IN THE COURT OF APPEAL, FIJI
Appellate Jurisdiction

CRIMINAL APPEAL NO. AAU 31 OF 2022
High Court No. HAC 330 of 2020

BETWEEN	:	**SUNIA RORAQIO**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Mataitoga, RJA**
Counsel	:	**Appellant in person** **B. Kantharia for Respondent [ODPP]**
Date of Hearing	:	**30 January 2024**
Date of Ruling	:	**18 April 2024**

RULING

1. The Accused have been charged with one count of Aggravated Burglary, contrary to Section 311 (1) (a) of the Crimes Act and two counts of Theft contrary to Section 291 (1) of the Crimes Act. The particulars of the offence are that:

COUNT ONE
Statement of Offence

AGGRAVATED BURGLARY: contrary to Section 313 (1) (a) of the Crimes Act, 2009.

Particulars of Offence

SUNIA RORAQIO with others, on the 31st day of August, 2020 at 248 Princess Road, Tamavua in Central Division, entered into the property of **KOI PING LEE** as trespassers, with the intention to commit theft therein.

COUNT TWO
Statement of Offence

THEFT: contrary to Section 291 (1) of the Crimes Act, 2009.

Particulars of Offence

SUNIA RORAQIO with others, on the 31st day of August, 2020 at 248 Princess Road, Tamavua in Central Division, in the company of each other, dishonestly appropriated assorted food items, 1 x pair of shoes and $20.00 cash, the property of **KOI PING LEE** with the intention of permanently depriving **KOI PING LEE** of his properties.

COUNT THREE
Statement of Offence

THEFT: contrary to Section 291 (1) of the Crimes Act, 2009.

Particulars of Offence

SUNIA RORAQIO with others, on the 31st day of August, 2020 at 248 Princess Road, Tamavua in Central Division, in the company of each other, dishonestly appropriated 1 x Microsoft surface 3 laptop in colour blue and black, approximately $200 AUSD and 1 x iPhone 5S the property of **JASON LEE** with the intention of permanently depriving **JASON LEE** of his properties.

2. The appellant represented himself, after Legal Aid Commission {LAC] have refused his application for counsel to assist. On 19 April 2022, at the commencement of the trial the information was read over and explained to the Appellant and upon entering pleas of not guilty the matter proceeded to hearing. The Prosecution presented the evidence of five witnesses and tendered two exhibits in evidence. The accused and another witness gave evidence on behalf of the defence. Subsequently, the appellant tendered his submission in writing and the counsel for the Prosecution made oral submissions and subsequently filed a written submission, as permitted by court. The appellant was found guilty, convicted and sentence on 2 May 2022 to 6 years 8 months and a non-parole period of 4 years 8 months.

The Appeal

3. Under Section 21(1)(b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence only with leave of court. For a timely appeal, the test for leave to appeal against conviction and sentence is **'reasonable prospect of**

success' [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) that will distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

4. The guidelines to be followed when a sentence is challenged on appeal, was set out by the Court of Appeal in **Kim Nam Bae v State** [1999] FJCA 21 (AAU No: 0015/18) and endorsed by the Supreme Court in **Naisua v State** [2013] FJSC 14 are whether the sentencing judge (i) acted upon a wrong principle; (ii) allowed extraneous or irrelevant matters to guide or affect him (iii) mistook the facts and (iv) failed to take into account some relevant considerations.

Grounds of Appeal
Against Conviction

5. Grounds A and B – alleges that the dock identification of the appellant was allowed by trial judge without the Turnbull Caution being given and in the absence of a police identification; this was an error of law and fact.

6. The appellant has not submitted the evidential basis of his claim based on the judgement of the court. However, in reviewing the judgement, from paragraphs 15 to 21, the trial judge specifically and directly address the issue of identification through CCTV footage. In light of the discussion by the Court in **Yalibula v State** [2023] FJCA 215 (at paragraphs 25 to 27), the same analysis applies in this case. Issues claimed by appellant to be errors of law and fact under these grounds of appeal are misconceived and has no merit.

7. Ground C – Alleges that the trial judge erred in law and fact in allowing incriminating questions by state counsel to be put to the accused during cross-examination. The submissions by the appellant does not clarify what is the gist of the complaint. But it is clear from paragraphs 26 to 28 of the judgement, that the trial judge was careful to inform the appellant of his rights under the Constitution. At paragraph 26 and 27 the judgement states:

> *"26. The rights and freedoms recognized and conferred by Chapter 2 of the Bill of Rights is not absolute and unfettered but subject to section 6(5) of the Constitution which provides for limitations. Sub section 5 of section 6 provides that rights could be limited by limitations expressly provided by or under a written Law. This is complemented by Section 7(3) of the constitution which provides that, a Law which so limits a right is not invalid solely because it exceeds the limits imposed by chapter 2 of the Constitution. Correspondingly section 125(6) of the CPC enables incriminating questions to be put to an Accused person if he gives evidence.*
>
> *27. Thus, the Accused in this case had no right to remain silent and the prosecution was not prevented from putting an incriminating question to the Accused. Tahe Prosecutor was entitled to ask the accused if he has a tattoo on his left arm. If the Accused did not have a tattoo at all or it was different from the tattoo as seen on the CCTV footage, all he had to do was to show his arm and that by itself would have been sufficient to create a serious doubt and bring home an acquittal. If so, why did he not answer or show his upper arm? The only inference is that he in fact has a tattoo as described by the witnesses and he was of a guilty mind and fared the truth."*

8. The above passage from the judgment shows that the claim that form the basis of this ground of appeal is misconceived and has no merit.

9. Ground D – alleges that the trial judge erred in law and fact when he failed to analyse the evidence, which was not supported and not investigated regarding the tattoo on the upper arm are irrelevant to bring home a guilty conviction, thus the verdict is unsafe. This claim is not backed up by evidence from the trial, just a reminiscence of what may have been. From the judgement it is evident that apart from the issues about the tattoo, there was enough evidence adduced at the trial to safely convict the appellant. This ground has no merit.

10. Ground E & F – Alleges that there was an error of law and fact when the trial judge did not properly direct himself to analyse the circumstantial evidence of the CCTC footage. This is ground has no merit in the light of the clear analysis of the evidence undertaken by the trial judge, which is set out from paragraph 31 to 43 of the judgement.

11. Ground F – alleges an error of law and fact in that the trial judge allowed prosecution witness PC 5077 Timoci Nakalevu, without proper consideration and warning given in his judgement where evidence stated on the 19 April 2022 to be appropriately taken as for consideration in transcript paged 21. DC Timoci stated: 'only the tattoo part I overlooked I didn't put in my statement. It is not clear what exactly is this ground complaining about. However, the trial judge sets out in paragraphs 18 to 20 the analyses he undertook of police witnesses and why he accepted their evidence. There is no error in that analysis. Another ground with no merit.

12. Grounds G – alleges that the trial judge erred in law when he shifted the burden of proof on to the accused. As a matter of fact this did not happen at the trial, the burden of proof at the trial of the appellant was place squarely on the prosecution at all times: see paragraphs 5 and 44. This ground of appeal has no merit.

13. Ground H – revisit the issues of identification and allege that the trial judge failed to consider the "material reliability" of weaknesses in identification evidence. It was never explained what is the material reliability of weaknesses in terms of the evidence adduce and considered by the trial judge with regard to the identification evidence via CCTV.

14. In **Yalibula** (supra) the Court of Appeal considered the relevant principles of law applicable in assessing CCTV evidence to prove identification of an accused person. The court stated it as follows at paragraph 26:

> *'26] The trial judge had addressed his mind to whole issue of CCTV footage being used for identification in the judgment as well. Therefore, the failure to call for the original DVD had not caused any prejudice to the appellant. The decision to admit CCTV was justified in terms of the principles set down in* ***ATTORNEY-GENERAL's REFERENCE NO 2 OF 2002*** *[2003] Crim LR 192, [2003] 1 Cr App Rep 21, [2003] 1 Cr App R 21, [2002] EWCA Crim 2373 & http://www.bailii.org/ew/cases/EWCA/Crim/2002/2373.html where Lord Justice Rose, Mr. Justice Pitchers and Mr. Justice Treacy of the England and Wales Court of Appeal (Criminal Division) having examined several*

previous decisions held that the officers' evidence should have been accepted. It was held that photographic evidence could be admitted in four situations (i) where the image itself was sufficiently clear to allow the jury to make its own direct comparison (ii) where the witness himself knew the defendant (iii) where the witness had spent sufficient time examining images from the scene to have acquired special knowledge, and (iv) where an expert with facial mapping skills could use the skills to assist the identification.'

15. The trial judge in this case reviewed the relevant evidence and applied the law correctly. There is no error. This ground has no merit.

16. Ground 1 – This ground is misconceived and frivolous in the context of how this trial was conducted by the trial judge. Ground has no merit.

Appeal Against Sentence

17. In reviewing the sentence ruling in this case, I am satisfied that both grounds advance by the appellants against sentence lacks merit. The trial judge has carefully explained how the he reached the sentence he passed against the Appellant. I find no error in the trial judges' assessment, except to observe that the appellant got a lenient final sentence, in light of the new tariff for the offences charged in this case, discussed in **Kumar & Vakatawa** [2022] FJCA 164.

18. The sentence was not harsh or excessive. Appeal against sentence has no merit.

Bail Pending Appeal

19. The Court of Appeal have set out in 2 decisions [**Tirtiri 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 and section 17 (3) of the Bail Act. Under the Bail Act there is no presumption in favour of bail for a convicted person appealing against conviction and/or sentence, it is necessary to consider the factors that are relevant to the exercise of the discretion. In the first instance 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:

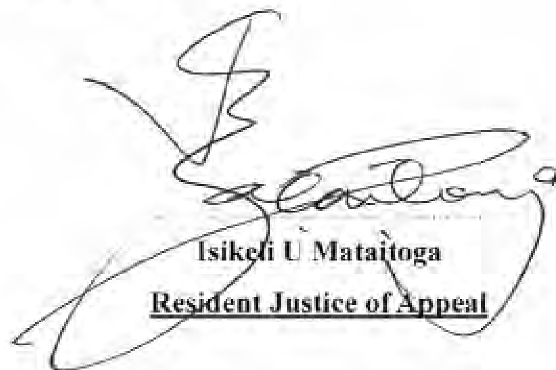
(a) the likelihood of success in the appeal;
(b) the likely time before the appeal will be heard
(c) the proportion of the original sentence which will have been served by the appellant when the appeal is heard."

20. An examination of the merits of this case would show that this bail pending application must not be granted. As will be evident from the above analysis of the grounds for the leave to appeal by the appellant, the prospect of success is unlikely. The sentence is about one-third served, so not usually considered that early in the sentence period. If this Leave to Appeal is renewed it will not be listed for hearing until late 2025. There are no exceptional circumstances that would engage the use of the wider judicial discretionary powers of the court to consider granting bail in this case.

21. In conclusion the case for Bail Pending Appeal has not met the requirements of section 17 (3) of the Bail Act. The application is therefore refused.

ORDERS:

1. Leave to appeal against conviction refused
2. Leave to appeal against Sentence refused.
3. Bail Pending Appeal is refused.



Isikeli U Mataitoga
Resident Justice of Appeal