IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO.AAU 0100 of 2016
[In the High Court at Lautoka Case No. HAC 047 of 2014]

BETWEEN	:	**PENI YALIBULA**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Appellant in person**
	:	**Mr. S. Babitu for the Respondent**
Date of Hearing	:	**18 August 2020**
Date of Ruling	:	**25 August 2020**

RULING

[1] The appellant had been indicted in the High Court of Suva on two counts of Act with Intent to Cause Grievous Harm [section 255(a)], one count of Aggravated robbery [section 311(1)(a)] and Damage to property [section 369(1)] of the Crimes Act, 2009 committed with 04 others [three of whom are the appellants in AAU0092/2016, AAU 099/2016 and AAU0067/2017] on 06 April 2014 at Nadi in the Western Division.

[2] The information read as follows.

'FIRST COUNT

Statement of Offence

ACT WITH INTENT TO CAUSE GRIEVOUS HARM: *Contrary to Section 255 (a) of the Crimes Decree 44 of 2009.*

Particulars of Offence

PENI YALIBULA, MIKAELE TURAGANIVALU, RUSIATE TEMO ULUIBAU, ULAIASI QALOMAI *and* ***TEVITA QAQANIVALU*** *on the 6th day of April 2014 at Nadi in the Western Division, with intent to cause grievous harm to* ***MANI RAM,*** *unlawfully wounded the said* ***MANI RAM*** *by kicking, hitting and striking him in the head with a liquor bottle.*

SECOND COUNT

Statement of Offence

ACT WITH INTENT TO CAUSE GRIEVOUS HARM: *Contrary to Section 255 (a) of the Crimes Decree 44 of 2009.*

Particulars of Offence

PENI YALIBULA, MIKAELE TURAGANIVALU, RUSIATE TEMO ULUIBAU, ULAIASI QALOMAI *and* ***TEVITA QAQANIVALU*** *on the 6th day of April 2014 at Nadi in the Western Division, with intent to cause grievous harm to* ***NAUSAD MOHAMMED,*** *unlawfully wounded the said* ***NAUSAD MOHAMMED*** *by kicking, hitting and striking him in the head with a liquor bottle.*

THIRD COUNT

Statement of Offence

AGGRAVATED ROBBERY: *Contrary to Section 311 (1) (a) of the Crimes Decree 2009.*

Particulars of Offence

PENI YALIBULA, MIKAELE TURAGANIVALU, RUSIATE TEMO ULUIBAU, ULAIASI QALOMAI *and* ***TEVITA QAQANIVALU*** *on the 6th day of April 2014 at Nadi in the Western Division, robbed* ***MANI RAM*** *of assorted liquor valued at $3,400.00, assorted cigarettes valued at $1,300.00 and $5,300.00 cash all to the total value of $10,000.00 and immediately before the robbery, force was used on the said* ***MANI RAM.***

FORTH COUNT

Statement of Offence

DAMAGING PROPERTY: *Contrary to Section 369 (1) of the Crimes Decree 2009.*

Particulars of Offence

> ***PENI YALIBULA, MIKAELE TURAGANIVALU, RUSIATE TEMO ULUIBAU, ULAIASI QALOMAI*** *and* ***TEVITA QAQANIVALU*** *on the 6th day of April 2014 at Nadi in the Western Division, willfully and unlawfully damaged assorted liquor valued at $3,200.00, assorted juice valued $580.00, 1 x computer valued at $650.00, dried Kava valued at $220.00 and 1 x cash register valued at $499.00 all to the total value of $6,609.00 the property of* ***MANI RAM.***

[3] After trial, the assessors expressed a unanimous opinion of guilty against the appellant on all charges on 06 June 2016. The learned High Court judge in his judgment on 13 June 2016 had agreed with the assessors and convicted the appellant as charged. He had been sentenced on 11 July 2016 to 11 years of imprisonment for all offences (aggregate sentence) with a non-parole period of 08 years.

[4] The appellant being dissatisfied with the conviction had in person submitted a timely application for leave to appeal on 21 July 2016. He had preferred written submission on 10 June 2020. The state had filed its submissions on 17 August 2020.

[5] In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. The test for leave to appeal is **'reasonable prospect of success'** (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019) in order to 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 and **Naisua v State** [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.

[6] ***Grounds of appeal against conviction***

> *Ground 1- That the Learned Trial Judge erred in law in failing to give sufficient weight on his direction on the summing-up regarding the burden and standard of proof.*

Ground 2- That the Learned Trial Judge erred in giving a confused and contradictory direction in the summing-up to the assessors on the principles of joint enterprise

Ground 3- That the Learned Trial Judge's direction in the summing-up to the assessor in relation to the caution interview is erroneous as his Lordship failed to leave it to the assessors to determine for themselves the voluntariness of the confession.

Ground 4- That the Learned Trial Judge erred in law in failing to give adequate directions to the assessors regarding the method of interrogation used by the Police which resulted in the Appellant giving a confessional statement.

Ground 5- That the Learned Trial Judge erred in law in allowing the usage of copied DVD to determine the issue of identification knowing the possibility of alteration by the complainant and failing to order the extraction of the original copy from the laptop hard drive.

Ground 6- That the Learned Trial Judge erred in law in allowing the dock identification of the Appellant without any identification parade after the alleged robbery.

Ground 7- That the verdict is unsafe and unsatisfactory having regards to evidence and non-direction or misdirection by the learned Trial Judge.'

[7] The prosecution evidence of the case as summarised by the learned High Court judge in the sentencing order is as follows.

'[3] The Complainant, Mr. Mani Ram, had been running a shop in Matintar, Nadi, for the past 40 years. To cater to customers who enjoy the night life in the Airport City of Nadi, he kept his shop open till late night in the company of his security guard, Mr. Naushad. Five accused came in a mini-van, got off near the shop and started drinking alcohol. Around 3 a.m., they came to the counter of the complainant's shop in the guise of customers and tried to forcibly enter the shop through the opening at the counter. Failing of which they broke off the rear door and entered the shop forcibly. They went on rampage in the shop completely disregarding personal and property rights of the shop keepers. They wounded the complainant and his security guard kicking, hitting and striking brutally with bottles, and destroyed the property. They robbed valuable goods and cash. 1st accused was apprehended red handed by members of the public while others fled with the loot. The entire 'horrific drama' lasted nearly for eight minutes was being secretly recorded by six surveillance cameras installed in the shop. The CCTV footages obtained from cameras helped the police to identify the culprits who were later apprehended. 1st accused made a confession to police. Other accused were positively identified by the prosecution witnesses. The CCTV footage displayed

during trial showed a systematic and coordinated brutal attack on the victims and their property.'

01st ground of appeal

[8] The appellant's complaint is on alleged lack of directions on the burden of proof and the standard of proof in the summing-up. The learned trial judge had addressed the assessors as to who bore the burden of proof throughout the trial and what the standard of proof was in paragraphs 5 and 98 of the summing-up as follows.

> *'5. The charges against the accused are set out in the information that you each have a copy of. This charge is brought by the Prosecution and the onus of proving it rests on the Prosecution from beginning to end. There is no onus on the accused at any stage to prove their innocence or to prove anything at all. They do not need to give evidence. In this case, except the 2nd accused, accused have chosen to do so but they still carry no onus. The law is that the Prosecution must prove the essential ingredients of the charge beyond reasonable doubt before there can be a verdict of guilty. That is the standard of proof I mean when I say throughout this summing up that the Prosecution must prove some matter proof beyond reasonable doubt. That is a classical phrase that you will have heard many times. Those words are clear and will be readily understood by you. They mean just what they say. A reasonable doubt is a doubt which you find is reasonable in the circumstances of this case. If, after a full consideration of the evidence, and bearing in mind the directions I give to you, you find the charges are proved beyond reasonable doubt your opinion must be 'guilty'. On the other hand, if you are left with a reasonable doubt, your opinion must be 'not guilty'.*
>
> *'98. As you are aware accused, except the 2nd accused, elected to give evidence. That is their right. Now I must tell you that the fact that an accused gives evidence in his own defence does not relieve the Prosecution of the burden to prove their case to you beyond reasonable doubt. Burden of proof remains on the prosecution throughout. Accused's evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate. Even if you don't believe a single word a accused person says, you must still be sure that he is guilty of the crime that he is charged with.'*

[9] There is no magical formula or straightjacket approach to describe what a reasonable doubt is and to be read as an incantation in a summing-up. Nor is a there a universally accepted definition of a reasonable doubt. In my view, the trial judge had adequately dealt with both the burden of proof and the standard of proof in the summing-up.

[10] There is no reasonable prospect of success in this ground of appeal.

02nd ground of appeal

[11] The appellant complains that the trial judge's direction on joint enterprise is contradictory and confusing. I find in the summing-up the following directions on joint enterprise.

> *6. 'You apply that test to the case against each accused. That is an important matter. As you are aware the five accused are jointly charged with the same crime.*
>
> *7. The law recognizes that more than one person may be parties together committing a crime. In this case it is alleged that the accused were acting on a joint enterprise together. The Prosecution says that they were involved with other persons in the commission of the crime. In view of this allegation it is convenient to deal with their cases together in the one trial.*
>
> *8. However, they are still entitled to have their charges considered separately. I direct you that you must consider the case against each accused separately. In doing this you must carefully distinguish between the evidence against one accused and the evidence against the other. You must not, for instance, supplement the evidence against one accused by taking into account evidence referable only to another.*
>
> *9. In the same way, you must bear in your mind that there are four counts in the information. You have to consider each charge separately.'*
>
> *22. In these circumstances I must explain to you the liability of a number of people who commit a crime together. If several people decide to commit an offence together, and all of them participate and assist each other in doing it - each of them is guilty of the crime that is committed. This is so, even though individually, some of them may not actually do the acts that constitute the offence.*
>
> *23. In this case the prosecution alleges that these two accused and one other were on a criminal enterprise together. They set out to rob Mr. Mani Ram's shop. That is to steal property from him by violence as I have explained it to you. If this is proved then each person who participated is a party to that robbery. That is so even though only one of them actually completed the robbery by taking the property. Same principle applies in respect of other two offences as well.*
>
> *24. If it is proved that all the people concerned embarked upon a criminal enterprise together intending that one or more of them should actually cause personal violence to the victim and damage the property before they robbed Mr. Mani Ram of his property. In that case they were intending to commit the*

offence of robbery with violence. Each may have played a different part but they were all knowingly assisting each other to commit that offence.

[12] The appellant cites paragraph 37 of the decision in **Vulaca v State** - Majority Judgment [2011] FJCA 39; AAU0038.2008 (29 August 2011) where the Court of Appeal had highlighted the trial judge's summing-up on joint enterprise in relation to the specific facts of that case and approved it as adequate and correct on the following basis.

> *'[38] After directing on the pieces of evidence that the prosecution relied upon to prove joint enterprise, the learned trial judge directed on the defence position on the issue:*
>
> > *"The defence position is, as I have described it, that the Accused were not at the scene, were not part of any joint enterprise and that all the evidence relied upon by the prosecution was done openly and not with any intent to hide evidence."*
>
> *[39] The assessors were clearly directed that they had to be satisfied that the death of the deceased was a probable consequence of a planned assault on him in which the first and the second appellants participated. In our judgment the direction on joint enterprise was adequate and was a correct statement of law. This ground fails.*

[13] Therefore, it is clear that the facts and the evidence available against the appellant are totally different to ***Vulaca*** and I think the trial judge's directions in this case are quite sufficient with regard to how the assessors should consider the prosecution evidence against the appellant jointly on the basis of a joint enterprise and individually. There is no reasonable prospect of success in this ground of appeal.

03rd ground of appeal

[14] The appellant argues that the trial judge's directions regarding his cautioned interview are erroneous in that the trial judge had not left the issue of voluntariness to be determined by the assessors. The directions on the cautioned interview should be considered in the context of overall evidence available against the appellant, which the trial judge had narrated in paragraphs 8-11 of the judgment.

> *8. 'First I look at the evidence adduced by the Prosecution against the 1st accused. Jone Toga made a dock identification of the 1st accused. Toga is an independent witness who intervened to help the shop keeper. He saw*

robbers stealing things inside the shop. When he approuched the robbers he came under attack. One robber chased him out of the shop and apprehended. Witness Joeli Lotawa and Toga's other friends intervened and managed to catch the robber. Robber was severely punched and later handed over to police officers. Toga identified the robber who chased and punched him as Peni Yalibula.

9. The evidence of Toga as to the incident was corroborated by witness Lotawa and by the video footage. ***The video footage was not clear enough to recognise the face of the 1st accused although his body language and the physique clearly matched with the robber in the CCTV footage****. Neither Toga nor Lotawa had been called by police for an identification parade to identify the 1st accused.* ***In my opinion, there was no necessity for 1st accused to be identified in an identification parade. There was a proper foundation for Toga to make a dock identification.*** *The robber who chased Toga was caught and got punched by Lotawa and Toga's other friends and had been handed over to police officers who had arrived at the crime scene soon after the robbery. Corporal Akariva confirmed that the person arrested at the crime scene with facial injuries was the 1st accused. He had been pointed out by the people who made the arrest. 1st accused later admitted under caution having participated in the commission of the crime. Prosecution relied on the admission made in the caution interview of the 1st accused.*

10. Giving evidence in Court, 1st accused challenged the voluntariness of the interview and said that admission was obtained using torture. Police witnesses vehemently denied those allegations. ***In the course of the trial, I reviewed my own finding on voir dire proceedings in respect of voluntariness, fairness and the constitutionality of the caution interview****. Other evidence led in the trial including the CCTV footage corroborated what the accused had told police under caution. I am satisfied that caution interview is a truthful statement of the 1st accused.*

11. Having considered the caution interview and other evidence led in the trial, I am satisfied that the identity of the accused is properly established.'

[15] Therefore, there was ample evidence to implicate the appellant with the robbery other than his cautioned interview which had been admitted in evidence after a *voir dire* inquiry. The trial judge had addressed the assessors on the appellant's cautioned interview as follows.

'111. Prosecution is relying on the caution interview and other identification evidence against the 1st accused. 1st Accused, in his caution interview, had made certain admissions. Giving evidence in Court, he challenged the ***voluntariness*** *of the interview and took up the position that those admissions were obtained illegally by police, violating their constitutional rights. Accused*

maintained that they made those admissions ***involuntarily*** *due to fear of police torture. Police witnesses vehemently denied those allegations.*

112. You have before you the cautioned interview of the 1st accused in which he made those admissions. You heard accused giving evidence in Court. You also heard other evidence and received a copy of his medical report. It is for you to assess what ***weight*** *should be given to his caution interview. If you are not sure, for whatever reason, that those admissions are* ***true****, you must disregard them. If, on the other hand, you are sure that they are true, you may rely on them.*

[16] In **Tuilagi v State** [2017] FJCA 116: AAU0090.2013 (14 September 2017) the Court of Appeal analyzing previous decisions including **Maya v State** [2015] FJSC 30; CAV 009. 2015 (23 October 2015), stated as to what directions should be given to the assessors on how to evaluate a confession.

'The correct law and appropriate direction on how the assessors should evaluate a ***confession*** *could be summarised as follows.*

(i) The matter of admissibility of a confessional statement is a matter solely for the judge to decide upon a voir dire inquiry upon being satisfied beyond reasonable doubt of its voluntariness (vide ***Volau v State*** *Criminal Appeal No.AAU0011 of 2013: 26 May 2017 [2017] FJCA 51).*

(ii) Failing in the matter of the voir dire, the defence is entitled to canvass again the question of voluntariness and to call evidence relating to that issue at the trial but such evidence goes to the weight and value that the jury would attach to the ***confession*** *(vide* ***Volau****).*

(iii) Once a ***confession*** *is ruled as being voluntary by the trial Judge, whether the accused made it, it is true and sufficient for the conviction (i.e. the weight or probative value) are matters that should be left to the assessors to decide as questions of fact at the trial. In that assessment the jury should be directed to take into consideration all the circumstances surrounding the making of the* ***confession*** *including allegations of force, if those allegations were thought to be true to decide whether they should place any weight or value on it or what weight or value they would place on it. It is the duty of the trial judge to make this plain to them. (emphasis added) (vide* ***Volau****).*

(iv) Even if the assessors are sure that the defendant said what the police attributed to him, they should nevertheless disregard the ***confession*** *if they think that it may have been made involuntarily (vide* ***Noa Maya v. State*** *Criminal Petition No. CAV 009 of 2015: 23 October [2015 FJSC 30])*

*(v) However, **Noa Maya** direction is required only in a situation where the trial Judge changes his mind in the course of the trial contrary to his original view about the voluntariness or he contemplates that there is a possibility that the confessional statement may not have been voluntary. If the trial Judge, having heard all the evidence, firmly remains of the view that the **confession** is voluntary, Noa Maya direction is irrelevant and not required (vide **Volau** and **Lulu v. State** Criminal Appeal No. CAV 0035 of 2016: 21 July 2017 [2017] FJSC 19.'*

[17] I cannot find the trial judge's directions to be objectionable in the light of above legal principles and this ground of appal has no reasonable prospect of success.

04th ground of appeal

[18] The appellant criticizes the trial judge for having failed to give adequate directions on the method of interrogation used by the police forcing him to give the confessional statement. The admissibility of the confessional statement is a matter for the trial judge and not the assessors as stated in ***Tuilagi***. The trial judge had gone into the issue of voluntariness at the *voir dire* inquiry and determined that the cautioned interview could be admitted as it had been voluntarily made. He had addressed the assessors in the following paragraphs on all the appellant's allegations regarding his cautioned interview in the summing-up.

100. 'Mr. Peni said that on the 7th of April 2014,he was in Lautoka and was taken to Nadi Police Station in the morning as a suspect of an Aggravated Robbery matter. He did not know how he was taken to Nadi. When he woke up woke up he found himself in the Crimes Office. He was questioned about an Aggravated Robbery. He told police officers that he knew nothing about it. Then police officers started beating him in front of the Police bure using a baton. Due to the pressure he admitted the allegation. Only the police officers who gave evidence assaulted him. Rusiate's mom was also present at the police Station.

101. He was badly injured in ribs, his back and legs. Despite his request, he was not taken to the hospital before the interview. He was taken to the hospital only after the interview on the 8th of April 2014 and was examined by Dr. Salote. Only the police officers gave information to the doctor. He tendered the medical report marked as 1DE1. On the 09th day of April, he complained to the Magistrate about the assault when he was produced in court.

102. Under Cross-examination, he admitted that he was drinking near the Daily Shop at Martintar, Nadi on the 6th of April 2014 at around 3 – 4 o'clock in the morning. He could not recall if he was assaulted by people officers near the shop. He denied having entered the Daily Shop, assaulted the occupants

and robbed. He also denied that he was interviewed on the 7th of April, 2014. However, he admitted that he had facial injuries before the interview and his rights were given by police officers.

[19] Coupled with paragraphs 111 and 112 of the summing-up, I think that the trial judge had given adequate directions on all evidence of the appellant on his cautioned interview. In addition in paragraph 10 of the judgment the trial judge had once again considered this aspect.

> *'10. Giving evidence in Court, 1st accused challenged the voluntariness of the interview and said that admission was obtained using torture. Police witnesses vehemently denied those allegations. In the course of the trial, I reviewed my own finding on voir dire proceedings in respect of voluntariness, fairness and the constitutionality of the caution interview. Other evidence led in the trial including the CCTV footage corroborated what the accused had told police under caution. I am satisfied that caution interview is a truthful statement of the 1st accused.'*

[20] Therefore, there is no reasonable prospect of success in this ground of appeal.

05th ground of appeal

[21] The appellant questions the trial judge's decision to allow the usage of a copy of the DVD to determine the identification of the appellant knowing the alleged possibility of alteration by the complainant and criticizes the failure of the trial judge to have called for the original.

[22] The learned judge's ruling dated 25 May 2016 in allowing the prosecution to produce the CCTV footage and call DC Leone as a witness does not show that the appellant has raised any objection to the production of one copy of several copies made of the original CCTV recording at the trial. Therefore, his present objection is clearly an afterthought. In any event, the trial judge had dealt with the attendant circumstances leading to the CCTV footage being admitted in evidence and shown to the assessors in the summing-up.

> *41. Mr. Reddy had been working for Daily Shop located at Lot. 1 Martintar, Nadi for four years. On 6th of April 2014, there was a break in at the shop. He watched, on following day, 7th of April, the CCTV footages taken from eight surveillance cameras installed at different places of the shop the Cameras had recorded the break in. He made soft copy from the Digital Video Recorder (DVR) using a Universal Serial Bus(USB), burnt into six Digital*

Versatile Disc(DVD)s. All DVD copies were given to police between 7th and 9th of April 2014 once made. One copy was tendered in evidence marked as PE.1. He identified the DVD by the writing that belongs to his brother in law Nishal Ram.

42. He played in Court different video files stored under each channel. Whilst watching, he pointed out his father- in- law, the shop owner, Mr. Mani Ram and the security personnel Mr. Naushad.

43. Under cross examination, he recalled giving a statement to the Police on the 9th of April 2014. The USB copy was given to Police officers on the 6th of April. Police had seen the footage the same day that is on the 6th of April.

44. He denied having made any alterations to the DVDs except the transfer before they were given to police on the 8th. He confirmed that the original saved in the hard drive from the DVR was still intact in the laptop and was in his possession though it was not tendered in evidence. He agreed that the video displayed in court was rather blurry and the faces of those that was shown is not that clear.

45. He did not write his name on the DVD because his writing was not that good.

46. He just converted using an available software. Answering the a question asked by court, he said that the original footages saved in the hard drive is available in his laptop to be watched. Police offices watched the original DVR video before he made copies and the original version saved in the USB was given to police officers during investigations. He was not an expert in converting and burning DVDs but had experience. Downloading of the footages was done in the presence of police officer. The first downloading of the USB took place in the daytime in the day the 6th of April and later on he made DVDs at 10p.m.'

[23] 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.

[24] This ground of appeal has no reasonable prospect of success.

06th ground of appeal

[25] The appellant argues that the trial judge had erred in law in allowing the dock identification in the absence of an identification parade.

[26] The trial judge had given ample consideration to the dock identification of the appellant by witness Jone Toga in the judgment in paragraph 8 and 9 quoted above and specifically held that it was not necessary for him to have been produced at an identification parade.

[27] The trial judge had referred to the first time dock identification in the absence of an identification parade by witness Mani Ram in paragraph 34 and 35 of the summing-up.

> *'34. 'Before leaving this topic of identification I should say something about Mr. Mani Ram's evidence in respect of identification of 1st, 2nd and 5th accused in court. He did not attend an identification parade to identify those accused before coming to court although he said all of them were there at the time of the robbery.*
>
> *35. Identification of the accused in the dock is notoriously suspicious, particularly when there has been no other identification since the time of the incident. You see, a witness coming into court is expecting to confront the offender. He or she knows that a person has been charged with the offence and there would be a natural tendency in those circumstances to assume that the accused in court must be the offender. He has a special place in the courtroom and is easily identifiable. He is not selected out from a group of people and there is a danger that he may be identified because he is the person in court that the witness assumes must be the offender that the witness saw on the earlier occasion.*

[28] While Jone Toga's identification cannot be treated as first time dock identification as the appellant was amply seen by him at the scene, the trial judge had clearly warned of Mr. Mani Ram's evidence as the appellant was not present at the identification parade having been arrested one year after the robbery.

[29] The tests were formulated in **Naicker v State** CAV0019 of 2018: 1 November 2018 [2018] FJSC 24, **Saukelea v State** [2018] FJCA 204; AAU0076.2015 (29 November 2018) and **Korodrau v State** [2019] FJCA 193; AAU090.2014 (3 October 2019) on first time dock identification directions. In ***Korodrau*** it was held as follows.

> *'[35] However, the Supreme Court in **Naicker** went on to state in paragraph 38 that the critical question is whether ignoring the dock identifications of the appellant, there was sufficient evidence, though of a circumstantial nature, on which the assessors could express the opinion that he was guilty, and on which the judge could find him guilty and answered the question in the affirmative. Going further, the Supreme Court formulated a test to be applied when dock identification evidence had been led and no warning had been given by the trial Judge. The test to be applied is found in the following paragraph.*
>
> > *'45. I return to the irregularities in the trial as a result of the **dock identifications** and the absence of a Turnbull direction. To use the language of the proviso to section 23(1) of the Court of Appeal Act 1949, has a "substantial miscarriage of justice" occurred?.....The question, in my opinion, is whether the judge **would** have convicted Naicker of murder if there had been no **dock identification** of him at all by the two witnesses who chased a man with blood on his hands. That is a different question to the one posed in para 38 above, which was whether the judge **could** have convicted Naicker without the **dock identifications.** The question now is whether he **would** have done so. I have concluded that, for the same reasons as I think that the judge could have convicted Naicker without the **dock identifications,** the judge would have convicted him of murder in their absence. It follows that I would apply the proviso, holding that no substantial miscarriage of justice has occurred despite the irregularities in the trial.' (Emphasis added)*
>
> *[36] Thus, the Supreme Court appears to formulate a two tier test. Firstly, ignoring the dock identification of the appellant whether there was sufficient evidence on which the assessors could express the opinion that he was guilty, and on which the judge could find him guilty. Secondly, whether the judge would have convicted the appellant, had there been no dock identification of him. In my view, the first threshold relates to the quantity/sufficiency of the evidence available sans the dock identification and the second threshold is whether the quality/credibility of the available*

evidence without the dock identification is capable of proving the accused's identity beyond reasonable doubt. Of course, if the prosecution case fails to overcome the first hurdle the appellate court need not look at the second hurdle. However, if the answers to both questions are in the affirmative, it could be concluded that no substantial miscarriage of justice has occurred as a result of the dock identification evidence and want of warning and the proviso to section 23(1) of the Court of Appeal Act would apply and appeal would be dismissed.

[30] In **Vulaca v The State** AAU0038 of 2008: 29 August 2011 [2011] FJCA 39, the Court of Appeal did not disapprove of dock identification because (i) the witness had seen the suspect twice before, on both occasions under good lighting, and (ii) there had been 8 defendants in the dock and though there had been a failure on the part of the judge in respect of the dock identification, nevertheless had gone on to hold that no prejudice had been caused despite lack of Turnbull direction. In fact, there was no need of Turnbull directions on the dock identification of the appellant by Jone Toga.

[31] Therefore, applying those tests to the appellant's complaint on Mr. Mani Ram's dock identification I am convinced that without his dock identification there was sufficient and direct evidence of identification of the appellant at the crime scene by Jone Toga, Loeli Lotawa, Corporal Akariva Nanovu and the admissions in the cautioned interview recorded by Constable 3458 Saiyasi Matarugu and also in the form of CCTV footage on all of which not only could the assessors and the trial judge have found him guilty but also they would have done so. Therefore, despite there being no specific warning on the first time dock identification by Mr. Mani Ram, the Court of Appeal would apply the proviso section 23(1) of the Court of Appeal Act and the appeal would be dismissed.

[32] Therefore, there is no reasonable prospect of success in appeal on this ground of appeal.

07th ground of appeal.

[33] The appellant states that the verdict is unsafe and unsatisfactory due to non-directions and misdirections. However, the appellant has not identified what those alleged omissions or erroneous directions are.

[34] The Court of Appeal in **Gonevou v State** [2020] FJCA 21; AAU068.2015 (27 February 2020) reiterated the requirement of raising precise and specific grounds of appeal and frowned upon the practice of counsel and litigants in drafting omnibus, all-encompassing and unfocused grounds of appeal. The Court of Appeal said

> *'[10] Before proceeding further, it would be pertinent to briefly make some comments on the aspect of drafting grounds of appeal, for attempting to argue all miscellaneous matters under such omnibus grounds of appeal is an unhealthy practice which is more often than not results in a waste of valuable judicial time and should be discouraged.'*

[35] Therefore, this ground of appeal cannot be considered by this court.

[36] The remarks in **Sahib v State** AAU0018u of 87s: 27 November 1992 [1992] FJCA 24 by the Court of Appeal would be relevant to the whole of the appellant's appeal.

> *'The whole summing up put the case properly and the assessors were left in a position to make up their own minds.*
>
> *We feel there was no misdirection by the learned trial Judge.*
>
> *That leaves us to consider the evidence, including the statements, in relation to each of the two counts appealed on the ground that it does not support the convictions. How is the Court to approach this?*
>
> *Section 23(1)(a) of the Court of Appeal Act sets out our powers:*
>
> *"23-(1) The Court of Appeal –*
>
> > *(a) on any such appeal against conviction shall allow the appeal if they think the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the Court before whom the appellant was convicted should be set aside on the grounds of a wrong decision of any question of law or that on any ground there was a miscarriage of justice and in any other case shall dismiss the appeal."*
>
> *The present wording is from the Court of Appeal (Amendment) Decree 1990 but, in this part, follows exactly the wording of the previous section.*
>
> *It also follows the wording of the English Court of Appeal Act 1907 and authorities under that section suggest the question the appellate Court should ask itself is whether there was evidence before the Court on which a reasonably minded jury could have convicted.*

Authorities in England since the passing of the 1966 Act are based on the requirement that the Court shall consider whether the verdict is unsafe or unsatisfactory. That test has given a number of appeal decisions based on a wide ranging consideration of the evidence before the lower Court and the views of the appellate Court on it. We were urged to make it the basis of our consideration of the present case but section 23 does not allow us that liberty and the powers of this Court are limited by the statute that created it. The difference of approach between the two tests was concisely stated by Widgery LJ in the final passages of his judgment in ***R v Cooper*** *(1968) 53 Cr. App. R 82.*

> *Having considered the evidence against this appellant as a whole, we cannot say the verdict was unreasonable. There was clearly evidence on which the verdict could be based. Neither can we, after reviewing the various discrepancies between the evidence of the prosecution eyewitnesses, the medical evidence, the written statements of the appellant and his and his brother's evidence, consider that there was a miscarriage of justice.*

It has been stated many times that the trial Court has the considerable advantage of having seen and heard the witnesses. It was in a better position to assess credibility and weight and we should not lightly interfere. There was undoubtedly evidence before the Court that, if accepted, would support such verdicts.

We are not able to usurp the functions of the lower Court and substitute our own opinion'

[37] There was enough evidence for the assessors and the trial judge to have found the appellant guilty. The verdict of guilty was not unreasonable and no miscarriage of justice had occurred. Thus, the appellant's appeal even as a whole has no reasonable prospect of success.

Order

1. Leave to appeal against conviction is refused.

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL