IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU 43 OF 2012
(High Court No. HAC 204 of 2010)

BETWEEN : **SANAILA DIDIGOGO**

Appellant

AND : **THE STATE**

Respondent

Coram : **Chandra JA**
Bandara JA
Perera JA

Counsel : **Mr. S. Waqainabete for the Appellant**
Mr. S. Vodokisolomone for the Respondent

Date of Hearing : **7 February 2017**

Date of Judgment : **23 February 2017**

JUDGMENT

Chandra JA

[1] The Appellant and two other co-accused persons were charged with two counts of Aggravated Robbery contrary to section 311(1)(a) of the Crimes Decree 2009 in the Magistrate's Court exercising extended jurisdiction.

[2] The two co-accused persons pleaded guilty to the two counts and were sentenced by the Court. The Appellant pleaded not guilty and after trial was acquitted of the first count but was convicted of the second count.

[3] The Appellant was sentenced to 7 years' imprisonment with a non-parole period of 5 years on 3rd April 2012. He filed a notice of appeal against his conviction and sentence.

[4] The Appellant in his notice of appeal set out the following grounds of appeal:

Appeal against conviction

1. The learned 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 (only) 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.

[5] Leave to appeal against conviction was granted by a single Judge of Appeal on grounds 1, 2 and 3 and leave was also granted against sentence on the ground urged by the Appellant.

Factual Matrix

[6] The victim, Wati Naivalura had been with a male companion at Suva foreshore at around 4.45 a.m. on 26 September 2010 when three men had approached them and threatened with a pen knife and robbed them. One of the attackers was the Appellant. She had fled the scene leaving her male companion behind to raise alarm. On the way she had met PC Joseph who had apparently been chasing three men who tried to rob him and his friend not too far from where the victim had been robbed. PC Joseph recognised the Appellant as one of his attackers and he had known the Appellant. The two accomplices were arrested immediately when they tried to get away and taken to the Central Police Station while the Appellant was arrested on the following Monday by PC Joseph. The first count related to the robbery of items from David Valentine, the companion of Wati Naivalura, but he was not called to give evidence, and the case proceeded on the second count which was for robbery of a mobile phone from Wati Naivalura.

[7] At the trial, prosecution led the evidence of the victim, PC Joseph and IP Inoke of the Central Police Station who tendered the Prosecution's Exhibit No.1 which was the Appellant's Caution Interview Statement. The victim stated in her evidence that she saw the Appellant for about five minutes and that he was about 2 meters away from her. The Appellant had grabbed her while another took her phone. She stated that her view was not obstructed by anything. She identified the Appellant while he was in the dock and under cross-examination stated that she had seen him at the Suva Market before the incident.

[8] The Appellant gave evidence on his behalf and denied the charge and stated that he was sleeping at home at the time of the incident. Under cross examination he had admitted that he knew PC Joseph before the incident.

Consideration of the Grounds of Appeal

Ground 1

[9] Ground 1 is regarding the admissibility of uncharged acts. It was argued that the evidence of PC Joseph suggested that the Appellant and others had attempted to rob PC Joseph and his friend and that whilst in pursuit he had met Wati Naivalurua who was calling for help but there were no charges proffered on account of such evidence. That the evidence of PC Joseph was thus prejudicial to the Appellant.

[10] It is clear from the judgment of the learned Magistrate that he placed reliance on the evidence of PC Joseph in convicting the Appellant. The question therefore arises as to whether the trial miscarried as a result.

[11] In **Senikarawa v. State** [2006] FJCA 25; AAU0005.2004S (24 March 2006) the Court of Appeal stated:

> *"The question of admissibility of such evidence is tested by the broader principle of whether the probative value of the evidence outweighs the prejudice to the accused,* **R v. Boardman** *[1975] AC 421,* **Pfennig v. R** *[1995)HCA7; (1994-95)127 ALR 99."*

[12] PC Joseph's evidence was that the appellant and his accomplices had tried to rob PC Joseph's companion about 2 to 3 minutes before they had robbed the victim and had run away on recognizing him as a police officer. PC Joseph had identified the appellant clearly at that time as he had seen the appellant previously while on duty when monitoring street kids. When PC Joseph had pursued after the appellant and his accomplices the appellant had run away and escaped while the two accomplices had been caught and taken into custody. PC Joseph had in his evidence stated that he

could confirm that the appellant was with the accomplices and had run away when he tried to arrest them. The appellant who gave evidence stated under cross examination that he had known PC Joseph earlier.

[13] In cases where the identity of the offender is in issue, evidence of a character sufficiently special reasonably to identify the perpetrator is required. **DPP v. P** [1991] 2AC 447 at 460. The nature of the evidence in this case although was in relation to the conduct of the Appellant it was more to identify the Appellant and had a probative value. In the circumstances of the present case it outweighed the prejudicial effect it had on the Appellant and therefore there was no miscarriage of justice. It is clear from paragraph 23 of the Judgment of the learned magistrate that the evidence of PC Joseph had been taken into account to establish the identity of the Appellant.

[14] Therefore this ground of appeal fails.

Ground 2

[15] The second ground of appeal is in relation to dock identification as no identification parade had been conducted.

[16] Counsel for the Appellant drew the Court's attention to the judgment in **Peni Lotawa v. State** Cr. Appeal No.AAU0091 of 2011 (5 December 2014) where reference was made to dock identification being unreliable in the absence of a prior foundation of identity parade or photograph identification.

[17] Peni Lotawa's case was an instance of dock identification where the complainant was giving evidence via skype and the Court of Appeal stated very strongly that in such instances dock identification would not be allowed to stand.

[18] However, the present case is clearly distinguishable from Peni Lotawa's case where evidence was given in open Court and the circumstances were quite different.

[19] The prosecution relied on the evidence of the victim and PC Joseph regarding identification. It was argued that the victim had not gone for a Police identification parade and that her first identification was conducted in the confines of the Court when the Appellant was in the dock and that her identification was questionable.

[20] The learned Magistrate in his judgment at paragraph 18 and 19 stated:

> *"18. The main considerations in relation to the identification of the accused persons have been widely discussed in the celebrated case of* **R v. Turnbull** *(1977) Q.B.224, where it was held that "the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made.*
>
> *i. How long did the witness have the accused under observation?*
> *ii. At what distance?*
> *iii. In what light?*
> *iv. Was the observation impeded in any way as for example by passing traffic or a press of people?*
> *v. Had the witness ever seen the accused before?*
> *vi. How often?*
> *vii. If only occasionally, had he any special reason for remembering the accused?*
> *viii. How long elapsed between the original observation and the subsequent identification to the police?*
> *ix. Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?*
>
> *19. In* **State v. Raymond Johnson** *(Crim,HAC120 of 2008) Gounder J in his summing up to the assessors stated that "in assessing the identification evidence, you must take such matters into account:*
>
> *(1) Whether the witness has known the accused before?*
>
> *(2) For how long did the witness have the accused under observation and from What distance? Was it more than a fleeting glance?*
>
> *(3) Did the witness have any special reason to remember?*

(4) In what light was the observation made?

(5) Whether there was any obstacle to obstruct the view?"

[21] These passages in the judgment of the learned Magistrate clearly show that he had considered the Turnbull principles in relation to the identification of the Appellant.

[22] According to the victim's evidence she had seen the Appellant for about 5 minutes and the light was sufficient to recognize him at the time the offence was committed. It was not a fleeting glance. **R v. Oakwell** 1978 1 WLR 32. She had seen him previously at the Suva Market. It is in the light of these items of evidence that the dock identification in this case has to be considered and as to whether it was prejudicial to the Appellant.

[23] In **Tiritiri v. State** [2015] FJCA 147; AAU0009.201 (2 October 2015) the Court of Appeal when considering the issue of dock identification regarding a High Court trial, stated:

> *"[19] ... ... First time dock identification is permissible in Fiji provided the trial judge cautions the assessors on the dangers of relying on the first time dock identification (**Semisi Waniqolo v. The State**, unreported Cr.App.No.AAU0027 of 2006; 24 November 2006). ... ..."*

[24] In the present case that the learned Magistrate has allowed dock identification having taken into account the **Turnbull** guidelines and the inherent dangers of first time dock identification.

[25] The conclusion reached by the learned Magistrate has been further strengthened by the fact that he had considered the evidence of PC Joseph who had known the Appellant. The Appellant and his two accomplices had according to the evidence of PC Joseph tried to rob him and his friend just a few minutes before they had robbed

the victim and her companion. PC Joseph had also stated that there was sufficient light and that he clearly identified the Appellant.

[26] The learned Magistrate at paragraph 23 of his Judgment stated:

> *"[23]. In view of the evidence of Ms. Naivalura and PC Joseph the prosecution specifically established that the accused was present at the time of the alleged incident. The accused in his evidence denied his presence at the time of this alleged incident and he stated he was at home. He did not call any witness for his defence of alibi. He admits that he was in town drinking with his friends. He was not aware of the time and could not exactly tell the time he left home. Having considered the evidence of the two prosecution witnesses and the accused in respect of the identification of the accused person, I am inclined to accept the evidence of two prosecution witnesses as it is reliable and consistent."*

[27] Considering the manner in which the learned Magistrate has considered the evidence as stated above this ground of appeal regarding the allowing of dock identification being prejudicial to the Appellant fails.

Ground 3

[28] The third ground of appeal relates to the fact that the learned Magistrate failed to direct his mind on the law of circumstantial evidence.

[29] It was argued that the evidence of PC Joseph as stated by the learned Magistrate in his judgment was circumstantial in nature and that the learned Magistrate has not directed himself on the law concerning circumstantial evidence.

[30] The evidence of PC Joseph showed that there were two incidents that had occurred that night. One was in respect of himself and his companion which occurred first, when the Appellant and the two accomplices had tried to threaten PC Joseph and his companion and thereafter the incident relating to the victim and her companion David

Valentine. PC Joseph 's evidence being that after the first incident he was chasing the Appellant and his accomplices when he met the complainant when she was crying out for help and later arrested the two accomplices the same night and the Appellant on the following Monday.

[31] In **Nadim & Anor v. The State** Cr. Appeal No.AAU 0080 of 2011 (2 October 2015) the Court of Appeal cited with approval the direction endorsed in **Lole Vulaca and 2 Others v. The State** Cr. App. No.AAU0038/08.29 August 2011 regarding circumstantial evidence as follows:

> *"Remember that in considering circumstantial evidence you must be satisfied beyond reasonable doubt that the only reasonable inference available to you is the guilt of the Accused before you can find them guilty. If you find that there are other reasonable inferences you can draw which are consistent with the Accused's innocence or if you have a reasonable doubt about it, then you should find each not guilty."*

[32] The Supreme Court in **Senijieli Boila v. The State** (Cr. App. No.CAV005 of 2006S: 25 February 2008) observed in respect of a direction regarding circumstantial evidence:

> *"What is required is a clear direction that the tribunal of fact must be satisfied of the guilt of the accused beyond reasonable doubt (**McGreevy v Director of Public Prosecutions** [1973] 1 WLR 276, applied **Kalisoqo v. R** Criminal Appeal No.52 of 1984)See also R v Hart [1986] 2NZLR 408 . The adequacy of the particular direction will necessarily depend on the circumstances of the case."*

[33] In the present case the learned Magistrate directed himself on the facts of the case which were the evidence of PC Joseph and the direct evidence of the victim and arrived at the conclusion that the prosecution had proved the charge beyond reasonable doubt, which is clear from paragraph 23 of the judgment which has been quoted at para [26] above.

[34] In view of this position the third ground of the Appellant also fails.

Ground of Appeal against Sentence

[35] This ground is on the basis that the learned Magistrate when imposing the sentence on the Appellant had double counted the same factors when selecting the starting point and the aggravating factors.

[36] The learned Magistrate having cited the decision in **State v. Rasaqio** [2010] FJHC 287; HAC 155/2007 as setting out the tariff for robbery with violence between 10 to 16 years went on to enumerate the factors in selecting the starting part.

[37] In his Sentencing Judgment the learned Magistrate stated:

> *"9... ... ... This is planned gang robbery at a public place at night. You used a pen knife to threaten the victim. The victim is a female person. In line with the above sentencing guidelines and principles, I select 10 years imprisonment period as a starting point.*
>
> *10. You committed this offence in a joint enterprise. I find this is a well calculated planned gang robbery. You all carried out your pre-planned robbery in most scandalous manner. By virtue of the principle of joint enterprise each one of you culpability and degree of responsibility for inflicting violence and robbing the complainant is the same as of your accomplices. You are not a first offender, therefore I disregard your previous good behavior.*
>
> *11. The impact of the offence on the victim must be a horrified experience as she was suddenly surrounded by a gang of three youth with knife and threatened and robbed. This dreadful experience definitely remains with her for the rest of her life. You inflicted violence and robbed her while she was enjoying her freedom at the seawall.*
>
> *12. You planned this act of aggravated robbery with your accomplices and acted in concert with each other to fulfill your criminal intention. You demonstrated that you have no respect and regard for other's rights and freedom. You completely disregarded law and order and utilized vulnerability and insecurity of the victim to carry out your criminal act.*

13. I now draw my attention to address the mitigating factors in your favour:

i. 19 years of age,
ii. Asked for forgiveness."

[38] The learned Magistrate chose the starting point as 10 years imprisonment, added 5 years for the aggravating factors and reduced 7 years for the mitigating factors which made it 8 years and reduced a further year for the time spent in custody resulting in imposing a sentence of 7 years with a non-parole period of 5 years.

[39] It is clear that the learned Magistrate in imposing the sentence had double counted by using the same factors to choose the starting point and setting them out again as aggravating factors of the offending. This amounts to an error in imposing the final sentence on the Appellant.

[40] However, when considering the mitigating factors that have been taken into account, the learned Magistrate had given a major discount of 7 years.

[41] In **Noa Maya v. State** [2015] FJCA 19; AAU0053.2011 (27 February 2015) the Court of Appeal in dealing with sentencing stated :

"87. In view of the fact that the trial Judge took into account a lower figure in determining the starting point for Robbery contrary to section 293(1)(a), and thereby the interim figure prior to the deduction of mitigating factors had been placed more towards the lower end of the accepted tariff, no prejudice has occurred to the appellants due to the double counting in this case".

[42] In the present case what has happened is the converse, in that a higher figure has been chosen in determining the starting point and a higher figure for mitigating factors which offsets the prejudice that has been caused to the Appellant as a result of the double counting.

[43] In view of this position, and in considering that the tariff for robbery with violence is 10 to 16 years, no prejudice has been caused to the Appellant and therefore the ground of appeal against sentence fails.

[44] In view of the above findings, the appeal against conviction and sentence of the Appellant is dismissed.

Bandara JA

[45] I agree with the Judgment of Chandra JA.

Perera JA

[46] I agree with the Judgment and proposed orders of Chandra JA.

Orders of Court:

1. *The Appeal against conviction and sentence is dismissed.*
2. *The conviction and sentence of the Appellant is affirmed.*

Hon. Justice S. Chandra
JUSTICE OF APPEAL

Hon. Justice N. Bandara
JUSTICE OF APPEAL

Hon. Justice V. Perera
JUSTICE OF APPEAL