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

CRIMINAL APPEAL NO.AAU 167 of 2020
[High Court at Suva Case No. HAC 166 of 2018]

BETWEEN

	:	**MATAIYASI NAVUGONA alias MATAIASI NAVUGONA**
		Appellant
AND	:	**STATE**
		Respondent

Coram	:	**Prematilaka, RJA**
Counsel	:	**Appellant in person**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	:	**07 August 2023**
Date of Ruling	:	**08 August 2023**

RULING

[1] The appellant had been convicted in the High Court at Suva on a single count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009 on 21 April 2018 at Nadera in the Central Division. The charge read as follows.

Statement of Offence

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

Particulars of Offence

Mataiyasi Navugona with another on 21st April 2018 at Nadera in the Central Division, stole 01 Samsung J5 mobile phone, 01 Samsung J2 mobile phone, 01 Samsung A3 mobile phone, 01 Samsung J1 mini mobile phone and 01 Samsung J1 mobile phone from Kamlesh Chand and immediately before stealing from Kamlesh Chand threatened to use force on him.

[2] After the assessors' unanimous opinion of guilty, the learned High Court judge had convicted him as charged and sentenced the appellant on 22 October 2019 to an imprisonment of 15 years with a non-parole period of 10 years.

[3] The appellant in person had untimely appealed against conviction and sentence. The factors to be considered in the matter of enlargement of time are (i) the reason for the failure to file within time (ii) the length of the delay (iii) whether there is a ground of merit justifying the appellate court's consideration (iv) where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed? (v) if time is enlarged, will the respondent be unfairly prejudiced? (vide **Rasaku v State** CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4 and **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17).

[4] Further guidelines to be followed when a sentence is challenged in appeal are whether the sentencing judge (i) acted upon a wrong principle; (ii) allowed extraneous or irrelevant matters to guide or affect him (iii) mistook the facts and (iv) failed to take into account some relevant considerations [vide **Naisua v State** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **House v The King** [1936] HCA 40*;* (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011)].

[5] The delay is about 01 year and 12 days which is substantial. The appellant has stated that he had tendered his appeal within time but the CA Registry had misplaced it. I cannot find evidence of such an eventuality in the court record. Nevertheless, I would see whether there is a **real prospect of success** for the belated grounds of appeal against conviction in terms of merits [vide **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019)]**.** The respondent has not averred any prejudice that would be caused by an enlargement of time.

[6] He urged the following grounds of appeal against conviction and sentence at the leave to appeal hearing.

> *'**Conviction:***
>
> ***Ground 1***
>
> *THAT the learned trial Judge erred convicting by failing to give proper, adequate, balanced, sufficient and fair direction on the law relating to identification as per the guidelines in **R v Turnbull** (1977) A.B, 224 and failed to direct the assessors of the weakness in prosecutions witness identification evidence cause substantial miscarriage of justice.*
>
> ***Ground 2***
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> *THAT the learned trial Judge erred in law when he shifted the burden of prove to the appellant at paragraph 17 of the Courts judgment.*
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> ***Ground 3***
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> *THAT the learned trial Judge erred in law and fact when he did not carefully, properly analyse or direct himself on the improper manner of the Police in conducting the photograph identification which was not conducted according to the correct guideline. Thus the improper conduct of the photo I.D has seriously prejudiced the appellant affecting the right to obtain a fair trial.*
>
> ***Ground 4***
>
> *THAT the appellant trial was held unfairly when there was no warning provided on the danger of accepting dock identification whereas the failure to direct and analyse the reason for refusing the police identification parade by the appellant. There should have been an adequate warning given to safeguard the appellant.*
>
> ***Ground 5***
>
> *THAT the significant weaknesses in the photo I.D evidence seriously prejudice the fair trial and investigation on this matter.*
>
> ***Ground 6***
>
> *THAT the aforesaid particulars of the offence in the present case was defective, unfair, prejudicial and erroneous causes serious injustice and the trial invalid and a nullity.*
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> ***Amended Ground 1***
>
> *THAT the learned trial Judge erred in law and facts when it did not adequately assess independently the evidence led at the trial by the prosecution witness evidence to convict the appellant which was unsatisfactory and unsafe.*

Amended Ground 2

THAT the failure to warn the assessors on the special need of caution as required by the R.V Turnbull guideline has caused the summing up being inadequate giving rise to serious prejudice.

Amended Ground 3

THAT the learned trial Judge erred in law and in fact in shifting the burden of prove to the appellant in paragraph 40 of the summing up.

Amended Ground 4

THAT the learned trial Judge erred causing serious harm and prejudice in the summing up at paragraph 42 when he stated that "you should remember that sometime an accused may come out with a lie just because it is easier to do so rather than telling the truth.

[7] When the complainant (PW1) Mr. Kamlesh Chand and 04 others, seated on the floor, were having grog in the veranda of his house at about 7.00 pm on 21 April 2018, the appellant and another covering his face had arrived there unexpectedly and the appellant had then held a cane knife at PW1's neck and demanded money while the other had collected 05 mobile phones on the ground. Both of them had then run away from the scene. The complainant had known the appellant for 14-15 years because he used to come and buy liquor from his shop more than 100 times. There were two tube lights on the veranda at that time. On 23 April 2018, the witness had also recognised the appellant from among the photographs shown to him by the police.

[8] The appellant had refused to participate at a police identification parade and PW2, PC Inoke Tuiloaloa had held a photo identification parade two days after the incident and PW1 had recognised the appellant on one of the photographs (PE1/D1).

[9] The appellant while giving evidence had taken up an *alibi* (though no *alibi* notice was given as required by law) in that he had said that he was at home throughout that night and did not go anywhere. He had admitted that he did not give his *alibi* to the police. He had admitted that PE1/D1 were his photographs.

01st ground of appeal and 02nd amended ground of appeal

[10] The Court of Appeal in **R v Turnbull** [1977] QB 224 prescribed rules to guide Judges faced with contested visual identification evidence. The guidelines are also applicable in cases of voice recognition or identification. The guidelines are aimed at assessing the quality of the identification. When a case depends wholly or substantially on the correctness of one or more identifications of the accused which the defence claims are mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the identification. In particular he should instruct them of the reason for the need for this warning and make some reference to the possibility that a mistaken witness can be a convincing witness and that a number of witnesses can all be mistaken. There is no prescribed form of words. The judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. This may include asking themselves the following questions:

> *How long did the witness have the accused under observation? At what distance? In what light?*
>
> *Was the observation impeded in any way e.g. by traffic or other people?*
>
> *Had the witness ever seen the accused before? If so, how often? If only occasionally, had he any special reason for remembering the accused?*
>
> *How long had elapsed between the original observation and the subsequent identification to the police?*
>
> *Was there any material discrepancy between the description given by the witness and the actual appearance of the accused?*
>
> *Where there is a material discrepancy the particulars should be provided to the defence and in all cases they should be supplied if requested.*

[11] Recognition should be more reliable than identification of a stranger. However, juries should be reminded that mistakes can be made. If the quality of the identification evidence is good and remains good to the end of the case, the danger of mistaken identification is lessened; but the poorer the quality, the greater the danger. No Turnbull direction is needed unless the prosecution case depends wholly or substantially on visual identification (vide **McMillan** [2005] EWCA Crim 1774; **Beckford v The Queen** (1993) 97 Cr App R 409; **Bowden** [1993] Crim LR

379). If the accuracy of a purported identification (as opposed to the honesty of the accusing witness) is not in issue, then the Turnbull guidelines need not be considered. In such cases, any attempt to apply the Turnbull guidelines would merely serve to confuse the jury by focusing their attention on the wrong issue (vide **Courtnell** [1990] Crim LR 115; **Cape** [1996] 1 Cr App R 191; **Panesar** [2007] EWCA Crim 2510. The governing principles in relation to self-incrimination by false alibis or other lies, as set out by the Court of Appeal in **Lucas** [1981] QB 720, held applicable in identification cases (vide **Goodway** [1993] 4 All ER).

[12] Contrary to the appellant's assertion, the learned trial judge without reference to the guidelines had addressed the assessors on Turnbull guidelines at paragraph 40 of the summing-up. The appellant had not challenged at all the complainant's recognition of him at the trial and therefore, Turnbull guidelines need not have even been considered. Therefore, the *Lucas* principles should apply to the false *alibi* on the part of the appellant this situation. The rule laid down in in ***Lucas*** is that a falsehood uttered in court or outside court by an accused could be taken as corroboration of the evidence against him. Of course, the assessors or the court did not rely on *Lucas* principles in this case. The trial judge in the judgment too had entertained no doubts of PW1's identification of the appellant at the crime scene.

[13] The Supreme Court in **Koroivuki v State** [2017] FJSC 28; CAV7.2017 (26 October 2017) held

> *'[19] This was not a case of a "fleeting glace "but clearly a case of recognition of a person who was well known. Even in such a case, it is still necessary to apply the Turnbull guidelines as Chandra JA acknowledged in paragraph [14] of his judgment. In any event, even without reference to the guidelines, the learned Magistrate has dealt with the question of identification fairly causing no prejudice to the Petitioner.'*

02nd ground of appeal and 03rd amended ground of appeal

[14] I cannot see how it could be argued that the trial judge had shifted the burden of proof at paragraph 41 of the summing-up and paragraph 17 of the judgment by merely stating that the appellant had failed to create a reasonable doubt. The appellant had taken these words out of context. The trial judge had addressed the assessors on the above lines in the light of the appellant's evidence of an *alibi*. The judge wanted them

to consider whether, despite PW1's unshaken evidence, the appellant's version would create a reasonable doubt. This direction should be considered in conjunction with directions at paragraph 45 of the summing-up where the trial judge had directed the assessors as to how they should evaluate the appellant's evidence.

03rd ground of appeal and 05th grounds of appeal

[15] The appellant complains that the police had not complied with Fiji Police Force Standing Orders in carrying out the photographic identification. The defence had challenged the photographic identification parade on the same basis and on the premise that as the appellant was already in police custody a photographic identification parade should not have been held. It was held in **Rainima v State** [2021] FJCA 32; AAU011.2019 (3 February 2021) following **Baba v State** [2020] FJCA 238; AAU0079.2018 (26 November 2020).

> *'[17] The appellant based his submission on paragraphs 7 and 8 of the 'Identification By Photographs' available at Fiji Police Force Manual (FPM) which is appendix 'A' (FRO19/90) to Fiji Police Force Standing Orders (FSO) made by the Commissioner of Police by virtue of section 7(1) of the Police Act Cap 85.*
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> *[18] Paragraph 7 of FPM of states:*
> *'Identification Parades by photograph will be carried out only when the identity of the offender is unknown and there is no other way of establishing his identity; or if it is suspected that there is no chance of arresting him in the near future. A photographic identity parade of a person already in custody shall not be held.'*
>
> *[19] Paragraph 8 of FPM sets out in detail the procedure or the manner in which an identification parade by photograph should be conducted.'*

[16] Thus, the Photo ID parade held was strictly against the Fiji Police Force Manual. Further, the manner in which it was held may not have been strictly in accordance with the Fiji Police Force Manual. However, Fiji Police Force Manual does not lay down principles of law or procedure but only some guidelines the beach of which would not necessarily vitiate a conviction. In any event, a perusal of the summing-up and the judgment shows that the results of the Photo ID parade had played no significant part in establishing the identity of the appellant as the trial judge had told the assessors at paragraph 39 that though the appellant challenged the photographic

identification, he did not challenge the evidence of PW1 who recognised the appellant who was well known to him at the time the crime was being committed. Therefore, the Photo ID pales into insignificance compared with direct evidence of recognition by PW1.

[17] Therefore, it is clear that Photo ID parade had been undertaken as a response to the appellant's refusal to stand at a police ID parade and as a measure for the investigators to satisfy themselves of PW1's claim that he knew the appellant beforehand and of the accuracy of his recognition of the appellant and not as an independent method of identification due to lack of other identification evidence. Even if the results of the Photo ID parade is cast aside, it does not weaken the prosecution case even a little bit as the evidence of PW1's recognition evidence remains unchallenged and intact. In fact, there was no need for a Photo ID parade at all. Thus, the deficiencies in the Photo ID parade had not caused any substantial miscarriage to the appellant.

04th ground of appeal

[18] The appellant complains of lack directions on dock identification. Since the complainant had recognised the appellant known to him for 14-15 years who had come to his shop for more than 100 times before the incident, there was no need for specific directions on dock identification as this is not a first time dock identification but recognition of a previously known person. It cannot be termed even as a dock identification as the Supreme Court in ***Koroivuki*** said

> *'[46]…….The question is whether he was merely saying that the two men in the dock were the two men he knew, or whether he was purporting to identify them for the first time as the two men he had seen on the day in question. Since he was saying that he had recognised them at the time, there was no question of him purporting to identify them for the first time in the course of his evidence as the men he had seen on the day in question. His identification of them arose as a result of his earlier recognition of them. This was not a dock identification, therefore, in the sense in which that term is usually used, and provided a witness is merely being asked to say whether the persons in the dock are the persons he knew, that is not improper. That can only happen in a recognition case, of course, which this case was…..'*

06th ground of appeal

[19] The appellant seems to complain about proof of the ownership of the lost property in that he argues that the police had not taken statements from four other persons who were with the complainant to show that they had lost their phones or had them stolen and included those details in the information.

[20] All criminal charges filed in court must comply with section 58 and 61 of the Criminal Procedure Act 2009. However, in **Saukelea v State** [2019] FJSC 24; CAV0030.2018 (30 August 2019) the Supreme Court dealt with the issue of a defective charge as follows:

> *'[36] The main consideration in situations similar to this where there is some infelicity or inaccuracy of drafting is whether the accused knew what charge or allegation he or she had to meet: **Koroivuki v The State** CAV 7 of 2017; [2017] FJSC 28. Secondly it was important that the accused and his counsel were not embarrassed or prejudiced in the way the defence case was to be conducted: **Skipper v Reginam** Cr. App. No. 70 of 1978 29th March 1979 [1979] FJCA 6. The Court of Appeal whilst not conceding merit in the point properly applied the proviso under section 23 of the Court of Appeal Act and dismissed the ground of appeal. Similarly in this Court, Ground 2 fails.'*

[21] The appellant has not demonstrated how he was prejudiced by the alleged defect in the information in formulating his defence, for his defence was one of alibi. Even if all four of PW1's friends were summoned to give evidence the appellant's defence would have been the same.

01st amended ground of appeal

[22] I cannot agree with the appellant's argument that the trial judge had not independently given his mind to the matters in issue in the judgment. Far from that, the trial judge had indeed considered all relevant aspects of the case in his judgment. In any event, in **Fraser v State** [2021] FJCA 185; AAU128.2014 (5 May 2021), the Court of Appeal said

> *'[25] In my view, in either situation the judgment of a trial judge cannot be considered in isolation without necessarily looking at the summing-up, for in terms of section 237(5) of the Criminal Procedure Act, 2009 the summing-up*

and the decision of the court made in writing under section 237(3), should collectively be referred to as the judgment of court. A trial judge therefore, is not expected to repeat everything he had stated in the summing-up in his written decision (which alone is rather unhelpfully referred to as the judgment in common use) even when he disagrees with the majority of assessors as long as he had directed himself on the lines of his summing-up to the assessors, for it could reasonable be assumed that in the summing-up there is almost always some degree of assessment and evaluation of evidence by the trial judge or some assistance in that regard to the assessors by the trial judge.'

04th amended ground of appeal

[23] The appellant once again picks up the statement that sometimes an accused may come out with a lie just because it is easier to do so rather than telling the truth at paragraph 43 of the summing-up out of context for criticism. However, when the totality of paragraph 43 is read it is clear that the trial judge was trying to emphasis to the assessors that they should not assume that the appellant was guilty because they rejected his version but they should rather be sure that the appellant was involved in the aggravated robbery. In other words, the trial judge was trying to direct the assessors not to find the appellant guilty because they considered his narrative to be false as some accused do come out with falsehood simply because it is easier to do so than telling the truth.

01st amended ground (sentence)

[24] The appellant was charged on the basis of joint enterprise. He contends that the sentence is excessive because the trial judge had taken into account the loss of 05 phones as an aggravating factor when PW1 lost only one phone. However, it is clear that 05 phones were in fact stolen during the incident whoever owned them. In any event, the main aggravating factor considered by the trial judge was the use of knife and unfortunately the fact of 'home invasion'.

02nd amended ground (sentence)

[25] Having considered the appellant's previous convictions set out in the sentencing order I do not doubt that the trial judge had properly treated the appellant as a habitual offender. I also find the following cases against him; **Navugona v State** [2021] FJCA

136; AAU0096.2019 (3 September 2021), **Navugona v State** [2016] FJCA 12; AAU0138.2014 (26 February 2016), **State v Navugona** [2013] FJHC 312; HAC86.2013 (3 July 2013), **State v Navugona** [2014] FJMC 170; Criminal Case 342.2012 (22 December 2014). The appellant's case is different to **Suguturaga v State** [2014] AAU0084 of 2010 (05 December 2014). Thus, the trial judge was entitled to sentence the appellant to a longer sentence than he would otherwise have deserved.

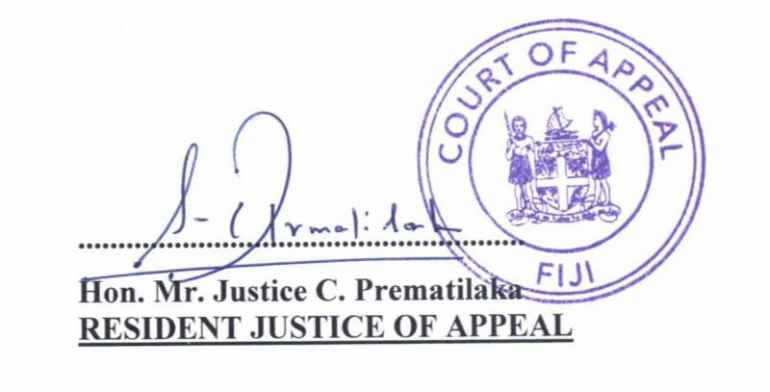
[26] The trial judge had correctly applied sentencing tariff set in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) which is between 08-16 years for aggravated robberies in the form of home invasions in the night (or other aggravated robberies of similar nature).

[27] However, I am a little concerned with the starting point of 09 years and the enhancement of the sentence by 07 years for aggravating factors. When the trial judge picked the starting point at 09 years, he may have, unwittingly though, considered some aggravation later reflected in the aggravating factors as well. Thus, it is possible that there had been a discreet double counting involved given the observations of the Supreme Court in **Kumar v State** [2018] FJSC 30; CAV0017.2018 (2 November 2018) at paragraphs [57] and [58]. Similarly, the propriety of 07 years for the aggravating factors which included 'home invasion' appears to be doubtful as the tariff of 08-16 is set for home invasions. If it is excluded the reaming aggravating factor is the use of a knife with no injuries caused.

[28] When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered [**Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006)]. In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range [**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015)]. Thus, I would leave it to the full court to deliberate on the sentence.

Orders

1. Enlargement of time to appeal against conviction is refused.
2. Enlargement of time to appeal against sentence is allowed on the 02nd amended ground.



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