**IN THE COURT OF APPEAL, FIJI**
**Appellate Jurisdiction**

**CRIMINAL APPEAL NO. AAU 0017 OF 2022**
**High Court No. HAC 114 of 2020**

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| **BETWEEN** | : | **KARIM BEGG** | *First Appellant* |
| | | **RONIL CHAND** | *Second Appellant* |
| **AND** | : | **THE STATE** | *Respondent* |
| **Coram** | : | **Mataitoga, RJA** | |
| **Counsel** | : | **Mr. J. Cakau for both Appellants [Vosarogo Lawyers]**<br>**Mr. R. Kumar with Ms. P. Mishra for Respondent [ODPP]** | |
| **Date of Hearing** | : | **25 March 2024** | |
| **Date of Ruling** | : | **16 April 2024** | |

# RULING

1. The appellants [Karim Begg and Roneel Chand] were charged with the following offences as per the Information of the Director of Public Prosecutions, dated 05th June, 2020:

**COUNT ONE**

*Statement of Offence*

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

*Particulars of Offence*

**KARIM BEGG & RONIL RAVINESH CHAND** on the 24th day of March 2020, at Sigatoka in the Western Division, in the company of each other stole $500.00 cash from **JIN CHAO** and immediately before committing theft, threatened to use force on **JIN CHAO.**

3. The trial of the above charge against both appellants was held at the High Court in Suva, between 31 October and 4 November 2022. They were found guilty and were convicted as charged on 25 November 2022. On 6 December 2022, both appellants were sentenced to 3 years 10 months 2 weeks, with a non-parole period of 2 years 10 months and 2 weeks. Both of you were given 30 days to appeal.

**The Appeal**

4. On 13 December 2022 through your lawyers A Notice and Grounds of Appeal were prepared and filed in the court registry on 16 December 2022. The appeal was against both conviction and sentence. This is a timely appeal.

5. There were16 grounds of appeal against conviction 1 against sentence, submitted to the court, in the initial Notice of Motion by Jiten Reddy Lawyers. On 8 December 2023 a Notice of Change of Solicitors was filed in Court by the new lawyers for the Appellants by Vosarogo Lawyers.

**Grounds of Appeal**

6. At the hearing on 25 March 2024, Mr Cakau for the appellant's informed the court that they are relying on the written submission filed in Court on 17 January 2024. In that submission the appellant relies on 9 grounds of appeal. Before each of the submitted grounds is assessed individually, the relevant principles of law is first outlined.

7. Section 21(1)(a) and (b) of the Court of Appeal Act are the relevant provisions here. The following is clear:

> 1. *Section 21(1)(a) <u>does not require leave of the court</u>, and there are two grounds claims that they raise issues of law only. It will be assessed to establish whether it in fact raises an issue of law only.*
>
> 2. *Section 21(1)(b) <u>requires that the appellants obtain leave of the court t</u>o appeal if the grounds they urge on the court involves issues of law and fact*

8. Where leave to appeal is required, the test for leave to be granted, the court must be satisfied that the grounds submitted by the appellant has **<u>'reasonable prospect of success'</u>** [see **<u>Caucau v State</u>** [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).]

**Ground of Appeal**

9. **Grounds 1 and 2** - alleges an error of law on the trial judge in not considering the evidence of oral confession was not proven. The second alleges the similar allegations that criminal procedural rule not being followed by the trial judge, before accepting the verbal confession by the appellants.

10. In assessing these appeal grounds, paragraphs 64 to 68 of the judgement are relevant for considerations. This ground of appeal alleges that the oral confession was not proven.

11. At paragraph 66 and 68 states:

> *"66. These are not caution statements but the two Accused when they were initially questioned even before formal charging have on their own uttered these words and made admissions in the presence of Harish and two other police officers. PC Ronil has made a clear admission that he has taken $400 from Jin Chao. As for Karim he had only admitted that the $200 he received from Ronil. These admissions no doubt have been made to senior police officers who can be considered as persons in authority. PC Ronil's admission have been made prior to cautioning him. Sergeant Karim after he was cautioned. I will now consider the admissibility of these two admissions.*
>
> *67. Extra Judicial admissions made by persons Accused are admissible however if they are made to persons in authority it should have been made voluntarily. Judge's rules do not prohibit such confessions or admissions being led in evidence even when strict compliance is not made. In this instance Ronil unexpectedly when being questioned has come out with an utterance of confessionary nature. He had been cautioned and thereafter he had handed over the money. As for Karim there does not appear to be a confession in the fullest sense but he had admitted receiving $200 from Ronil.*
>
> *68. This sequence of events contains two parts; firstly, the verbal admission or confession made and secondly the conduct induced by certain questions posed by Harish that is when he asked a question Ronil takes out $200 and hands it over. Similarly, Karim shows the money on his fridge at home. The rules in respect of confessions would apply to the*

*form of utterances. The law does not prohibit such spontaneous confession made to persons in authority* ***being led provided there voluntarily.****"*

12. From the above paragraphs two issue need further detail consideration as a matter of law, in the light of full record of the trial. First issue surrounds the "voluntary" nature of the confession, the focus being on the likely inducements that may have been directly/indirectly made to the appellants as police officers by other police officers who are investigators in the case and senior in rank to them. The second is the lack of analysis by the trial judge surrounding the circumstances in which these confessionals were made and whether the right to remail silence was given to the accused once it became clear to ASP Harish and Sgt Ashnil, that the appellants may self-incriminate themselves if police interview continued. The issue of law is whether the trial judge erred in law in treating the issue as purely of voluntariness of the so-called confession, when other procedural legal issues such as the right of the appellants under section 13(1) of the Constitution should have been considered also, but was not.

13. In paragraphs 78 and 79 the trial judge admitted that the voluntary statement admitting the offence was made to ASP Harish, which was denied by the appellants. In the absence of voir dire, and cautioning of the appellants regarding their rights to remain silent, the interview continued, no doubt with some encouragement from the police officers.

14. In **Deo v State** [2003] FJCA 20, the Court of Appeal stressed the need for police officers when dealing with accused persons to follow the requirements of the constitution in criminal investigation interview etc. The High Court in **State v Vasuitoga & Qurai** [Crim Case No HAC 008/65] cautioned against the police officers taking advantage superior information gap that they have over the appellants to get confessions, without voir dire.

15. These grounds of appeal are arguable and has a reasonable prospect of success on appeal. Leave to appeal is granted.

16. **Ground 3**: allege that the trial judge erred in law and in fact when he failed to consider the facts that the money believed to have been proceeds of his crime were no tendered in court as exhibits.

17. The appellant's submission in support of this ground misunderstands that the money in question does not have to be tendered as exhibits as a matter of law, for the prosecution to prove the charge of aggravated robbery. The trial judge explained this clearly at paragraph 63 of the judgment:

> *'At the trial the 4x $100 notes were not physically produced. These 4 notes will be in the nature of real evidence. However, due to the misplacement whilst in the custody of the police the said exhibits were not available. It was led in evidence that these 4 notes have been documented and uplifted into the article register of court exhibits. According to entry number 493/2020 of exhibit PE2, these 4 notes have been uplifted to the register on the 28th March, 2020. Then it had been disposed of for the Police Tribunal Enquiry on the* 23rd September 2020 and it has been brought back. *Thereafter, the said notes could not be found in the police safe. The 1st Accused admits that $200 notes were recovered from his house. 2nd Accused Ronil admits that 2x $100 notes was taken on the 25th morning by ASP Harish. Therefore, the fact 4x of $100 notes been uplifted is admitted and not in dispute. In these circumstances the absence of the physical exhibits does not affect the prosecution case to any extend.'*

18. This ground has no merit.

19. **Grounds 4 & 5** alleges error of law and fact, which raises issues about the second appellant's $200 which was loaned by the first appellant to him found in the second appellant's possession was not proceeds of the crime. In the context of the aggravated robbery charge the appellants face, these are irrelevant matters.

20. Paragraphs 47 to 51 covers the trial judge's assessment of the evidence of the appellants, there is nothing that is an error in that assessment. The matter raised implicitly by these grounds of appeal was unsubstantiated suggestion. Both appellants did not raise this matter when giving evidence during the trial.

21. These grounds fail the test and leave to appeal refused.

22. **Ground 6** alleges that the trial judge erred in law and fact in that he did not properly analyze the inconsistencies and contradictions in prosecution witnesses PW4 ASP Harish Prasad and PW5 Sgt 3914 Ashnil during the trial.

23. It is well settled that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be discredited or disregarded. It is important that undue

importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution's witnesses [vide **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015)]

24. This was a trial for Aggravated Robbery charge against the appellants. The inconsistencies of witnesses referred to in this ground are peripheral and even if they are true, it does not impact the overall finding of guilt against the appellants. This is one of those case where the inconsistencies claimed without specifying, in the statements of PW4 and PW5 evidence cover peripheral matters only, not germaine to the proving of the charge

25. This ground has no merit

26. **Ground 7** alleges that the trial judge erred in law and fact for allowing state witness Jin Chao to make dock identification without proper identity parade or photograph identification being undertaken.

27. The trial judge at paragraphs 59 to 62 of the judgement, discussed the identification of the appellants by Jin Chao and evaluated the relevant evidence giving cogent reasons for accepting the dock identification, thus

> *'61. The evidence of Jin Chao is credible, but due to the poor light, he may not have had the opportunity to clearly observe, perceive and register the distinctive facial features. But he certainly had the opportunity, light and the occasion to observe, perceive and identify the general features, shape of the physique and various acts and deeds of the two Accused persons that night. When Jin Chao testified that he can identify the Accused in the dock, Jin Chao is not untruthful, but he genuinely believes so and says so thus his evidence as to the acts, events and happenings vis-à-vis the body shape description it is credible and reliable. However, the facial feature identity is not reliable.*
>
> *62. Accordingly, the acts committed and deeds done by each of the officers who came there is narrated by Jin Chao by identifying them based on the said description of tall and fat. Therefore, it is in evidence clearly and an unambiguously the different acts committed and utterances made by each of the Accused. Even if Jin Chao's facial feature identification of the two Accused be unreliable yet the other evidence proven beyond reasonable doubt that the two persons were the Accused 1st and 2nd Accused and no other. Therefore, the identity in this instance is proved by the said circumstances.'*

28. The appellants were not only identified by Jin Chao at the dock, he first gave evidence on the physical features of the 2 appellants based on his first encounter with them when the appellants stopped his car in Sigatoka Valley. The identification further enhanced at Namaka Police Station when the witness told the police officers ASP Harish the description of the appellants. All those opportunities of Jin Chao having seen the appellants before the trial gave ample basis for making the dock identification.

29. The dock identification was not the first time Jin Chao had identified the appellants, and the circumstances outlined and accepted by the trial judge to allow the dock identification was a permissible exercise of judicial discretion.

30. This ground of appeal has not merit.

31. **Ground 8** alleges excessive interference by the trial judge in the trial process causing miscarriage of justice.

32. It is a fundamental principle of law that an accused person is entitled to a fair trial. In **Peter Michel v The Queen** (2009) UKPC 41 Privy Council, Appeal No. 0075 of 2008) Lord Brown, in relation to an accused person's right to a fair trial stated that: -

> *"But the right of a criminal defendant to a fair trial is absolute. There will come a point when the departure from good practice is so gross, or so persistent, or so prejudiced, or so irremediable that an appellate court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe, however strong the grounds for believing the defendant to be guilty. The right to a fair trial is one to be enjoyed by the guilty as well as the innocent for a defendant is presumed to be innocent until proved to be otherwise in a fairly conducted trial"*

33. All departures from good practice render a trial unfair. However, the appellants submission does not provide examples of the excessive interference alleged. But that may be due to the lack of detail records of the trial being available at this stage of the criminal procedure process.

34. In **R. v. Mulusi** [1973] J59 Crim. App.R378, Lawton LJ, in relation to a situation of summarizing an undesirable judicial intervention stated;

> *"Time and Time again the judge intervened, got an answer and then asked questions on that answer. The impression he must have given was that he was cross-examining on the evidence in chief as it was being given. It really was most unfortunate".*

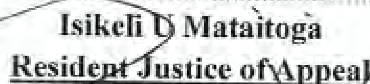
35. This ground cannot be fully and properly assessed until the full high court trial record are available. It will be for the full court to review this claim by the appellants if this ground is part of the renewed application.

**Appeal Against Sentence**

36. The appellants Karim Begg and Ronil Chand have filed Form 3 in accordance with Rule 39 Court of Appeal Rules, informing the Court that they have abandoned their appeal against sentence. The Court being satisfied that they have reached this decision on their own free will and without undue pressure, and that they further understand the consequences of their decision, dismissed the sentence appeal for both appellants.

**ORDERS:**

1. Leave to Appeal against conviction on ground 1 and 2 allowed.
2. Leave to Appeal against conviction on grounds 3 to 8 refused.



**Isikeli U Mataitoga**
**Resident Justice of Appeal**