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

CRIMINAL APPEAL NO.AAU 115 of 2018
[In the High Court at Suva Case No. 158 of 2010]

BETWEEN : **FILIPE DELANA**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Appellant in person**
: **Ms. S. Tivao for the Respondent**

Date of Hearing : **15 June 2020**

Date of Ruling : **24 June 2020**

RULING

[1] The appellant had been indicted in the High Court of Suva on a single count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009 committed with others on 22 July 2010 at Suva regarding property belonging to Pranit Narayan.

[2] The information read as follows.

'Statement of Offence

AGGRAVATED ROBBERY: contrary to section 311(1) (a) of the Crimes Act 2009.

Particulars of Offence

FILIPA DELANAin the company of others on the 22nd day of July 2010 at Suva in the Central Division, robbed PRANIT NARAYAN of 1 x Compaq Laptop, 1 x Men's Cologne, 1 x Women's Cologne, 1 x Shaving Gel, 1 x Motorola Mobile Phone, 1 x Toyota Land Cruiser, the property of the said PRANIT NARAYAN.'

[3] After trial, the assessors expressed a unanimous opinion of guilty against the appellant of the charge of aggravated robbery on 29 October 2018. The learned High Court judge in his judgment on 31 October 2018 had agreed with the assessors and convicted the appellant of aggravated robbery. He had been sentenced on 02 November 2018 to 12 years of imprisonment. After deducting the period of remand and the sentence (served after the previous trail and conviction), the appellant was committed to serve 04 years, 03 months and 15 days with a non-parole period of 03 years and 06 months.

[4] The appellant being dissatisfied with the conviction and sentence had in person signed a timely notice application for leave to appeal on 06 November 2016. He had preferred additional grounds of appeal on 12 July 2019. His skeleton submissions had been received on 28 November 2019. The appellant had filed amended grounds of appeal and further submissions on 28 February 2020. The respondent's written submissions had been tendered on 03 February 2020. However, the state counsel informed this court at the leave to appeal hearing that the state would not file further submissions in reply to the last of the appellant's submissions as its previous written submissions had dealt with all grounds of appeal raised by the appellant.

[5] In the meantime the appellant had submitted an application to abandon his appeal against sentence on 15 June 2020 in Form 3 of the Court of Appeal Rules which will be considered before the full court of this court.

[6] 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 and **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). This threshold is the same with timely leave to appeal applications against sentence as well.

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

1) The learned trial judge gave inadequate directions on the Turnbull guidelines on identification of evidence.

2) The learned trial judge gave no directions on the first time dock identification.

3) The learned trial judge failed to direct the assessors that there was no material evidence brought during the trial thus rendering all evidence to be hearsay evidence.

[8] The evidence of the case reveals the following. In the wee hours of the morning on 22 July 2010 (at about 3.00 a.m.) the complainant's house was broken into by three persons armed with a bolt cutter, screwdriver and a knife. Two of them were wearing masks and the other, identified as the appellant who was referred to as the tall man by the complainant was not wearing a mask. The tall man had hit the complainant with the bolt cutter on his head causing a swelling on the head. The complainant had more than 20 minutes to observe him at close proximity without any obstruction under the fluorescent lights. The complainant had seen the appellant before in March 2010 in a cell block when he had shared the same cell with him for an offence of drunkard driving and had lunch together.

[9] The appellant had pressed the bolt cutter to the complainant's father's face and demanded jewellery and money. The group had robbed many an item including the property stated in the information. Thereafter, the appellant had asked for the car key from the complainant and the group had fled in the vehicle with the stolen goods. The complainant had identified the appellant from photographs shown to him at the police station and for that reason and due to the fact that the appellant was a known person no identification parade had been held. The police had found several items including the car key in the possession of the appellant when he was arrested around 12 noon on the same day at Anadela Hotel and the same had been later identified by the complainant.

The car too had been recovered subsequently and both the car and the car key had been handed over to the complainant. However, the car key had not been listed among the exhibits (though listed in the search list) or produced at the trial.

[10] The appellant's position had been that in the previous night he had been with his girlfriend in the town and then gone to Anadela Hotel where he was arrested by the police. He had denied any knowledge of the robbery and stated that no car keys were recovered from him but only shown them to him at Vanalevu police station at the time of the cautioned interview. But he had admitted to having had in his possession perfumes and the mobile phone at the time of the arrest.

[11] It is not very clear from the summing-up whether the perfumes, mobile phone, shower gel, ring and the laptop were recovered from the appellant at the time of his arrest or subsequently (as the two police officers have not spoken to all the items) though they appear to have been identified by the complainant as part of the loot. It is only with the full appeal record would this court be able to clarify this issue with certainty. If several items other than the car key stolen from the complainant's house had been found in the possession of the appellant it would constitute recent possession evidence against him.

01st ground of appeal

[12] The appellant's complaint is that the learned trial judge had not addressed the assessors adequately on Turnbull guidelines. The summing-up contains the following paragraphs on the matter of identification.

> *'34. When you consider the evidence on the identification of the accused by the 1st witness as the person who hit him on the head with the bolt cutter and one of them who robbed his house and also as the person who took his car keys and robbed the vehicle, please bear in mind that an honest and a convincing witness can still be mistaken.*
>
> *35. In this case the witness testified that he has seen the Accused before at the Cell Block. Therefore, at the time of the robbery, it was recognition of the previously seen person. Recognition is somewhat stronger than identifying for the first time. Still, mistaken recognition can occur even of close relatives and friends. Therefore, you should closely examine the following circumstances among others when you evaluate the evidence given by the aforementioned witnesses on identification of the accused;*

(i) Duration of observation;
(ii) The distance within which the observation was made;
(iii) The lighting condition at the time the observation was made;

(iv) Whether there were any impediments to the observation or was something obstructing the view;
(v) Whether the witness knew the accused and for how long;

(vi) Whether the witness had seen the accused before, how often and special reason to remember; and
(vii) Duration between original observation and identification.'

[13] In **Korodrau v State** [2019] FJCA 193; AAU090.2014 (3 October 2019) the Court of Appeal looked at Turnbull directions and first time dock identification in detail and stated as follows on Turnbull directions *vis-à-vis* the first time identification in the dock:

> *'[28] **Turnbull** [1977] QB 224 laid down important guidelines in the face of widespread concern over the problems posed by cases of mistaken identification, for judges in trials that involve disputed identification evidence. Where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification(s). The judge should tell the jury that:*
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> 1. *caution is required to avoid the risk of injustice;*
> 2. *a witness who is honest may be wrong even if they are convinced they are right;*
> 3. *a witness who is convincing may still be wrong;*
> 4. *more than one witness may be wrong;*
> 5. *a witness who recognises the defendant, even when the witness knows the defendant very well, may be wrong.*
>
> *The judge should direct the jury to examine the circumstances in which the identification by each witness can be made. Some of these circumstances may include:*
>
> a. *the length of time the accused was observed by the witness;*
> b. *the distance the witness was from the accused;*
> c. *the state of the light;*
> d. *the length of time elapsed between the original observation and the subsequent identification to the police.*
>
> *[29] It is clear that the directions in paragraph 28 and 29 of the summing up are substantially in terms of Turnbull guidelines though such directions need not be given unless the prosecution case depends wholly or substantially on visual identification.....'.*

[14] In **Saukelea v State** [2018] FJCA 204; AAU0076.2015 (29 November 2018) the Court of Appeal stated:

> *'[43] In **Mills & Others v The Queen** (1995 CLR 884 and TLR 1/3/95) the Privy Council emphatically rejected the mechanical approach to the Judge's task of summing up stating that*
>
> > *'R v Turnbull was not a Statute and did not require an incantation of a formula - the Judge did not need to cast his directions in a set form of words'.*
> >
> > *'All that was required of him was that he should comply with the sense and spirit of the guidance in Turnbull'.*
>
> *'[46] Then, in giving the Turnbull direction the judge should direct the jury to examine the circumstances in which the identification by each witness can be made. Some of these circumstances may include the length of time the accused was observed by the witness, the distance the witness was from the accused, the state of the light (visibility), obstructions blocking the witness's view, whether the accused had been known or seen before, any other reason for the witness to remember who he saw, the length of time elapsed between the original observation and the subsequent identification to the police or identifying the accused at an identification parade, errors or discrepancies between the first description of the accused seen given by the witness to the police and the actual appearance of the accused.*

[15] Examining in the light of the above decisions no criticism can be made of the learned trial judge's directions in paragraph 34 and 35 of the summing-up though he had not used the label 'Turnbull directions'. In any event, given that the complainant had seen and been together with the appellant at the cell block for a considerable time just a few months ago, it was more of recognition of a previously known person inside the house and then in one of the photographs than a first time identification in the dock and strict 'Turnbull directions' were not called for. It is no surprise that the complainant could identify the appellant from among the photographs shown to him by the police.

[16] Therefore, this ground of appeal has no reasonable prospect of success.

02nd ground of appeal

[17] The appellant argues that the learned trial judge has failed to give any directions on the first time dock identification. ***Korodrau*** has dealt with a similar complaint in the case of a first time dock identification in detail. However, this is not a first time dock identification after the incident but the appellant had been seen by the complainant a few months back and there had been photograph identification after the incident. Thus, the complainant was only identifying the appellant in the dock who was already known to him.

[18] 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**.**

[19] Therefore, I am of the view the learned trial judge need not have given first time dock identification directions to the assessors i.e. to give it little or no weight or warned the assessors of the undesirability in principle and dangers of a dock identification, as the complainant was only recognising the appellant whom he had seen at the cell block and in one of the photographs before. In addition, the trial Judge had given Turnbull directions on identification to the assessors. Therefore, the tests formulated in **Naicker v State** CAV0019 of 2018: 1 November 2018 [2018] FJSC 24 and ***Korodrau*** on first time dock identifications need not be invoked in this case. Moreover, the learned trial judge had given his mind to the identification of the appellant in his judgment in sufficient measure and concluded that the prosecution had established the identity of the appellant beyond reasonable doubt.

[20] Therefore, this ground of appeal has no reasonable prospect of success

03rd ground of appeal

[21] I cannot understand the gamut of the appellant's argument under this ground. There was the complainant's direct evidence as to the robbery and the identity of the appellant. Secondly, the appellant was in possession of the car key of the stolen car belonging to

the complainant not long after the incident which had not been explained by the appellant except his defense of denial, the key was an introduction by the police and the *alibi* that he was elsewhere in the night of the robbery. If the appellant had been in possession of other stolen properties at the time of his arrest, that would constitute additional circumstantial evidence against the appellant.

[22] All these matters including the appellant's position had been put to the assessors by the learned trial judge meticulously in the summing-up and he had given his mind to them in his judgment. The assessors have believed the prosecution version but obviously not placed any credibility on the appellant's evidence.

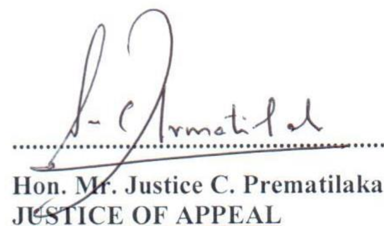
[23] On what basis the appellate court could interfere with the decision of the assessor and that of the judge in a situation like this has not been demonstrated by the appellant. In **Sahib v State** AAU0018u of 87s: 27 November 1992 [1992] FJCA 24 the Court of Appeal said

> *'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.'*

[24] Accordingly, there is no reasonable prospect of success in the appellant's appeal and leave to appeal against conviction has to be refused.

Order

1. Leave to appeal against conviction is refused.



Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL