing police officers. They alleged assaults and unfairness on the police part. Neither of them complained to any senior police officers, the Magistrate Court or the High Court, on any alleged police assaults and any unfair police conducts. Although the State had the burden to prove the accuseds' guilt beyond reasonable doubt, there was no credible medical evidence to show any bruises or injuries suffered by the accuseds, as a result of the alleged repeated police assaults. When caution interviewed, their legal rights were given to them, and their meal and rest breaks were given to them. Furthermore, after examining all the evidence, it is the court's view that the two accuseds' confessions to the police were the truth. I find the prosecution's witnesses' evidence credible and I accept them. I accept the prosecution's version of events. I reject both accuseds' denials. I also find Accused No. 2's witnesses' evidence not credible. I reject both accuseds' assertion that they were somewhere else, at the material time.'

15. In terms of the other indices for assessing fairness of the trial process, the trial judge found that during the conduct of the caution interviews the appellants were given their rights and meals and rests were provided. In the light of the above appeal grounds 1, 4 and 6 have no prospect of success. Leave refused.

16. As regards ground 2 and 3 they simply are frivolous and do not raise an issue of law or fact. The trial judge understandably did not address them directly as was raised in the grounds of appeal. As stated in paragraph 17 (quoted above) of the judgement the trial judge had carefully considered all the evidence before the court and assessed the witnesses and he rejected the evidence of the appellant.

17. Ground 5 is confusing in that it does not state clearly whose medical report is being tendered by him. It does not also state what is the relevance of the medical report to his claims. It is clear that the finding of guilt by the trial judge does not hinge or rely on the medical report as being critical in his finding. This ground is dismissed.

18. Ground 7 is confusing and misconceived. The appellant was arrested in Suva and according to police witnesses he had confessed to the crime. He was taken to Pacific Harbour Police Station for completion of police investigation procedures and processes because that was where the crime was committed and whether caution interview of the appellant was carried out. A ground with no merit.

19. Ground 8 is full of unsubstantiated claims that were not made during the trial process beginning from the Magistrates Court and throughout the High Court trial. They were clearly developed after the judgement was delivered to contrive grounds of leave to appeal, that is not supported by the evidence adduced at the trial. Another ground with no merit.

20. All the first appellant's 8 grounds of appeal when reviewed against the principle of **'reasonable prospect of successes** and the evidence at the trial, the threshold for leave to appeal is not met. Leave to appeal is refused.

Bail Pending Appeal

21. By a Notice of Motion dated 18 May 2023, the first appellant submitted an application for Bail Pending Appeal.

22. The Court of Appeal have set out in 2 decisions [**Tiritiri v State** [2015] FJCA 95 and **Balagaan v State** [2012] FJCA 100] the governing principle for determining an application for bail pending appeal by an appellant. Under the Bail Act there is no presumption in favour of bail for a convicted person appealing against conviction and/or sentence, it is mandatory to consider the factors that are relevant to the exercise of the discretion. These are set out in section 17 (3) of the Bail Act which states:

> *"When a court is considering the granting of bail to a person who has appealed against conviction or sentence the court must take into account:*
>
> *(a) the likelihood of success in the appeal;*
>
> *(b) the likely time before the appeal will be heard*
>
> *(c) the proportion of the original sentence which will have been served by the appellant when the appeal is heard."*

23. In assessing the circumstance of this case against the three factors in section 17(3) of the Bail Act, it is clear that from the examination of the grounds of appeal submitted by this appellant in support of his leave to appeal application, which is set out paragraphs 12 to 20 above, there is no likelihood of success of the appeal by the appellant. The other issue to consider, now with the leave to appeal being refused, there is no appeal pending in the

Court of Appeal. However, if the appellant decides to submit a renewed appeal to the full court under section 35(3) of the Court of Appeal Act. A further application for Bail Pending Appeal may be raised again, because with the renewed application to appeal, there is an appeal pending before the court.

24. It is not necessary to deal with the other factors in Section 17(3) of the Bail Act in light of the conclusion reached in paragraph 23 above. There are no extraordinary circumstances pleaded by the appellant that may move the court to grant bail in the interest of justice.

25. The bail pending appeal application by the appellant Kilioni Vatutaqiri is refused.

Enlargement of Time to Seek Leave to Appeal by Second Appellant – Lemeki Baleitavua

26. The second Appellant, Lemeki Baleitavua's submitted the following 3 grounds of appeal against conviction and 1 ground of appeal against sentence:

> "[1] The Learned Trial Judge had erred in law and in fact when he failed to take into consideration the untruthful statements disputed by the Prosecution witnesses on how the investigation was conducted that questions the reliability of the confessions made.
>
> [2] That the Learned Trial Judge had erred in law and in fact when he denied a fair trial from the Appellant when he allowed skype application causing a miscarriage of justice.
>
> [3] That the Learned Trial Judge erred in law and in fact when he failed to consider that if the accused had voluntarily confessed, there was no need for him to be taken to Totogo police station, Navua police station before finally cautioned at Pacific Harbour police post. This is a miscarriage of justice and prejudice to the Appellant.
>
> [4] The sentence is too harsh and excessive with the no consideration to fix a non-parole period."

27. The second appellant's appeal is untimely by 5 months 4 days. He had submitted an application on 18 January 2023, for enlargement of time to file leave to appeal against conviction and sentence.

28. The power to grant enlargement of time is conferred by a justice of Appeal pursuant to section 35 (1) (b) of the Court of Appeal Act. However, the factors that the judge must consider when considering enlargement of time, were canvassed by the Supreme Court in **Rasaku v State** [2013} FJSC 4 and in **Kumar v State**; **Sinu v State** [2012] FJS 17. These factors are: (1) the reason for the failure to file within time, (ii) the length of the delay; (iii) where there has been a substantial delay, nonetheless is there a ground of appeal that will probably succeed? and (iv) if time is enlarged will the respondent be unfairly prejudiced.

29. The second appellant submits the following reasons to explain his failure to file his appeal on time. The reason for the delay is that there was miscommunication between the second appellant and his lawyer. This claim is not substantiated by a letter from the lawyer to confirm the cause for the delay in filling the leave to appeal application on time. In the absence of any support letter from his lawyer, it is not unreasonable to hold that the reason provided is contrived. The delay was 5 months and 4 days. The Court of Appeal in **Magitigusuna v State** [2014] FJCA 61, (AAU 0022/2013), per Justice Lecamwasam at paragraph 23 observed:

> 'A delay of 4 months is a substantial time period which has not been explained with sufficient adequacy to sway this Court. Had there existed a plausible reason, the appellant has failed to explain it to the satisfaction of this court.'

30. In assessing factors 1 and 2, I conclude that the explanation given by the appellant for such a long delay is inadequate and would be sufficient basis for the court to dismiss this application. Despite this, I still review the grounds of appeal to determine whether there is real prospect of success for the belated grounds of appeal against conviction and sentence. None of the grounds of appeal submitted by this appellant have a real likelihood of success on appeal.

31. A careful review of grounds of appeal submitted by the second appellant Lemeki Baleitavua set out in paragraph 22. i.e. grounds 1, 2 and 3 are similar to grounds discussed with regards to the appeal grounds submitted by the first appellant Kilioni Vatutaqiri.

Appeal Against Sentence

32. When a sentence is challenged on appeal as in this case, the court will review the sentence to determine whether the sentencing judge (i) acted upon a wrong principle; (ii) allowed extraneous or irrelevant matters to guide his decision; (iii) mistook the facts and (iv) failed to take into account some of the relevant considerations: **Naisua v State** [2013] FJSC 17 and **Kim Nam Bae v State** [1999] FJCA 252.

33. I have considered submissions from both parties. The appellant Baleitavua did not support his claim that the sentence was harsh and excessive with any grounds at all. I accept the respondent's submission that the trial judge adopted the correct tariff for home invasions set out in **Wise v State** [2015] FJSC 7 (CAV 004 of 2015) of 8 to 16 years imprisonment. The Supreme Court in Wise observed:

> *'Even these sentences appear to be lenient. We are concerned with a single case here and not a spate of robberies: **Livai Nawalu v The State** [2013] FJSC 11 (CAV0012/2012) at paragraphs 27-29, where the tariff for violent crimes of this nature was set at 10-16 years.'*

34. The level of violence, threats and assault and the use of kitchen knife to terrify and subdue the complainants all by the appellants suggests that the sentence in this case was lenient. The appellants tied up the home owners, ransacked the house, stole their properties before they fled. I would have increased the sentence had I forewarned the appellant and invited his submission in mitigation.

35. Appeal against sentence has no merit and leave is refused.

ORDERS:

1. Leave to Appeal by the First Appellant [Kilione Vatutaqiri] is refused.
2. Bail Pending Appeal by the First Appellant is refused.
3. Application For Enlargement of Time to Appeal by Second Appellant [Lemeki Baleitavua] is refused.
4. Appeal against sentence by Second Appellant is refused.

COURT OF APPEAL FIJI

Isikeli U Mataitoga
Acting President / Resident Justice of Appeal