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

CRIMINAL APPEAL NO. AAU 135 of 2016
[In the Magistrates Court at Lautoka Case No. 484 of 2012]

BETWEEN	**:**	**VILIAME ROCATIKEDA**
		Appellant
AND	**:**	**STATE**
		Respondent

Coram	**:**	**Prematilaka, RJA** **Gamalath, JA** **Bandara, JA**
Counsel	**:**	**Ms. S. Ratu for the Appellant** **Ms. R. Uce and Mr. S. Babitu for the Respondent**
Date of Hearing	**:**	**12 September 2022**
Date of Judgment	**:**	**29 September 2022**

JUDGMENT

Prematilaka, RJA

[1] I have read in draft the judgment of Bandara, JA and agree with his reasons and the order of acquittal of the Appellant.

Gamalath, JA

[2] I agree with the draft judgment of Bandara, JA.

Bandara, JA

[3] The Appellant was charged along with another in the Magistrate's Court in Lautoka (which exercised the extended jurisdiction of the High Court) on a single count of Aggravated Robbery contrary to section 311 (1) (a) of the Crimes Act 2009.

[4] The information read as follows:

> '***Statement of Offence (a)***
>
> ***AGGRAVATED ROBBERY:*** *Contrary to Section 311 (1) (a) of the Crimes Decree No. 44 of 2009.*
>
> ***Particulars of Offence (b)***
>
> ***VILIAME ROCATIKEDA*** *and* ***ANASA YALIBOGIDUA****, on the 31st day of August 2012 at Lautoka in the Western Division, robbed* ***ZAHID ANISH ALI*** *of a Nokia Mobile Phone valued at $100.00 and cash of $60.00 all to the total value of $160.00 the property of* ***ZAHID ANISH ALI****.'*

[5] Upon his arraignment the Appellant pleaded not guilty to the charges whereupon the matter proceeded to trial.

[6] At the conclusion of the trial on the 21st August 2015 the Appellant was convicted on the charge preferred against him, while his co-accused was acquitted of the same.

[7] On 23rd August 2016 the Trial Judge sentenced the Appellant for a period of 8 years imprisonment with a non-parole period of 6 years.

The facts of the case

[8] The Prosecution had led the evidence of 4 witnesses including the virtual complainant.

[9] The virtual complainant Saheeb Anish Ali, at the time of the offending had been working as a taxi driver for a period about 6 – 7 years.

[10] On the day of the incident (31/8/2012) at about 1 a.m. the complainant had been returning from work. Whilst passing the Indus Corner Shop in town, the 2nd Accused (who was acquitted after trial) had stopped him and asked to be dropped at his residence in Naikabula Field 4 Road. The complainant had agreed and on the way the 2nd Accused had told him that, to pay his fare he had to get money from his house when they reached it.

[11] When they reached the destination, the 2nd Accused got off the taxi and asked the complainant to wait and walked towards his residence. The complainant having felt that he was not going to be paid had got off the vehicle and started to follow the path taken by the 2nd Accused. At that point the 2nd Accused had appeared along with the Appellant and confronted the complainant. The complainant narrated subsequent events in his testimony in the following manner:

> *"…all of a sudden him and another guy came out – another Fijian boy came out from inside and the 1st guy who hired me he grabbed my neck from the back and the other guy came and started punching on my left arm and my ribs and then the guy who hired me."*

[12] Leading evidence of identification of the accused through the complainant had not been properly done at the trial. As the charge reflects both accused merely stood as Viliame Rocatikeda and Anasa Yalibogidua.

[13] Whilst leading the evidence of the complainant the initial identification had been done through the shirts they had been wearing in court (page 57 of the court proceedings):

> *"Prosecution: If you happen to see that boy again will you able to identify him?*
> *PW1: Yes.*
> *Prosecution: Can you show to the Court if he present?*
> *PW1: He is right over there with the* ***Bula Shirt*** *on.*
>
> *Prosecution: But you happen to these two people will you be able to identify them?*
> *PW1: Yes, I saw him very clearly.*
> *Prosecution: Are these two present in Court today?*
> *PW1: Yes.*
> *Prosecution: Can you show to the Court who are they?*
> *PW1: One is wearing* ***Blue Shirt*** *and one* ***wearing white*** *both in the Accused Box.*

Prosecution: So when they came out can you tell the Court what happen after that?
*PW1: The one with the **blue shirt** he held my back from the back and the other guy started punching on my left eye and the other one put his hand inside my pocket and took out my phone and he took out the money from the other side and started punching me hard when I started yelling…"*

[14] It is in the course of the cross-examination only, that the accused were started to be referred to as the 1st and 2nd Accused. According to the evidence it was the 2nd Accused who obtained the services of the virtual complainant.

[15] In the examination-in-chief the complainant had testified that, the 2nd Accused had grabbed his neck from the back and the Appellant (referred to as the 1st Accused at the trial) started punching on his left arm. Thereafter, the 2nd Accused too had started to punch him. The Appellant then had proceeded to rob the complainant's phone and money $60.

[16] In the course of the cross-examination the identification had led to a confusion. At page 63 of the court proceedings, complainant had testified stating it was the 2nd Accused who obtained the services of the complainant.

"Ms. Diroiroi: So by the time the 2nd Accused arrived home he got off the taxi right away – is that correct?
PW1: Yes.
Ms. Diroiroi: And he went inside the house?
PW1: He went inside his house."

[17] At page 64, the person who hired the taxi is referred to as the 1st Accused by the complainant:

"Ms. Diroiroi: Yes, the 1st Accused had walked out – you confirm that right?
PW1: Yes.
Ms. Diroiroi: He punched you – is that correct?
PW1: No, the 1st Accused who hired me – he held my neck from the back."

[18] From that point onwards each accused's actions has led to confusion (page 64 of the court proceedings):

> *"Ms. Diroiroi: Can you confirm whether or not he punched you?*
> *PW1: Which one you talking about.*
> *Ms. Diroiroi: The 1st Accused?*
> *PW1: No, the one in the Bula Shirt he accused me first from the back and then the 2nd one came and punched on my left eye.*
> *Ms. Diroiroi: I am asking if whether or not you confirm the 1st Accused that got out of the house and punched you?*
> *PW1: No."*
>
> *Ms. Diroiroi: And right after that I put it to you – you ran away from the house?*
> *PW1: Yes.*
> *Ms. Diroiroi: I put it to you that there was nothing stolen from you by my client the 1st Accused?*
> *PW1: How could you say that.*
> *Ms. Diroiroi: I put it to you that there was nothing stolen from you by my client the 1st Accused – ÿes"or"no"?*
> *PW1: Yes, he didn't."*

[19] It appears that this confusion had led the Learned Magistrate to make the following observation in his judgment:

> *"[6] The complainant's evidence reveals that both Accused were involved in the robbery and identified them in Court. In cross-examination however, the complainant identified Accused 1 only as the person punching him and going back to his house. He identified Accused 2 however as the person grabbing his neck from the back."*

<u>Grounds of Appeal</u>

[20] Two grounds of appeal were advanced before the Full Court on behalf of the Appellant (one on the conviction and the other on the sentence). Leave was granted by the Single Judge of Appeal to proceed with both grounds.

Ground of Appeal against conviction

'The learned trial Magistrate erred in law and in fact in delivering a verdict that is unreasonable and cannot be supported by the totality of evidence'

[21] The Learned Magistrate in his judgment has come to the finding that:

> *"The complainant's evidence reveals that both accused were involved in the robbery and identified them in court."*

[22] Further, he states that in paragraph 12:

> *"[12] It is obvious from both Accused that they are blaming each other as the person taking the phone. However, since the offending is alleged to be jointly committed by them, the Court is satisfied beyond reasonable doubt that they took the complainant's mobile phone..."*

[23] However, on the one hand the Learned Magistrate had come to the finding that (as set out in paragraph 12) *"the Court is satisfied beyond reasonable doubt that **they** took the complainant's mobile phone"* (emphasis is mine) and on the other hand:

1. In paragraph 16 referring to the 2nd Accused he states *"observing his demeanor and considering his evidence that Court is convinced that he was honest and forthright."*

2. At paragraph 18 the Learned Magistrate states, *"that there is insufficient evidence to find Accused 2 guilty."*

[24] It is difficult to reconcile these seemingly contradictory findings of the Learned Magistrate.

[25] In the circumstances it clearly appears that the verdicts are inconsistent and unreasonable.

[26] Moreover, in the caution interview of the 2nd Accused which has been tendered as Exhibit 2 (and stands as an unchallenged piece of evidence) the latter had admitted having stolen the mobile phone.

> *"Q28: Did you two take anything from the taxi driver after punching him?*

Ans: ***Yes we stole the mobile phone from him***.
Q29: Which one of you took the mobile phone of this taxi driver?
Ans: Tuvili grabbed the mobile phone from the driver after punching him.
Q30: Where did you two went to afterwards?
Ans: I went straight home and I don't know where Tuvili went to.
Q31: How did you know that Tuvili stole the taxi driver's mobile phone?
Ans: I saw that its light were on after he had forcefully grabbed it from the taxi driver."

[27] Having regard to the above, any logic cannot be found as to how the Learned Magistrate came to the following finding (as per paragraph 16):

> *"[16] For Accused 2, the complainant conceded that the Accused 2 did not punch him. There is no evidence either that he took the complainant's phone..."*

[28] When the evidence overwhelmingly showed that both accused were carrying out a joint criminal enterprise there was no basis for the Magistrate to take two inconsistent positions and acquit one accused. The Learned Magistrate should have either convicted or acquitted both accused on the available evidence. Hence, it clearly appears that the Learned Magistrate's verdicts are inconsistent, when he acquitted the co-accused and convicted the Appellant, acting on the same evidence, which cannot be explained.

[29] When the evidence reveals that two accused had taken part in a robbery acting in furtherance of a joint enterprise, the acquittal of one of them based on same evidence needs to be explained with cogent reasons. The reasons upon which the Learned Magistrate acted is seem to be the following, as set out in his judgment:

> *"[15] In observing the Accused person's demeanour, the Court finds the Accused 1 being evasive and contradictory in his evidence. He admits punching the complainant and despite his answer to the caution interview, now says that he told police 'I think. There is nothing recorded in the Caution Interview as 'I think' now alleged by Accused 1. After all, he was drunk at the time of offending."*
>
> *[16] .....Observing his demeanour and considering his evidence, the Court is convinced that he was honest and forthright. He was confident in giving evidence and remained calm."*

[30] In **Babban Singh and Daddan Singh vs The State Of Bihar** on 2 July, 2021 In the High Court of Judicature at Patna, it was held that:

> *"Altogether twelve accused persons faced trial in Sessions Trial No. 531 of 2008 corresponding to Harnaut P.S. Case No. 97 of 2006 before the learned Fast Track Court No. 1, Nalanda for offences under Sections 147, 148, 447/149, 307/149 and the eleven were acquitted of all the charges on the very same evidence and the sole appellant was convicted under Section 307 I.P.C. and 27 of the Arms Act…"*
>
> *307 I.P.C. as well as under Section 27 of the Arms Act.*
>
> *"11. Thus there is serious doubt on the identity of the assailant of Shiv Shankar Singh.* ***Moreover, on the very same evidence, eleven persons have been acquitted and in absence of any material to substantiate or reason disclosed in the impugned judgment that case of the appellant stood on different and graver footing, the conviction of the appellant is not sustainable****."* (emphasis is mine)

[31] It has to be emphasised, that in the present case, it appears that one accused had been convicted and the co-accused had been acquitted on the same evidence with no logical, rational or cogent reasons being given.

[32] In **Balemaira v State** [2013] FJSC 17; CAV 0008.2013 (6 December 2013) the Supreme Court quoted with approval the following passage from **Nemani Tuinavavi & Semi Turagabete** Criminal Appeal No. HAC0002/2005L at paragraph [23] it has been held that:

> *"The law on inconsistent verdicts is accepted by both Appellants and respondents is as it is summarized by the Canadian Supreme Court in* ***R v. Pittiman*** *[2006] 1 SCR 381. It is similar to that of the High Court of Australia in* ***Mackenzie v. The Queen*** *[1996] HCA 35; (1966) 190 CLR 348 (per Gaudron, Gummow and Kirby JJ), and in* ***Osland v. The Queen*** *[1998] HC 75. It is that a conviction will only be set aside if the different verdicts brought by the jury are such that no reasonable jury, applying themselves properly to the facts, could have arrived at those verdicts. It is the Appellant who must satisfy the court that the verdicts are unreasonable or "an affront to logic and commonsense which is unacceptable and strongly suggests a compromise of the performance of the jury's duty" (****Mackenzie v. The Queen*** *at page 368). See also* ***R v. Darby*** *[1982] HCA 32; (1982) 148 CLR 668 (per Murphy J)."*

[33] In **Lole Vulaca v The State** Criminal Appeal No. CAV0005 of 2011 (21 November 2013), this Court endorsed the above principles at paragraph [67]:

> *"As was observed by the High Court of Australia in Mackenzie v R [1996] HCA 35; (1996) 190 CLR 348, at 366-7 [Gaudron, Gummow and Kirby JJ], the test that is applied in dealing with questions of inconsistent verdicts, "is one of logic and reasonableness." In the course of its judgment, the High Court of Australia cited a passage in an unreported judgment of Devlin J in R v Stone (13 December 1954), to the effect that an accused who asserts that two verdicts are inconsistent with each other, "must satisfy the court that the two verdicts cannot stand together"."*

[34] In **R v McShannok** (1980) 44 CCC (2d) 53 (Ont C.A.) at p.56 as follows:

> *"Where on any realistic view of the evidence, the verdicts cannot be reconciled on any rational or logical basis the illogicality of the verdict tends to indicate that the jury must have been confused as to the evidence or must have reached some sort of unjustifiable compromise. We would, on the ground that the verdict is unreasonable alone, allow the appeal, set aside the verdict, and direct an acquittal to be entered."*

[35] The foregoing principles pertaining to unreasonable and inconsistent verdicts, when applied to the present case, the only conclusion that can be reached is, that the guilty verdict of the Appellant had resulted in a substantial and grave miscarriage of justice.

[36] It further appears that the Learned Magistrate had taken into consideration the contents of the co-accused's caution interview against the Appellant which is against the well settled law. Both accused in their caution interviews had put the blame on each other as the person who robbed the phone. This is well settled law and the State too concedes by stating in their written submissions the following:

> *"[10] The appellant was charged with another for aggravated robbery. The trial Magistrate acquitted the co-accused but appears to convict the appellant on the co-accused caution statement. If this was the basis for the appellant's conviction then it creates an arguable error because what the co-accused said in his caution interview statement is only admissible against him."*

[37] For the reasons already given the Appellant's appeal against conviction should be allowed and his conviction quashed.

[38] Hence, the necessity to deal with the ground of appeal against the sentence does not arise.

Orders of the Court:

1. Conviction is quashed.
2. Appellant is acquitted.

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Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL

COURT OF APPEAL FIJI

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Hon. Mr. Justice S. Gamalath
JUSTICE OF APPEAL

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Hon. Mr. Justice W. Bandara
JUSTICE OF APPEAL