

**IN THE COURT OF APPEAL**  
**[On Appeal from the Extended Jurisdiction**  
**of the Magistrates' Court]**

**CRIMINAL APPEAL NO: AAU0043/2012**  
**[Criminal Case No. HAC204/2010]**

**BETWEEN** : SANAILA DIDIGOGO  
*Appellant*

**AND** : THE STATE  
*Respondent*

**Coram** : Hon. Mr. Justice Daniel Goundar

**Counsel** : Mr. J. Savou for the Appellant  
Mr. Y. Prasad for the Respondent

**Date of Hearing** : 15 February 2016

**Date of Ruling** : 1 March 2016

**RULING**

[1] The appellant was convicted of aggravated robbery contrary to section 311(1)(a) of the Crimes Decree 2009 after trial in the Magistrates' Court exercising an extended jurisdiction. On 3 April 2012, he was sentenced to 7 years' imprisonment with a non-parole period of 5 years. This is a timely application for leave to appeal against conviction and sentence on the following grounds:

**Appeal against conviction**

1. The learned trial Magistrate erred in law and in fact when he allowed the State to lead evidence of uncharged acts through PC Joseph which resulted in a miscarriage of justice.
2. The learned trial Magistrate erred in law and in fact in not (sic) allowing first time dock identification against the unrepresented appellant but also failing to warn/direct himself on the same.

3. *The learned trial Magistrate erred in law and in fact when he failed to direct himself on the law regarding circumstantial evidence relating to the evidence of PC Joseph.*
4. *The learned trial Magistrate erred in law and in fact when he failed to direct himself on the law regarding joint enterprise which was incumbent upon the charges.*

**Appeal against sentence**

1. *The learned trial Magistrate erred in law and in fact when he relied upon the same factors upon to determine the starting point of sentencing as aggravating factors which caused the sentence to be harsh.*
- [2] The test for leave to appeal against conviction is whether any of the ground is arguable. The test for leave to appeal against sentence is whether there is an arguable error in the sentencing discretion.
- [3] At trial, it was not in dispute that the victim was robbed. The victim, Wati Naivalura gave evidence that she was with a male companion at Suva foreshore at around 4.45am on 26 September 2010 when three men threatened them with a pen knife and robbed them. One of the attackers was the appellant. The victim said she had previously seen the appellant at the Suva market. She fled the scene leaving her male companion behind to raise alarm. On the way she met PC Joseph who apparently was chasing three men who tried to rob him and his friend not too far from where the victim was robbed. PC Joseph recognised the appellant as one of his attackers as he knew the appellant very well. PC Joseph suspected that the appellant was involved in the incident involving the victim and her male companion. The appellant was convicted on the evidence of the victim and PC Joseph
- [4] The appellant's defence was alibi. He said that at the time of the alleged robbery he was at home, but in cross-examination he said he was in city.



### Conviction appeal

- [5] The first ground relates to admissibility of evidence of uncharged act, namely an attempted robbery on PC Joseph. It is not clear why the appellant was not charged with attempted robbery on PC Joseph if the prosecution case was that the two offences were committed in the course of the same transaction. The uncharged act was prejudicial evidence that was used by the trial Magistrate to assess the reliability of the second victim's identification evidence. The appellant was unrepresented at the trial. He might not have known that he could have objected to the admissibility of the evidence of uncharged act. When an accused is unrepresented, the duty is on the trial Magistrate to ensure the accused's trial is fair by ensuring that any prejudicial evidence that is led has probative value that outweighs its prejudicial effect. That assessment was not carried out in this case. Ground 1 is arguable.
- [6] The circumstances under which the victim identified or recognised the appellant called for directions on the guidelines in *R v Turnbull (1977) Q.B. 224*. The trial judge properly directed his mind to the *Turnbull* guidelines, but he did not expressly direct his mind to the inherent dangers associated with the first time dock identification of the appellant by the victim. Ground 2 is arguable.
- [7] In his judgment, the learned Magistrate used PC Joseph's evidence as circumstantial evidence to convict without directing his mind to the law on circumstantial evidence. It is arguable that no inference of guilt could be made from PC Joseph's evidence because there was no link between the two alleged incidents. Ground 3 is arguable.
- [8] The prosecution alleged that the appellant committed the robbery in company. The fact that the robbery was committed in company was an element of the offence. The learned trial Magistrate directed his mind to this element of the aggravated robbery. There was need for the learned Magistrate to direct his mind to the principle of joint enterprise. Ground 4 is not arguable.

**Sentence appeal**

[9] Although the sentence imposed on the appellant is below the established tariff of 10-16 years' imprisonment for aggravated robbery, there is an arguable error that learned Magistrate double counted the same factors when selecting the starting point and the aggravating factors.

**Result**

[10] Leave to appeal against conviction and sentence is granted.



A handwritten signature in black ink, appearing to read "Daniel Goundar".

.....  
Hon. Mr. Justice Daniel Goundar  
**JUSTICE OF APPEAL**

**Solicitors:**

Office of the Legal Aid Commission for the Appellant  
Office of the Director of Public Prosecutions for the State