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

CRIMINAL APPEAL NO. AAU 120 of 2016
[In the High Court at Suva Case No. HAC 83 of 2013]

BETWEEN : **SEMI TUBUDUADUA**

Appellant

AND : **STATE**

Respondent

Coram : **Gamalath, JA**
: **Prematilaka, JA**
: **Dayaratne, JA**

Counsel : **Mr. S. Waqainabete for the Appellant**
: **Dr. A. Jack for the Respondent**

Date of Hearing : **12 May 2022**

Date of Judgment : **26 May 2022**

JUDGMENT

Gamalath, JA

[1] I have read the judgment in draft and the conclusion of Prematilaka, JA and I agree with them.

Prematilaka, JA

[2] The appellant had been granted enlargement of time to appeal only on a single ground of appeal against conviction entered by the High Court against him on one count of rape under section 207 (1) and (2)(b) of the Crimes Act, 2009 alleged to have been

committed on 16 February 2013 at Lot 2, Velau Drive, Kinoya in the Central Division by inserting his finger into the vagina of MDV (real name withheld) without her consent.

[3] At the end of the summing-up, the assessors by a majority had opined that the appellant was guilty of rape. The learned trial judge had concurred with the majority opinion of the assessors, convicted the appellant as charged and sentenced him on 10 February 2016 to 6 years 11 months and 02 weeks of imprisonment with a non-parole period of 05 years.

[4] The sole ground of appeal pursued by the appellant's counsel is as follows.

'*1. <u>THAT</u> the learned Trial Judge erred in law:-*

(a) By not directing the assessors adequately and properly on the weakness of identification before the [assessors] could act upon it.

(b) By not directing the assessors as to why there is a need for special caution and why it is given. Failure to do so denied the Appellant a fair trial.'

Evidence in brief

[5] To understand the basis of the appeal ground one needs to be aware of the factual scenario associated with the case. Prosecution case was primarily based on the evidence of the complainant MDV, a mother of three children. As was customary on every Friday evening, on the day of the incident she was with her relations for yet another get-together. The appellant, who grew up in the family of MDV's partner was also there and she had known him from a very young age. All of them started drinking beer inside the main house. MDV, having consumed some beer, wanted to go to a night club where her brother was expected to bring his girlfriend and asked someone to accompany her to the club and repeatedly asked the appellant also to accompany her but he declined her request. MDV, having then decided not to go to the club, had gone into her bedroom where her daughter was already sleeping. The bedroom was close to where the drinking party was and its door was kept open. The room had no source of light on its own except the light from the porch, kitchen and nearby street lamp.

[6] MDV woke up from her sleep when she felt somebody touching her. She could feel a hand touching her buttocks and between her thighs while she was sleeping on her side hugging a pillow. She fell asleep again. Once more she had felt a hand touching her body. As she felt the touch she moved and twitched. Then the appellant had said to her ear *"not to worry, it's OK don't worry, Just me"*. Thereafter, he slid his hand along her panty line and touched her vagina. She felt his fingers poking into her vagina and also the tip of a finger. The appellant had inserted his finger about an inch into her vagina. Then he had removed the hand slowly.

[7] Her response to the touch was to put her skirt down and moving of her body. She had *'twisted'* her head as it happened to look at her daughter, Adi who was sleeping on the bed. MDV did not see the appellant in the room. She was conscious and was aware of what was happening although she was unable to get up or to call out for help due to intoxication.

[8] MDV had been challenged during cross examination on the basis that the voice and the incident were figments of her imagination induced by alcohol and it could also be a sexually oriented dream and her response had been that when the appellant spoke softly into her ear, she made sure as to whom she was listening to and she could distinguish his voice from the voices of other males who were at home drinking beer. During this episode she had also heard the voice of her sister-in-law at a distance. She was shocked with the experience but had soon fallen asleep. When she woke up the following morning she had called up her husband who was at Nadi at the time and informed him of the last night's incident. Her partner, Jackson Yavala had confirmed in his evidence that MDV had indeed told him in the morning that the appellant had touched her private parts. MDV also told her sister-in-law of what happened but she was not called as a witness.

[9] MDV's 13 year old daughter Adi Funaki had testified that the older members of her family were drinking beer on the day of the incident and having played with other kids, she had gone to sleep in the bed room. At one point she woke up and saw her mother lying on the mattress. She had then gone back to her sleep. She had been woken up again when she felt something on her buttocks and saw the appellant lying beside her

and noticed her mother's skirt up to her stomach. She had identified the appellant, who was just half a feet away from her, from the light coming from the porch, kitchen and street lamps and there was nothing to impede her vision to see him clearly. Then she heard her aunt calling up the appellant. In the morning her mother had inquired her about the happenings in the night.

[10] The appellant had taken the stand and come up with a total denial of the allegation but admitted having gone into the bed room once that night to pick his phone's battery charger. His caution statement had been tendered as an agreed fact and under cross-examination as to his admission to police that he had gone into MDV's bed room twice that night, he had said that though the statement was made available he was shown only some portions of his statement.

[11] The only other witness called by the appellant had admitted in cross-examination that although the appellant said that he would sleep in the sofa that night, he could not see the sofa from the place where he sat. He had admitted that when he learnt the following day as to what took place in the bed room, he had assaulted the appellant.

Ground of appeal

[12] Therefore, unsurprisingly the sole ground of appeal is based on the issue of voice identification of the appellant by MDV. The counsel for the appellant submitted that the trial judge had failed to direct the assessors on the weakness of voice identification and also failed to give a special caution to the assessors before acting on voice identification evidence. According to the counsel, these omissions had deprived the appellant of a fair trial. He particularly relied on a passage from **Davis v Crown** [2004] EWCA Crim 2521 which reads as follows.

> *"_ _ _ we accept that voice identification (or here more precisely recognition) evidence needs to be approached with even greater care that usual identification or recognition evidence. But the general principles governing identification stated in Turnbull (emphasis added) apply to both cf e.g. Hersey [1997] EWCA Crim. 3106 (1 December 1997) (1998) Crim. L.R. 281."*

[13] At common law voice identification is only admissible if either (i) the witness was familiar with the voice before the crime or (ii) the voice was very distinctive [see

Smith [1986] 7 NSWLR 444, ***Brownlowe*** (1986) 7 NSWLR 461, ***Brotherton*** (1993) 65 A Crim R 30 and ***Bulejcik*** (1996) 185 CLR 375,70 ALJR 462].

[14] In **The State v Daniel** [1988 – 89] PNGLR 580 Doherty AJ, sitting alone, held:

> *Evidence that the voice of a person involved in an offence is the voice of a defendant is admissible to prove identification of the defendant where:*
>
> *(a) the voice is known by the witness and recognized by the witness; and*
>
> *(b) the voice is not previously known to the witness but has such distinctive features that it leaves a clear mental impression in the mind of the witness enabling him/her to draw the conclusion on hearing it later that it was the same voice.*

[15] The trial judge's directions on the aspect of identification are at paragraphs 86-89 of the summing-up.

> *'[86] It is clear that the prosecution has only evidence of identification by voice to connect the accused to the offending act. When the accused whispered into the ear of the complainant that "not to worry, just me", she says she identified the accused. The complainant did not see the accused in the room, even though there was light coming from porch, kitchen and street lamp. The complainant was confident that she had properly identified the voice that whispered into her ear that night and she attributed it to the accused, whom she knew from his early childhood. Being in a state of intoxication and unable to move her body in spite of the attempts she made, she says she identified the accused by voice.*
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> *[87] It is a very important question of fact for you to decide whether the complainant made a positive identification of the accused by his voice. In determining this question of fact, you must also consider the possibility of her having a sexually oriented dream as the accused suggested or whether she made a mistaken identity under the circumstances. She could genuinely believe that she made identification but at the same time could be mistaken. Please consider these factors before you determine this question of fact.*
>
> *[88] The evidence of the daughter of the complainant also had to be considered in this respect. She says she had seen the accused close to her. She had not seen him close to her mother. The accused admits going once into the bed room when both of them were sleeping. It is for you to decide whether this witness also made a positive identification of the accused. The accused is a known person to her. She had seen him in close proximity. Whether there was sufficient light to properly identify the person on that occasion and whether this witness had clear mental comprehension to make the identity and whether there is a mistake in identifying the person are questions of fact you have to consider and decide in the light of available evidence.*

[89] You must also consider if this witness did positively identified the accused than whether that identification helps the prosecution to prove that it was this accused who inserted his finger into the vagina of the complainant. The prosecution must prove identity of the accused beyond a reasonable doubt by truthful and reliable evidence. If they have failed then you must find the accused not guilty.'

[16] In ***Davis*** one of the gunmen was wearing a 'Scream' horror mask and with respect to him the witness has said that he could see part of his face and recognised the eyes and skin colour as being the accused who had then shouted 'Where's Chrissie?' and it was the accused's voice. The witness had heard his voice before. He had said that he had a sufficient view of the eyes and eyeball to enable him to make a recognition of the masked man. In an voice identification 'parade' under the supervision of the police, 15 out of 44 had been selected from recordings, and of those the witness had been asked if he could pick one out of ten as being the voice of the accused. The witness had successfully picked number three.

[17] The Supreme Court of Judicature – Court of Appeal (Criminal Division) in ***Davis*** remarked that

'*26. This was a case of purported recognition of familiar eyes and a familiar voice during an incident, not a case of purported identification at a parade following a brief glance at an unknown stranger during an incident. The nature and course of the incident, the words said, how they were said, and the witnesses' ability to see, appreciate and remember accurately what was going on were all matters which required investigation in the witness box, as would have been the precise nature of the Scream mask, although in the event no one could assist on this. Further, it was a case where the Crown proposed to rely on a wealth of background evidence, which was capable of reflecting upon and supporting the correctness of the limited visual and voice recognision evidence that Steven Wemyss could give'*

[18] In ***Flemming*** (1986) 86 CAR 33 it was held that it is quite unnecessary for a trial judge faced with issues about the quality or probative value of identification evidence to hold a trial-within-a-trial and the normal procedure is that laid down in ***Turnbull***. The Supreme Court said in ***Davis*** that general principles governing identification stated in ***Turnbull*** apply to both voice identification and visual identification or recognition evidence. In the end, the Court did not uphold the contention (along with other grounds of appeal) that the trial judge had failed to adequately or at all to direct the jury that the visual identification and voice identification were so unreliable as to be worthless in terms of their evidential value. The Court dismissed the appeal.

[19] The Supreme Court in ***Davis*** helpfully laid down some guidance for the trial judges to approach the evidence of voice identification as follows.

> *'In our judgment the danger of miscarriages of justice occurring can be much reduced if trial judges sum up to juries in the way indicated in this judgment.*
>
> *First, whenever 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 or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.*
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> *Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? 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? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence.*
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> *Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.*
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> *All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened, but the poorer the quality, the greater the danger.'*

[20] **ARCHBOLD 2020 – Criminal Pleadings Evidence & Practice** at page 1860 and 1861 sheds more light on this topic.

"14-71 Where voice identification (now commonly referred to by speech scientists as "speaker comparisons") is in issue, the jury should be given the full Turnbull warning, appropriately modified: Hersy [1998] Crim.L.R. 281, CA; Phipps v DPP [2012] UKPC 24; [2013] Crim.L.R. 263. Accurate voice identification is more difficult than visual identification (although it is more likely to be reliable when carried out by experts (as to which, see below) using acoustic, spectrographic and sophisticated auditory techniques: Flynn and St John [2008] EWCA Crim.970; [2008] 2 Cr. App. R. 20); accordingly, a warning to a jury should be even more stringent than that given in relation to visual identification: Roberts [2000] Crim.L.R. 183, CA.

Lay listeners (including police officers)

14-73 The factors relevant to the ability of a lay listener correctly to identify voices include: the quality of the recording of the disputed voice, the gap in time between the listener hearing the known voice and his attempt to recognize the disputed voice, the ability of the individual to identify voices in general (research showing that this varies from person to person), the nature and duration of the speech which is sought to be identified and the familiarity of the listener with the known voice; and even a confident recognition of a familiar voice by a lay listener may nevertheless be wrong: see Flynn and St John, above……"

[21] As far as the summing-up goes, one may conclude that the relevant paragraphs have fallen short of a full-blown ***Turnbull*** direction on MDV's voice identification evidence and particularly with regard to the warning or caution that voice identification evidence needs to be approached with even greater care than usual visual identification or recognition evidence as prescribed in ***Davis***. Therefore, it would be necessary and most relevant to consider how the trial judge had considered the issue of voice recognition in his judgment. I quote in verbatim:

'[15] In relation to the prosecution, the only evidence they presented to connect the accused to the offending act is the identification of the accused by voice. The assessors were directed to consider the possibility of a mistaken identity, and also the circumstances under which it was made. They were also directed as to whether the accuracy of identification by voice is diminished by the level of intoxication of the complainant.

[16] The majority of the assessors have accepted the identification of the accused by voice and there was no mistake made by the complainant and her level of intoxication had not adversely affected its acceptance. I am in agreement with the majority opinion of the assessors and the reasons for that conclusion are described in the following paragraphs.

[17] The possibility of a mistaken identity or even the possibility of non-identification for that matter is negated when considering the circumstances

leading to the claim of identity. The complainant said she was woken up when she felt someone's touch on her body for the first time that night. That provided an opportunity for the complainant to recover from the initial drowsiness of her sleep. Then the second experience of feeling the touch would have alerted her mind to be mindful of what was happening.

[18] It is appropriate to note in relation to the circumstances that she did not hysterically reacted to the first touch, but had opted to observe and investigate as to what it was silently when it happened for the second time. It is clear that when the hand touched her body, she had keenly followed its movements along her body. She felt the hand touching her buttocks, then proceeded to touch between her legs. She was sleeping at that time on her side hugging a pillow. Then the hand proceeded along her panty line and then poked into her vagina. She clearly felt the fingertip as it penetrated into her vagina about an inch. When she put down her skirt and moved the body, the hand slowly withdrew. Then perhaps due to motherly instinct, she looked at her sleeping daughter by twisting her head.

[19] The description of the sequence, demonstrates of an alert mind which had recorded the events in details as it happened and stored in memory for recollection at a subsequent point of time. There was no evidence of any inconsistency of this sequence of events before the Court. It clearly negates any adverse effect of intoxication, which had by this time admittedly affected her body.

[20] It is this alert mind that had heard and processed the voice that spoke into her ear which said that "not to worry, it's OK, don't worry, Just me". She said in her evidence that she deliberately made certain to her mind to whom she was listening to and she could distinguish the accused's voice from the voices of other males who were there drinking beer. She also heard the voice of her sister in law. The complainant, in her mind, as these words are whispered into her ear, had compared the known voices, and having excluded other possibilities, concluded that it was the accused. The complainant, in her cross examination displayed no signs of a doubt when this issue was intrusively probed.

[21] Considering the alertness of her mind to register the sequence of events accurately as it happened and to reproduce them in the following morning when the complainant conveyed the incident to her partner and later in the day to the Police and finally to Court, as evidenced by consistency of her evidence, it is reasonable to infer that the level of intoxication had not altered her mind. It is for the same reason the possibility of a sexually oriented dream could safely be excluded.'

[22] Thus, it is clear that the trial judge had conscientiously ventilated all possibilities that could have affected the reliability of MDV's voice identification of the appellant. He had made amends for any perceived inadequacy in the summing-up by addressing himself on the issue of identification in the judgment and convinced himself of the accuracy and reliability of the identification of the appellant by MDV.

[23] For my part, I would add that the evidence that the appellant, being in her family circle, had been known to MDV for a long time and having regular encounters with him and therefore the high degree of possibility and probability of her having easily recognised his voice, MDV's daughter having felt being touched on her buttocks and found the appellant lying next to her on the bed more or less about the time he is alleged to have inserted his fingers into MDV's vagina and the appellant having left the room only when one of the ladies in the house called his name constitute strong circumstantial evidence supportive of MDV's voice identification. MDV's recent complaint to her husband also demonstrates her consistency enhancing her credibility. Adi's evidence cuts across the appellant's version that he went inside the room only once to retrieve his phone charger. He had clearly spent more time and done many things inside the room.

[24] Therefore, despite the apparent inadequacy of the directions on voice identification by the trial judge, I do not think that the deficiency would have caused substantial miscarriage of justice. I have dealt with in detail as to how the appellate courts would deal with misdirection, non-direction, omission or inadequate directions in **Kishor v The State** AAU 0085 of 2016 (26 May 2022) and could only repeat my conclusion reached therein in so far as this appeal is concerned.

> *'[23].....However, on the whole of the material on record, I cannot conclude that the omissions highlighted by the appellant are so significant that the assessors and the trial judge notwithstanding the advantage of having seen and heard SL and her mother ought to have entertained a reasonable doubt of their truthfulness, reliability and credibility. In my view, any reasonable fact finders properly directed on the alleged omissions would, on the whole of the evidence, without doubt have convicted the appellant. To me, the conviction was inevitable based on the written record of the trial. Thus, there is no miscarriage of justice by reason of the verdict being unreasonable or not supported by evidence. Therefore, there is no necessity to invoke the proviso to section 23(1) of the Court of Appeal Act. However, I am of the view that had it been necessary to consider the proviso the conclusion that there had been no substantial miscarriage of justice would have been open to the Court.'*

[25] Therefore, I conclude that pursuant to section 23(1) of the Court of Appeal Act the appellant's appeal should stand dismissed.

Dayaratne, JA

[26] I have read in draft the judgment of Prematilaka, JA and agree with the reasons and conclusion.

Order

(1) Appellant's appeal against conviction is dismissed.

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Hon. Mr. Justice S. Gamalath
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL

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Hon. Mr. Justice V. Dayaratne
JUSTICE OF APPEAL