IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 01 of 2023

BETWEEN	:	**SATEN SINGH**
		APPELLANT
A N D	:	**THE STATE**
		RESPONDENT
Counsel	:	Mr. M. Kumar for the Appellant.
	:	Ms. S. Naibe for the Respondent.
Date of Submissions	:	21 June, 2023
Date of Hearing	:	28 June, 2023
Date of Judgment	:	04 July, 2023

JUDGMENT

BACKGROUND INFORMATION

1. The appellant was charged for one count of robbery with violence contrary to section 293 of the Penal Code Cap. 17 at Magistrate's Court, Ba. It was alleged that the appellant on 6th day of February, 2008 at Moto, Ba in the Western Division robbed Tej Ram of $100.00 cash, an Alcatel mobile phone valued $49.00 and a gents Seiko wrist watch valued $50.00, a gents Quartz wrist

watch valued at $35.00 and a wallet valued at $2.00 all to a total value of $236.00 and at the time of such robbery did use personal violence to the said Tej Ram.

2. The appellant first appeared in the Magistrate's Court on 18th February, 2008, he elected Magistrate's Court trial and pleaded not guilty. After numerous adjournments the voir dire hearing commenced on 15th September, 2011. On 5th July, 2012 the learned Magistrate held the caution interview of the appellant dated 13th February, 2008 and the charge statement dated 16th February, 2008 were admissible in evidence.

3. The trial proper began on 29th August, 2022, the prosecution called five witnesses whereas the accused gave evidence and called one witness. On 12th December, 2022 the appellant was found guilty as charged and he was convicted accordingly. On 29th December, 2022 the appellant was sentenced to 6 years and 13 days imprisonment with a non-parole period of 4 years.

4. The brief summary of facts was as follows:

   a) The appellant with three others planned to rob the victim. The appellant is related to the victim Tej Ram, prior to the date of the robbery the appellant received information that Tej Ram was keeping $20,000 cash in his house. The appellant relayed this information to the others involved and he planned with them to rob Tej Ram. It was also decided that everyone involved will share the money. The appellant then showed Tej Ram's house to one Epeli and Sikeli who actually carried out the robbery on 6th February, 2008.

   b) Epeli and Sikeli went to Tej Ram's house in a van and entered the house of Tej Ram armed with cane knives which was used to assault, scare and threaten the occupants of the house including Tej Ram and the two witnesses namely Savitri and Ashmika. Ashmika was assaulted on her

backside with the back of the knife. Epeli and Sikeli then informed those inside the house to sit down and asked them for the money. Thereafter Epeli and Sikeli stole the items mentioned in the charge from inside the house and left.

c) The matter was reported to police and investigations were conducted Epeli and Sikeli were arrested, charged and dealt with. The appellant was arrested later, interviewed under caution and charged for the offence of robbery with violence.

APPEAL TO THE HIGH COURT

5. The appellant being aggrieved by the conviction and sentence filed a timely appeal in this court. The grounds of appeal filed is titled as amended grounds of appeal, however, additional grounds of appeal have been added. The grounds of appeal are as follows:

   1 *That the Learned Magistrate erred in law and in fact in convicting your appellant of the said offence when there was no evidence that the appellant, however, had used any violence on the said Tej Ram.*

   2 *That the Learned Magistrate erred in law and in fact in convicting your appellant of the said offence when there was no evidence that the appellant had robbed the said Tej Ram.*

   3 *That the Learned Magistrate erred in law and in fact in convicting your appellant of the said offence when there was no evidence that your appellant was present at the scene of the crime.*

   4 *That the Learned Magistrate erred in law and in fact in convicting your appellant of the said offence on the uncorroborated evidence of a convicted felon and alleged co-offender.*

5 *That the Learned Magistrate erred in law and in fact in convicting your appellant of the said offence on the basis of a dock identification and in the absence of a police identification by way of a parade and the same has caused a substantial miscarriage of justice.*

6 *That the Learned Magistrate erred in law and in fact in convicting your appellant of the said offence by compelling "PW 5" namely one Sikeli Vunimoli to change his testimony by threats of imprisonment upon failure to adhere to his police statement.*

7 *That the Learned Magistrate erred in law and in fact in convicting your appellant of the said offence by relying on a single alleged confessional statement in the face of a first exculpatory caution statement which was not disclosed to the court thereby causing a substantial miscarriage of justice.*

8 *That the Learned Magistrate erred in law and in fact in convicting your appellant of the said offence by the shifting the burden of proof of innocence on your appellant thereby causing a substantial miscarriage of justice.*

9 *That the Learned Magistrate erred in law and in fact in convicting your appellant of the said offence by placing too much reliance on the absence of a medical report by not analyzing the evidence presented in that your appellant was at all material times pre first court appearance kept in the custody of the police officers.*

10 *That totality of the evidence does not support a conviction.*

11 *That the learned Magistrate on the 5th of July 2012 erred in law and in fact in admitting the caution interview statement of the appellant dated 13th February 2008.*

12 *That the Learned Magistrate erred in law and in fact in admitting the Charge Statement of the appellant dated 16th of February,2008.*

13 *That the Learned Magistrate erred in law and in fact in relying for the purpose of conviction, on the caution interview statement dated 16th February 2008.*

14 *That there has been substantial miscarriage of justice in relation to the Voir Dire Ruling by reason of the following:*

i. *Magistrate V.D. Sharma hears evidence on Voir Dire on the 15th September 2011 and completed the hearing on the 16th of September 2011.*

ii. *The Learned Magistrate then adjourned the matter to 21st October 2011 to deliver Ruling on the Voir Dire Hearing.*

iii. *On 21st October 2011, the Learned Magistrate adjourned the Ruling to the 25th October 2011.*

iv. *On the 25th October 2011, the Learned Magistrate again adjourned the matter to the 17th November 2011 for Ruling.*

v. *On 17th November 2011, a different Magistrate namely Magistrate Vandhana Lal appears as the presiding Magistrate and adjourned the matter to the 22nd December 2011 for mention only.*

vi. *On 22nd December 2011, Magistrate Lal adjourned the matter to the 1st March 2012 for mention.*

vii. *On 1st March 2012, Magistrate Lal adjourns the matter to 16th May 2012 for mention only.*

viii. *On 16th May 2012, Magistrate Lal adjourned the matter to 31st May 2012 for Ruling. Later the same day, 31/05/2012 date is vacated and matter was adjourned to 5th July 2012 for mention only.*

ix. *On 5th July 2012, Magistrate Lal read out aloud the Ruling on Voir Dire which was signed by the former presiding Magistrate V.D. Sharma dated 31st May 2012.*

x. *That the question for determination by this Honourable Court is; how could Magistrate Lal read out a Ruling of the former Magistrate Sharma when he was no longer the presiding Magistrate in this matter. For the Courts benefit (subject to confirmation) the former Magistrate Sharma was no longer a Magistrate in the Western Division.*

xi. *Thus, if the foregoing is correct then Magistrate Lal could not have delivered a Ruling on the Voir Dire signed by former Magistrate V.D. Sharma on the 31st May 2012.*

xii. *Hence, if the impugned Voir Dire Ruling was irregular, then the same should be rejected by this Honourable Court on Appeal and the conviction of the Appellant should be set aside.*

15 *That the Learned Magistrate Qica erred in law and in fact in convicting the Appellant on the strength of the Caution Interview and the Charge Statement of the Appellant, notwithstanding the issue of admissibility of the said statements, when there was present unchallenged evidence that your Appellant was subjected to torture and oppressive treatment before and during his interview, extending to over a period of 5 days, and the same has caused a substantial miscarriage of justice to the Appellant.*

16 *That the Learned Magistrate erred in law and in fact in ruling on the caution interview for the purposes of convicting your Appellant and in so doing overlooked the following:*

(i) *The Appellant is first brought to Ba Police Station on 13th February, 2008 and interview commences through to about midday on the 14th of February 2008 which conclusively shows that the interview by the Ba Police Officers has been completed.*

(ii) *The Station Diary entry No. 80 of the 14th February 2008 shows that the interview having been completed, the Appellant having been released, leaves the Ba Police Station without any complaints.*

(iii) *There is a contradictory entry No. 82 and 83 which clearly shows that your Appellant never left the Police Station and was still in the custody of the Police. The entry shows that your Appellant is provided lunch and has no complaints. The above entry is completely misleading and has contributed to the miscarriage of justice against the Appellant.*

(iv) *The interview of the Appellant having been completed on the 14th of February 2008. There is no entry in the Station Diary or the cell Book as to the whereabouts of the Appellant.*

(v) *The Appellant claimed that he was taken by the Lautoka Police Officers from the Ba Police Station, assaulted, produced in the Lautoka Magistrates Court on the 15th of February 2008 (Criminal case no. 124/2008), and then interviewed again on the 15th February in the Ba Police Station and charged on the 16th of February 2008, and produced in the Ba Magistrates Court on the 18th of February 2008.*

(vi) *The Appellant complained of assault by both Police Officers from Ba and Lautoka. The Appellant was bailed in the Lautoka Magistrates Court and the Magistrate directed that the Appellant be examined by the Doctor and a copy of the report to be furnished to Court.*

(vii) *The Appellant, instead on being taken to a Doctor was immediately taken into custody by the Ba Police Officers. The Appellant was taken back to Ba Police Station, interviewed again, (See interview of 15th February 2008) and produced in the Ba Magistrates Court on the 18th of February 2008.*

(viii) *All of the foregoing has vitiated the truth and admissibility of the Appellants caution interview and charge statement.*

17 *That the Learned Magistrate erred in law and in fact in convicting your Appellant by failing to address his mind to the reasons for the second interview and has thereby caused a substantial miscarriage of justice.*

18 *That the Learned Magistrate erred in law and in fact in convicting your Appellant in the face of a complete lack of evidence that your Appellant had either procured, counselled or conspired to rob the victim and at best which is not admitted. Your Appellant is alleged to have told the accomplice that there was money in the victim's house.*

APPEAL AGAINST SENTENCE

a) *The sentence is manifestly harsh and excessive in all the circumstances of the case.*

b) The sentence is manifestly unjust in view of the lesser penalty given to the principal offenders.

c) That the learned Magistrate erred in law and in fact in ignoring the Appellant's regular attendance in court for over a 14 year period which ought to have impacted on any sentence to be passed.

d) That the learned Magistrate erred in law and in fact in not taking into consideration the small value of the item alleged to have been stolen and its subsequent recovery from the actual offenders.

e) That the Appellant reserves the right to argue, amend, vary and/or revise his grounds of appeal upon receipt of the court record.

6. Both counsel filed written submissions and also made oral submissions during the hearing for which this court is grateful.

GROUND ONE

That the Learned Magistrate erred in law and in fact in convicting your Appellant of the said offence when there was no evidence that the Appellant had used any violence on the said Tej Ram.

GROUND TWO

That the Learned Magistrate erred in law and in fact in convicting your Appellant of the said offence when there was no evidence that the Appellant had robbed the said Tej Ram.

GROUND THREE

That the Learned Magistrate erred in law and in fact in convicting your Appellant of the said offence when there was no evidence that your Appellant was present at the scene of the crime.

7. All the above grounds can be addressed together since they relate to the same issue. The appellant's counsel argued that there was no evidence that the appellant was present at the scene and had committed the offence as alleged. The charge also did not state that the appellant had acted in concert with the others and therefore the appellant was wrongly found guilty and convicted.

8. The above grounds of appeal and the submissions are misconceived. The prosecution had brought the charge on the basis that the appellant had planned, aided and abetted in the commission of the offence. Section 21 of the Penal Code (now repealed) was the basis behind the charge against the appellant he does not have to be present physically at the crime scene and take part in the actual offending to be charged for the substantive offence. Section 21 (1) of the Penal Code (now repealed) states:

   When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say-

   ...

   (c) every person who aids or abets another person in committing the offence;

   (d) any person who counsels or procures any other person to commit the offence.

9. When the Crimes Act came into effect section 45 (1) of the Crimes Act stated the following:

"A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly."

10. At paragraphs 27 and 28 of his judgment the learned Magistrate had stated the following:

    27. *I find the evidence adduced by prosecution as reliable and credible. I accept that the accused person had actively participated in the commission of robbery with violence committed by Sikeli and Epeli when he aided, abetted, counseled and procured them to commit the offence against the complainant (Tej Ram) at his residence at Moto, Ba.*

    28. *All in all I find the accused guilty for the offence of Robbery with Violence as charged in light of the repealed section 21 (1) (b), (c) & (d) of Penal Code, Cap 17 and which is somewhat similar to section 45(1) of the Crimes Act 2009 which states that "A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.*

11. The appellant in his caution interview and charge statement admitted that he was part of the planning to rob Tej Ram and his family and he had also showed the others the house of Tej where the robbery took place. These facts in my considered judgment was sufficient for the learned Magistrate to find the appellant guilty.

12. The above grounds of appeal are dismissed as frivolous.

GROUND FOUR

That the Learned Magistrate erred in law and in fact in convicting your Appellant of the said offence on the uncorroborated evidence of a convicted felon and alleged co-offender.

13. Counsel argued that the learned Magistrate erred in convicting the appellant on the uncorroborated evidence of a convicted felon Sikeli that it was the appellant who had counseled and procured this person to commit the offence in question.

14. Sikeli Vunimoli (PW5) had taken part in the commission of the offence gave evidence for the prosecution in the trial against the appellant. Furthermore, it is to be noted that Sikeli had not identified the appellant which the learned Magistrate was mindful of and had taken that into account. However, the learned Magistrate gave weight to the confession of the appellant in the caution interview and the charge statement. During the trial proper the defence had argued the voluntariness of the confessions made by the accused. The learned Magistrate had directed his mind to the allegation of police brutality while in police custody and he gave a detailed reason why he gave weight to the confessions.

15. At paragraph 21 of the judgment the learned Magistrate mentioned the following:

> *The contents of the interview and the formal charge of accused in my view reflects true statements. How would police have known that accused was related to complainant and that his brother's daughter was married to complainant's son? All these information would have been given by accused himself as there is no evidence to show that Sikeli and Epeli, the two persons who actually were used to carry out*

the actus reus knew or were related to the complainant. There is no evidence to establish that such information was given by some other person then accused. There is no other justifiable reason as to why Sikeli and Epeli would blame accused. I find difficult to accept that police made up or fabricated the contents of accused caution interview and formal charge statement. Without the information relayed by accused, Sikeli and Epeli wouldn't have known the location of complainant's house. According to the evidence, it was the accused who showed complainant's place to Sikeli and Epeli as mentioned in his caution interview and this was also confirmed by Sikeli in his evidence.

16. Paragraph 24 of the judgment is reproduced for completeness:

I have considered accused testimony and find it unreliable and he didn't strike me as a credible witness. He basically denied the allegation to save himself after realizing the incriminating evidence he freely gave to police whilst being interviewed and formally charged. Although he raised allegations of assaults by police during the trial before me, that was already resolved in the voir dire ruling.

Additionally, bearing in mind accused testimony that he had received serious injuries from police officers, he didn't file any formal complaint with any police station in Suva as he was living in Suva after being bailed from court. Had the injuries been grave, he could have taken the necessary steps to undergo medical examination and obtain a medical report which could have established the consistency of his complaint against police officers which was not done. Accused also had counsel being present at the initial stages of the interview hence he could have obtained the required legal advice to do the needful after being bailed. Although he has nothing to prove, the absence of these pertinent aspects raised above makes his testimony irrational and unbelievable.

17. It is important to note that the appellant was charged alone. The purpose of the charge was to show the involvement of the appellant as aider, abettor and procurer in the commission of the offence.

18. This ground of appeal is dismissed due to lack of merits.

GROUND FIVE

That the Learned Magistrate erred in law and in fact in convicting your Appellant of the said offence on the basis of a dock identification and in the absence of a police identification by way of a parade and the same has caused a substantial miscarried of Justice.

19. This ground of appeal was abandoned.

GROUND SIX

That the Learned Magistrate erred in law and in fact in convicting your appellant of the said offence by compelling "PW 5" namely one Sikeli Vunimoli to change his testimony by threats of imprisonment upon failure to adhere to his police statement.

This ground of appeal was abandoned at the hearing.

20. The appellant's counsel did not argue grounds seven to ten in his oral submissions and also in his written submissions. However, in the interest of justice I will address those grounds.

GROUND SEVEN

That the Learned Magistrate erred in law and in fact in convicting your appellant of the said offence by relying on a single alleged confessional statement in the face of a first exculpatory caution statement which was not disclosed to the court thereby causing a substantial miscarriage of justice.

21. The thrust of the argument in the above ground is that the learned Magistrate relied on the single confessional statement which was not disclosed to court.

22. This ground of appeal is not sustainable the caution interview of the 13th February, 2008 was correctly tendered at the trial proper after it was found admissible after a voir dire hearing. Once tendered the court had knowledge of this document and had relied on it.

23. There is no merit in this ground of appeal.

GROUND EIGHT

That the Learned Magistrate erred in law and in fact in convicting your appellant of the said offence by the shifting the burden of proof of innocence on your appellant thereby causing a substantial miscarriage of justice.

24. The argument in this ground of appeal is that the learned Magistrate had shifted the burden of proof on the appellant.

25. This argument does not have any force. The learned Magistrate in his judgment at paragraphs 12 and 30 respectively made a succinct reference to the burden of proof and standard of proof. The learned Magistrate had kept this in mind throughout the judgment.

26. This ground of appeal is dismissed as frivolous.

GROUNDS NINE AND TEN

That the Learned Magistrate erred in law and in fact in convicting your appellant of the said offence by placing too much reliance on the absence of a medical report by not analyzing the evidence presented in that your appellant was at all material times pre first court appearance kept in the custody of the police officers.

That totality of the evidence does not support a conviction.

27. The arguments raised in the above grounds of appeal states that the learned Magistrate had placed too much reliance on the absence of the medical report by not analyzing the evidence presented by the appellant and the totality of the evidence did not support a conviction.

28. The perusal of the entire judgment shows that the learned Magistrate had given a balanced narration of the prosecution and defence cases. The comments in respect of the failure by the appellant to provide his medical report were based on his claims of serious assault by police officers. The learned Magistrate was alert to this contention which was justified in view of the defence raised.

29. The learned Magistrate in this context has also raised the issue of consistency the medical report would have given to the claim of the appellant. Had the defence case not been analyzed properly the above mentioned pertinent comments would not have been raised by the learned Magistrate which was obvious from the evidence adduced.

30. Finally, it is incorrect to suggest that there was no evidence to support a conviction. The charge of the appellant was based on section 21 of the Penal

Code and there was evidence adduced by the prosecution that the appellant had aided, abetted and procured some people to carry out his plan in robbing the complainant and his family.

31. These grounds of appeal are dismissed due to lack of merits.

32. Moving on the appellant has raised multiple grounds of appeal in respect of the voir dire ruling delivered by the learned Magistrate which starts from ground 11 (K) till ground 16 (P). The grounds here been reproduced in this judgment at paragraph 5. Hence there is no need for it to be reproduced again.

33. Grounds 11 (K) and 12 (L) mentions that the learned Magistrate had erred in law and in fact when he admitted the caution interview and the charge into evidence. Ground 13 (M) then mentions that it was erroneous of the learned Magistrate to rely on the caution interview for the purpose of convicting the appellant. Ground 14 (N) states the reasons causing substantial miscarriage of justice.

34. The reasons have been stated from paragraphs (i) to (xii). The issue raised is how Magistrate Lal could have read the voir dire ruling of the former Magistrate Sharma when he was no longer the presiding Magistrate in the Western Division. Counsel submits in view of the above the voir dire ruling was irregular hence it should be rejected by this court.

35. To answer the above there is a need to peruse the voir dire ruling delivered on 5th July, 2012. The ruling is at pages 40 to 47 of the copy record, the ruling was signed by Resident Magistrate Vishwa Datt Sharma. At the time of writing the ruling RM Sharma was transferred from Magistrate's Court at Ba to Suva and Resident Magistrate Vandana Lal was transferred to Magistrate's Court at Ba.

36. It is incorrect for the appellant to say that RM Sharma was a former Magistrate when the ruling signed clearly shows that this judicial officer was still a Resident Magistrate but in Suva. The ruling was correctly signed and sealed but delivered by Resident Magistrate Lal. There is nothing untoward about the procedure for the pronouncement of the voir dire ruling in court by RM Lal.

37. The above grounds of appeal are dismissed as frivolous. In respect of grounds 11 (K), 12 (L), and 13 (M). I would like to state that the learned Magistrate has correctly applied the law in respect of the challenge to the admissibility of the caution interview and the charge statement. The evidence adduced were properly mentioned and applied to the law. The conclusion was correctly arrived after all the relevant facts were taken into account. Once the caution interview and the charge statement were found to be admissible, the weight of the confessions was a matter for trial. There was no error made by the learned Magistrate in this regard and there is no substantial miscarriage of justice caused to the appellant.

38. **GROUND 15**

That the Learned Magistrate Qica erred in law and in fact in convicting the Appellant on the strength of the Caution Interview and the Charge Statement of the Appellant, notwithstanding the issue of admissibility of the said statements, when there was present unchallenged evidence that your Appellant was subjected to torture and oppressive treatment before and during his interview, extending to over a period of 5 days, and the same has caused a substantial miscarriage of justice to the Appellant.

39. In support of this ground of appeal counsel submitted that the appellant had been consistently complaining of assault by the police and the learned Magistrate had failed to analyze the evidence of the appellant objectively

thereby causing a substantial miscarriage of justice. Counsel relies on page 66 of the copy records during the voir dire hearing and pages 98 to 100 during the substantive hearing.

40. To answer the above, page 66 of the copy record is reproduced herewith it is the evidence of the appellant during the voir dire hearing:

Defence : *I wish to call Saten Singh accused who will give evidence on oath.*

Satend Singh
Of Nadawa, Suva.
Taxi Driver.
Sworn on Ramayan in Hindi

- *I recall 13/2/08.*
- *I was at Ba Police Station.*
- *I came with lawyer H A Shah*
- *They made me sit in the crime office with Constable Kamal Gounder and another Fijian police officer.*
- *PC Kamal was doing the talking.*
- *Asked further questions.*
- *Mr H A Shah was there for an hour (1 hour).*
- *He asked me did I go to Moto and involved in robbery.*
- *I answered no.*
- *He said you went there, you drove the van.*
- *Mr Shah left for Lautoka.*
- *No sooner Mr Shah left the police surrounded me and said, you brought the lawyer.*
- *Main police officer was Kamal and Fijian officer PC Yakobo.*

- *Both have given evidence in court.*
- *PC Yakobo sat on table.*
- *When Mr H A Shah was there he was properly sitting on the bench.*
- *Kamal stood at my back and pulled my shirt causing back wounds and I fell.*
- *He kicked me on the stomach.*
- *Kamal kicked me.*
- *The other Fijian police did not do anything.*
- *He was just standing.*
- *They said wait, Lautoka police are coming to take you and will pick you up today.*
- *They punched me and kicked me.*
- *This assault lasted for 10 minutes.*
- *They asked me to sit on the bench.*

41. Pages 98 to 100 is also reproduced herewith it is basically the version of the appellant during his evidence at trial.

Q: *Which language interview conducted?*

A: *Hindustani.*

Q: *Who signed interview?*

A: *I signed, my lawyer also signed. At Lautoka police station, they made us lie on floor and assaulted. In the morning next day they took us to Lautoka House for that case. We were bailed from court. From there brought us to Lautoka Police station. From there they brought us to Ba Police Station. They took us to CID room and assaulted us. I was alone that time. One whole day they assaulted me on neck, head and back. I'm not educated but I recall I signed. I think Kamal took my statement. He took two statements. One after the other.*

Shown interview, identified same, I identifies his signature. Can't recall other signatures.

Q: *Who was there?*

A: *Kamal there and plenty officers were there too. I cannot read statement. Second time they just took my signature. They just told me to sign. My body paining from assault.*

Q: *Who's was there?*

A: *Kamal there and plenty officers were there too. I cannot read statement. Second time they just took my signature. They just told me to sign. My body paining from assault.*

Q: *How long statement took place?*

A: *One whole day they put me in CID room, which ever police came they assault me. I just signed. I didn't give statements.*

After question 90 you admitted whatever they asked. I said it. I was in pain from assault.

Q: *You know Epeli, Sikeli and Prakash?*

A: *I'm van driver, I know plenty people. After interview I was brought to court the next day police told me don't say in court. When I came to court, didn't say anything and remanded.*

Q: *What you mean don't say thing?*

A: *Police say don't say thing or they will arrest me again. Tej Ram is related to me. He is father in law of my niece.*

Q: *You planned with Epeli to rob Tej Ram?*

A: *I don't know about this plan.*

Q: *Why would they mention your name and they know you?*

A: *I don't know. I was kept at Lautoka Police station & Ba Police Station. I think it was 5 days at Lautoka. I was not given a chance to change clothes. At Ba I was allowed to change clothes. I was remanded in custody at Ba Magistrate's court. I can't recall how many days.*

Q: *Why never complain to court that police assaulted?*

A: *Police told me if I say anything they will arrest me again, as I had pending case in court.*

Q: *When Lautoka Police arrested you, they search your home?*

A: *No police from Ba didn't search my house too.*

Lautoka case already finished. They was no case to answer. Haroon Ali Shah represented me in that case. I was alleged I assaulted van driver and stole vehicle.

Shown judgment (Lautoka). Identified same. My name is there. Tendered (DEF – 2).

Q: *You know name of police who assaulted?*

A: *Kamal, Ashwin another in Nalawa now. There were 5 to 6 who assaulted me. They made me lie on table and assault me on my foot with stick and also assault me on my ears. I didn't complain because they will arrest me again and assault me again.*

Q: *Question 84 you travelling with i-taukei man?*

A: *This version is not correct. Fare Ba to Vatulaulau is $5.00 return is not $3 but $2. Answer is not correct. I cannot read.*

Cross examination

Lautoka matter and Ba matter 2 different matters? Yes.

Whole day of assault would result in serious injury? Yes.

What was extend of injury? Really bad.

Any medical done? No.

After outside of court did you complaint? I was remanded 14 days then bailed.

After bailed you complaint? I went to live in Suva and not complaint to anyone.
You complained to anyone? No. On hearing day I complaint of assault.
Did your lawyer tell that interview and charge ruled admissible?

You took Cakobau to Balevuto that day? Yes.

LTA didn't take long to book? 10 minutes.

LTA wouldn't know your whereabouts after booking you? From there I came to town.

No one would know your where about from 10 am – 12 pm? My witness Cakobau outside.

Tej Ram related to you through your brothers daughter? Yes.

When my lawyer left, they assaulted me.

Answers related to facts of the case? I don't know. You don't know written English & Hindi? Don't know.

You not given options? No.

You lying to court? No.

Epeli carrier driver before? I don't know.

In questions 90 – 95 you admitted telling lies, you said to save yourself? I want to tell court truth.

Because of assault, I was afraid and said that in interview. How Epeli, Sikeli and Prakash know house of Tej? I don't know them. Sikeli said Saten Singh and nick name Baba? Yes.

That's you? Other people name Saten Singh and also Baba. They are carrier drivers too? I don't know.

You went to Moto that day? Yes.

Second interview they told me to sign here and nothing else.

You on total evidence committed offence.

Sikeli, Epeli and Prakash convicted this matter? I knew from police officers.

Re-examination

I was appearing alone in this case. Other people appearing different file. I came to know of their case by Ba police.

Court: Why you told court that you alone will give evidence and not another witness? Because I dint know I will give evidence on job at Balevuto. I called him and told him if he remanded about dropping him at Balevuto.

Dayal: He never mentioned this witness to me. Interview one Fijian named there.

That person came to my office yesterday.

42. There is no doubt that the confessions contained in the caution interview and the charge statement had undergone a hearing and its admissibility determined. Furthermore, the trial counsel had also ventilated the issue of assault by police officers at trial. The learned Magistrate at paragraph 9 of the judgment gave a succinct account of the defence evidence. In his analysis of the entire evidence the learned Magistrate at paragraph 21 of the judgment gave his reasons why he gave weight to the confessions contained in the caution interview and the charge statement.

43. This ground of appeal is dismissed due to lack of merits.

GROUND 16

a) *That the Learned Magistrate erred in law and in fact in ruling on the caution interview for the purposes of convicting your Appellant and in so doing overlooked the following:*

(i) *The Appellant is first brought to Ba Police Station on 13th February, 2008 and interview commences through to about midday on the 14th of February 2008 which conclusively shows that the interview by the Ba Police Officers has been completed.*

(ii) *The Station Diary entry No. 80 of the 14th February 2008 shows that the interview having been completed, the Appellant having been released, leaves the Ba Police Station without any complaints.*

(iii) *There is a contradictory entry No. 82 and 83 which clearly shows that your Appellant never left the Police Station and was still in the custody of the Police. The entry shows that your Appellant is provided lunch and has no complaints. The above entry is completely misleading and has contributed to the miscarriage of justice against the Appellant.*

(iv) *The interview of the Appellant having been completed on the 14th of February 2008. There is no entry in the Station Diary or the cell Book as to the whereabouts of the Appellant.*

(v) *The Appellant claimed that he was taken by the Lautoka Police Officers from the Ba Police Station, assaulted, produced in the Lautoka Magistrates Court on the 15th of February 2008 (Criminal case no. 124/2008), and then interviewed again on the 15th February in the Ba Police Station and charged on the 16th of February 2008, and produced in the Ba Magistrates Court on the 18th of February 2008.*

(vi) *The Appellant complained of assault by both Police Officers from Ba and Lautoka. The Appellant was bailed in the Lautoka Magistrates Court and the Magistrate directed that the Appellant be examined by the Doctor and a copy of the report to be furnished to Court.*

(vii) *The Appellant, instead on being taken to a Doctor was immediately taken into custody by the Ba Police Officers. The Appellant was taken back to Ba Police Station, interviewed again, (See interview of 15th February 2008) and produced in the Ba Magistrates Court on the 18th of February 2008.*

(viii) *All of the foregoing has vitiated the truth and admissibility of the Appellants caution interview and charge statement.*

44. Counsel relied on paragraphs (i) to (viii) in the ground of appeal as part of his submissions.

45. It is trite law that after the document containing the confession of an accused is found to be admissible the weight that ought to be given to the contents of the document is a matter for the trial court. In this instance at trial the defence counsel had again cross examined the prosecution witnesses about the assaults on the appellant. At paragraph 24 of the judgment the learned Magistrate was mindful of the above as follows:

...bearing in mind the accused testimony that he had received serious injuries from police officers, he didn't file any formal complaint ...Had the injuries been grave, he could have taken the necessary steps to undergo medical examination and obtain a medical report... Accused also had counsel present at the initial stages of the interview hence he could have obtained the required legal advice to do the needful...

46. A perusal of the copy record also does not show that paragraphs (i) to (vii) were put to the prosecution witnesses and the accused had not mentioned them in his evidence either during the voir dire hearing or the trial proper.

47. This ground of appeal is dismissed as frivolous.

GROUND 17

That the Learned Magistrate erred in law and in fact in convicting your Appellant by failing to address his mind to the reasons for the second interview and has thereby caused a substantial miscarriage of justice.

48. Counsel submitted that substantial miscarriage of justice has been caused to the appellant by the admission of the second caution interview when the admissibility of this document was not dealt with by the learned Magistrate during the voir dire hearing. Counsel also stated that the production of the second caution interview was highly irregular and the learned Magistrate presiding over the substantive trial ought to have rejected the said caution interview.

49. There is nothing in the copy record that will show any objection taken by the appellant in respect of the second caution interview. The voir dire only makes reference to the caution interview of the 13th and nothing about 15th. The appellant was represented by counsel during the voir dire and the trial proper. The primary ground of objection taken during the voir dire hearing and the trial was the assault on the appellant by police officers which was addressed by the learned Magistrate in his voir dire ruling and trial judgment.

50. This ground of appeal is dismissed due to lack of merits.

GROUND 18

That the Learned Magistrate erred in law and in fact in convicting your Appellant in the face of a complete lack of evidence that your Appellant had either procured, counseled or conspired to rob the victim and at best which is not admitted. Your appellant is alleged to have told the accomplice that there was money in the victim's house.

51. Counsel submitted that since the appellant had been charged alone there was no evidence that the appellant had committed the offence alleged. The prosecution case was that the appellant had told others to commit the offence but there was no evidence that he had procured or aided and abetted the offence of robbery with violence.

52. The caution interview of the appellant contains the confession of the appellant who told the police officer writing his police statement that he had planned with others to rob the victim. In the process he had asked Sikeli and another to execute his plan. The appellant was related to the complainant knew the location of the victim's house and he had showed Sikeli and another the victim's house. The appellant was charged under section 21 (1) of the Penal Code (now repealed) which was superseded by section 45 of the Crimes Act 2009.

53. In this case the appellant was charged for committing the actual offence which is allowed under the law.

54. This ground of appeal is dismissed due to lack of merits.

APPEAL AGAINST SENTENCE

55. The appellant's counsel relied upon the following ground of appeal against sentence:

a) *The sentence is manifestly harsh and excessive in all the circumstances of the case.*

b) *The sentence is manifestly unjust in view of the lesser penalty given to the principal offenders.*

c) *That the learned Magistrate erred in law and in fact in ignoring the Appellant's regular attendance in court for over a 14 year period which ought to have impacted on any sentence to be passed.*

d) *That the learned Magistrate erred in law and in fact in not taking into consideration the small value of the item alleged to have been stolen and its subsequent recovery from the actual offenders.*

LAW

56. In sentencing an offender the sentencing court exercises a judicial discretion. An appellant who challenges this discretion must demonstrate to the appellate court that the sentencing court fell in error whilst exercising its sentence discretion.

57. The Supreme Court of Fiji in *Simeli Bili Naisua vs. The State, Criminal Appeal No. CAV0010 of 2013 (20 November 2013)* stated the grounds for appeal against sentence at paragraph 19 as:-

> *"It is clear that the Court of Appeal will approach an appeal against sentence using the principles set out in House v The King [1936] HCA 40; (1936) 55 CLR 499 and adopted in Kim Nam Bae v The State*

Criminal Appeal No. AAU0015 at [2]. Appellate Courts will interfere with a sentence if it is demonstrated that the trial judge made one of the following errors:-

(i) Acted upon a wrong principle;

(ii) Allowed extraneous or irrelevant matters to guide or affect him;

(iii) Mistook the facts;

(iv) Failed to take into account some relevant consideration."

58. Counsel submitted that there was a disparity of sentence between what the others got for the same offence in the same case in comparison with the appellant. Unfortunately, counsel did not assist the court any further than this. The state counsel assisted by informing the court that Sikeli and another had pleaded guilty. Appellant's counsel also pointed out that it took 14 years for the matter to be finalized and all along the appellant had the charge hanging over his head for which he should have been given a reduction in sentence. The total amount involved was also of minimal value.

59. This was a case of gross breach of trust by the appellant who was the master mind behind the robbery in broad daylight. These are the two most crucial aggravating factors which does not go in favour of the appellant. The matter had been delayed because the appellant had pleaded not and it was crucial for the court to undertake a voir dire hearing deliver its ruling and then hear the substantive trial. It is also noted that the appellant at no time had requested for a speedy trial. In any event at paragraph 12 of the sentence the learned Magistrate had given a discount of 1 year.

60. The minimal value of the stolen properties does not mean the appellant should receive a less sentence it is the manner and the circumstances of the offending that is to be looked at holistically.

TARIFF

61. The tariff for robbery with violence is 7 to 10 years as observed by Madigan J in *Baleinakeba v State [2010] FJHC 207;HAA008.2010* as follows:

"*A tariff of 4-8 years may have at one time been appropriate tariff, but it is certainly no longer. In adopting the dicta of the Fiji Court of Appeal in Basa's case CA AAU 24 of 2005 the Fiji Courts are now following the English line of cases for robbery with violence and not more lenient New Zealand authorities. In the High Court, the tariff is more within the range of 10 to 15 years. Considering and given the jurisdictional restraints of the Magistrates Court, I would venture that the proper tariff there now should be 7 to 10 years.*"

62. Here the offenders were armed with cane knives which was used to assault, threat and scare the occupants of the house and the complainant where the robbery took place.

63. The maximum sentence for the offence of robbery with violence is 14 years imprisonment. In my considered judgment the final sentence is below the tariff, the sentence is lenient and there is no error made by the learned Magistrate in arriving at the sentence of 6 years and 13 days imprisonment with a non-parole period of 4 years. The appellant was the mastermind and the initiator of the robbery, he played the leading role in planning and logistical arrangement for the others to undertake what he wanted. In effect he used the others for his ulterior motive.

64. Prematilaka JA sitting as a single judge of the Court of Appeal in *Alfred Ajay Palani vs. State, AAU 111 of 2020 (16 December, 2021)* made a pertinent observation in respect of the importance of the final sentence rather than the reasoning process leading to the final sentence at paragraph 37 which is applicable to the current issue raised by the appellant in the following words:

However, it is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered (vide Koroicakau v The State [2006] FJSC 5; CAV0006U.2005S (4 May 2006). In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range (Sharma v State [2015] FJCA 178; AAU48.2011 (3 December 2015). However, not every sentence within the range would be necessarily an appropriate sentence that fits the crime.

65. The sentence in this case is neither harsh nor excessive. This ground of appeal against sentence is also dismissed due to lack of merits.

66. Although not raised by the appellant's counsel in the interest of justice I have upon perusal of the copy record at page 69 noticed some prejudicial questioning of the appellant in cross examination by the prosecutor. These are:

Q. Any time before you were charged by Police?

A. Yes I have previous convictions.

Q. You have 13 previous convictions?

A. Yes. I am well aware of the court system.

67. The issue before the court during the voir dire was about the voluntariness of the confessions made hence the learned Magistrate had to rule on the admissibility of the caution interview and the charge statement only. The

trial was conducted before another Magistrate hence no prejudice or substantial miscarriage of justice was caused to the appellant. The voir dire ruling is on the issues raised by the appellant in his voir dire grounds.

SUBSTANTIAL MISCARRIAGE OF JUSTICE

68. The appellant's counsel argued in the majority of his grounds of appeal that there was a substantial miscarriage of justice caused to the appellant unfortunately he did not to point to the test which this court should take into account. The test is that the appellate court had to be satisfied on the evidence adduced and the application of law that the only conclusion reached would have been one of guilt.

69. The Court of Appeal in *Munendra vs. The State, criminal appeal no. AAU 0023 of 2018, 25 May, 2023* from paragraphs 40 to 42 stated the above in the following words:

*[40] The test as propounded on the proviso to section 4(1) of the Criminal Appeal Act, 1907 in UK which is identical with the proviso to section 23(1) of the Court of Appeal Act in Fiji, is that the appellate court may apply the proviso and dismiss the appeal if it is satisfied that on the whole of the facts and with a correct direction the only proper verdict would have been one of guilty [see **R. v. Haddy** [1944] K. B. 442; 29 Cr. App. R. 182; **Stirland v D. P. P.** [1944] A.C. 315; 30 Cr. App. R. 40; **R. v. Farid** 30 Cr. App. R 168)].*

[41] The proviso to section 23(1) of the Court of Appeal Act is almost identical with section 256 (2) (f) of the Criminal Procedure Act and therefore, the same test applied to the proviso to section 23 (1) should apply to proviso in section 256 (2) (f) of the Criminal Procedure Act.

[42] The Court of Appeal in ***Aziz v State*** *[2015] FJCA 91; AAU112.2011 (13 July 2015) adopted the same test in the application of the proviso to section 23(1) of the Court of Appeal Act as follows:*

'[55] ....if the Court of Appeal is satisfied that on the whole of the facts and with a correct direction the only reasonable and proper verdict would be one of guilty there is no substantial miscarriage of justice. This decision was based on section 4(1) of the Criminal Appeal Act 1907 (UK) which was in the same terms as section 23(1) of the Court of Appeal Act.

[56] This test has been adopted and applied by the Court of Appeal in Fiji in ***R -v- Ramswani Pillai*** *(unreported criminal appeal No. 11 of 1952; 25 August 1952);* ***R -v- Labalaba*** *(1946 – 1955) 4 FLR 28 and* ***Pillay -v- R*** *(1981) 27 FLR 202. In* ***Pillay -v- R*** *(supra) the Court considered the meaning of the expression "no substantial miscarriage of justice" and adopted the observations of North J in* ***R -v- Weir*** *[1955] NZLR 711 at page 713:*

"The meaning to be attributed to the words 'no substantial miscarriage of justice has occurred' is not in doubt. If the Court comes to the conclusion that, on the whole of the facts, a reasonable jury, after being properly directed, would without doubt have convicted, then no substantial miscarriage of justice within the meaning of the proviso has occurred."

[57] ....when considering whether to apply the proviso the appeal may be dismissed if the Court considers that there was no substantial miscarriage of justice.

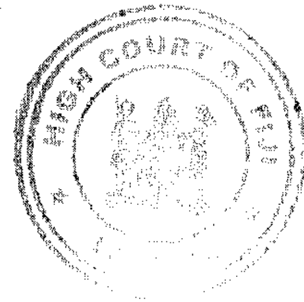
In ***Vuki -v- The State*** *(unreported AAU 65 of 2005; 9 April 2009) this Court observed at paragraph 29:*

"The application of the proviso to section 23(1) _ _ _ of necessity, must be a very fact and circumstance – specific exercise."

70. I have perused the copy record and read through the evidence I am satisfied that upon the analysis of the evidence adduced the only verdict is the guilt of the appellant.

ORDERS

1. The appeal against conviction and sentence are dismissed due to lack of merits;
2. The conviction and the sentence of the appellant of the appellant is affirmed;
3. 30 days to appeal to the Court of Appeal.



Sunil Sharma
Judge

At Lautoka
04 July, 2023

Solicitors
Messrs Fazilat Shah Legal for the Appellant.
Office of the Director of Public Prosecutions for the Respondent.