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

CRIMINAL APPEAL NO. AAU 0063 OF 2019
[Labasa Criminal Action No: HAC 39 of 2017]

BETWEEN : **ULIANO SAMUNAKA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Mataitoga, JA**
Qetaki, JA
Morgan, JA

Counsel : **Mr M Fesaitu for the Appellant**
Dr A Jack for the Respondent

Date of Hearing : **12th & 18th September, 2023**

Date of Judgment : **28th September, 2023**

JUDGMENT

Mataitoga, JA

[1] I concur with the judgment of Qetaki, JA.

Qetaki, JA

Background

[2] This is an appeal against conviction of the appellant by the High Court of Labasa. The appellant had been indicted in the High Court at Labasa on a single count of rape contrary to section 207(1) and (2)(b) of the Crimes Ac5, 2009 committed on 23 July 2017 at Navetau Village, Saqani in the Northern Division.

[3] The information reads as follows:

"*Statement of Offence*

RAPE: *Contrary to section 207(1) and (2) (b) of the Crimes Act, 2009.*

Particulars of Offence

ULIANO SAMUNAKA *on23 July 2017, at Navetau Village, Saqani in the Northern Division, penetrated the vagina of (name suppressed) with his finger, without her consent.*

[4] After summing up on 17 August 2018 the assessors had unanimously opined that the appellant was guilty of the charge of rape. In the judgment delivered on the same day the learned trial judge had agreed with the assessors and convicted the appellant as charged. On 20 August 2018 the appellant had been sentenced to 09 years and 06 months of imprisonment with a non-parole period of 08 years.

[5] On 10 June 2019, the Legal Aid Commission had filed an application for enlargement of time to appeal against conviction. It also filed written submissions on 26 August 2020.The delay in appealing is about 08 months and three weeks. The State filed its written submissions in response on 04 September 2020.

[6] There were five grounds of appeal filed by the appellant against conviction, of which, the learned single judge dismissed grounds 2, 3, and 4 and granted enlargement of time to

appeal against conviction only on the first ground. This is the only ground of appeal before the Full Bench of the Court, as follows:

Ground 1

"That the conviction is not supported by the totality of the evidence, in that there is serious doubt to the identification of the Appellant and that the Appellant had penetrated the complainant's vagina with his fingers."

[7] A person convicted on a trial held before the High Court may appeal his /her conviction to this Court under section 21 (1) (a) and (b) of the Court of Appeal Act 1949.Section 23(1)(a) of the said Act prescribes that the Act may allow the appeal if it thinks that the verdict should be set aside because it:

(i) Is unreasonable.

(ii) Cannot be supported having regard to the evidence.

(iii) Was grounded on a wrong decision of any question of law.

(iv) Constitutes a miscarriage of justice.

[8] The determination of appeals before this court are made under section 23 of the Court of Appeal Act and Subsection (2) of the Section contains the following proviso:

"Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal against conviction or against acquittal must be decided in favor of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has occurred."

The Facts

[9] The facts as adopted from the summing up and decision of the learned trial judge are as follows: At about 2am on 23rd July 2017 a married lady who will be referred to as Kate for the purposes awoke in pain. Her husband was away for the night but she felt somebody on top of her sexually assaulting her. She immediately recognized the accused whom she had known in the village for 14 years, as her abuser. She tried to shout but he blocked her mouth to stop her. He invaded her with his fingers while kissing her on the mouth. Kate

struggled to evade him and the accused punched her twice on her inner thigh in an attempt to spread her legs. He was unsuccessful and then left her bedroom. She was able to confirm his identity when she saw him in the kitchen when he was on his way out of the house. She then shouted and alerted a young relative who was sleeping in the lounge to go and try to locate the assailant. The boy was unable to do so.

Appellant's Case

[10] The Legal Aid Commission had filed comprehensive submissions on behalf of the appellant on 12 August 2022.That and the oral submissions made by counsel at the hearing in this Court comprise the submissions made for the appellant and which are enumerated below.

[11] The central issue at the trial was on the positive identification of the appellant. The complainant had alleged that the appellant penetrated her with fingers which is contrary to the appellant's denial that he was present in the complainant's room at the material time. The learned trial judge, in summing up (paragraph 10, page 54 Record of High Court), had directed the assessors to deliberate for themselves the sole trial issue that being identification. The appellant contends that the learned trial judge had failed to direct the assessors on the principles of *Turnbull* guideline for the assessors to assess the correctness of the identification. The non-direction on the *Turnbull* guideline, it was submitted, is fatal to the conviction. That it amounts to a substantial miscarriage of justice.

[12] The appellant contended that although the complainant, in her evidence, informed that she had known the appellant for 14 years, despite the identification of the appellant is one of recognition, it was still incumbent on the learned trial judge to have directed the assessors on the *Turnbull* guidelines. In support of the submission, the appellant cited: **Savu v State** [2014] FJCA 208; AAU0090.2012 (5 December 2014).

[13] It is also contended that the quality of the lighting under which the complainant had asserted to have recognized the appellant was in dispute. (See paragraph 15 of appellant's submission).

[14] The complainant's ability to say who it was, immediately after the incident would have contributed to the weaknesses in her identifying the appellant. (See paragraph 16 of appellant's submissions).

[15] Part of the *Turnbull* principles requires that special caution ought to have been directed to the assessors before they could convict on such evidences. The submission stated there was no special warning given as a result of non-direction on *Turnbull*. Even an honest witness can still be mistaken, and the assessors ought to be told, it is argued.

[16] Further, the learned trial judge had not assessed the correctness of the identification in line with *Turnbull* principles in the judgement - see paragraph [9] at page 50 of Record of High Court. Therefore there is a substantial miscarriage of justice as a result of the learned trial Judge's failure to have directed the assessors and himself of the learned trial Judges on the *Turnbull* principles to assess the correctness of the identification of the person said to have committed the abuse against the complainant. The applicant drew support on this argument in: **Mateni v State**; [2020] FJCA 5; AAU061.2014 (27 January 2020) which had dealt with a similar complaint.

[17] Re-Direction was sought but not on recognition and identification (page 227 Record of the High Court) but not on *Turnbull* principles. Appellant commended the observations made in **Naicker v State** [2018] FJSC 24; CAV 0019.2018 (1 November 2018).I will comment on the matter in the course of the judgment.

[18] The appellant further submitted that in the present case, it cannot be said the appellant was deliberate (the Defence) in not seeking Re-Directions at the end of the summing up.

[19] On the test whether there is a substantial miscarriage of justice, this Court in **Naduva v State** [2021] FJCA 98; AAU0125 (27 May 2021) had stated:

> *"[35] Thus for grounds alleging miscarriage of justice, **Baini v R** (supra) seems to suggest a slightly different test of the guilty verdict or conviction being 'inevitable to be concluded by appellate court from its review of the record' as opposed to the 'guilty verdict of conviction being one that is 'open to the assessors to be satisfied beyond reasonable doubt on the whole of evidence" which is applicable to grounds based on "unreasonable or cannot be supported having regard to the evidence':*
>
> > *"Nothing short of satisfaction beyond reasonable doubt will do, and an appellate court can only be satisfied, on the record of the trial, that an error of the kind which occurred in this case did not amount to a "substantial miscarriage of justice" if the appellate court concludes from its review of the record that conviction was inevitable. It is the inevitability of conviction which will sometimes warrant the conclusion that there has not been a substantial miscarriage of justice with the consequential obligation to allow the appeal and either order a new trial or enter a verdict of acquittal."*

[20] It is difficult to say whether conviction is inevitable had there been a direction on the *Turnbull* principles. The sole issue at trial is on identification of the perpetrator. The prosecution's case rests on the complainant's own evidence .With her evidence placed aside, there is no other evidences sufficient to sustain conviction.

State's Case

[21] The State had filed its written submissions dated 16 August 2022 and relies on it and the oral submissions made at the hearing of the appeal. It challenged the appellant's contention that because identification was the sole issue at the trial and is in dispute the learned trial judge ought to have explicitly directed the assessors on the *Turnbull* Guidelines. It argued that while the ground of appeal asserts deficiency in the trial judge's directions, the State submitted that:

(a) The law on the matter is now clear;

(b) In the absence of cogent reasons for not raising the issue by way of redirection, the appellant is barred from pursuing an appeal on this ground: **Mohammed Alfaaz v State** FJSC 17; CAV0009/2018(30 June 2018) ;

(c) The learned trial judge expressly asked counsel if they wished to seek redirection, but the appellant, did not express any concerns about the Judge's Summing Up on identification;

(d) If the concerns expressed by the appellant were as critical as the appellant now says they are, he could and should have raised them at that opportunity;

(e) In a recent case when an appellant similarly purported to advance a ground of appeal founded on a misdirection in respect of which no redirection was sought, this Court found *".....the appellant is not even entitled to raise this as a point at this stage...."* **Kishore v The State** AAU85 of 2016 (26 May 2022[18].

[22] The State accepts that the learned trial judge did not specifically reference ***Turnbull*** and did not expressly say the words *"even an honest witness might be mistaken"*, but it submitted that a judge does not have to use specific words or quote directly from ***Turnbull*** .It finds support in **Silatolu v State [2006]** FJCA 13; AAU0024.2003S (10 March 2006)[13] where in this Court, it was stated "[w]hen *Summing up to a jury or assessors, the judge's directions should be tailored to the particular case....* " In this case the issue of identification was addressed extensively in the course of trial, and the learned trial judge canvassed all that evidence in summing up.

[23] The State further submitted that in **R v *Turnbull*** (1976) 3 All ER 549, the Court listed factors which might affect the reliability of a witness' identification:

(1) The length of time which the witness had the accused under observation,

(2) The distance between the witness and the accused,

(3) The lighting,

(4) Whether there was anything impeding the witness' view,

(5) The length of time between when the witness saw the accused and the witness told Police,

(6) Any inconsistency in identification, and

(7) Whether the witness had ever seen the accused before and if so how often.

[24] In this case all of these considerations were covered both in the evidence and in the learned trial judge's Summing Up. The Sate provided by enumeration the circumstances referred to.

[25] In conclusion, the State submitted that the learned trial judge did conscientiously consider all the possible factors which might have affected the reliability of the victim's identification of the appellant as the rapist. It was also its submission that even if the Court were to find fault with the directions given by the learned judge in this case, any such deficiency would not have caused a miscarriage of justice, let alone a substantial one.

[26] Also, that following guidance provided by this Court in **Kishore v State** [2020] FJCA 40; AAU85 of 2016 (26 May2022) and applied in **Tabuduadua v The State;** AAU 20 of 2016 (also 26 May 2022), and noting that the learned trial judge had the benefit of watching the victim in this matter give evidence, and be tested under cross examination, it is submitted that any reasonable fact finder would have convicted the appellant on the evidence before the court.

[27] The State submitted that the learned trial judge's directions on identification were adequate. Any deficiencies were minor and in no way show the decision to convict was unreasonable, not supported by the evidence, grounded on a wrong decision of any question of law, or constituted a miscarriage of justice substantial or otherwise.

Analysis

[28] The sole ground of appeal in this matter asserts that the conviction is not supported by the entirety of the evidence in that there is a serious doubt to the identification of the appellant and that the appellant had penetrated the complainant's vagina with his fingers. The appellant submitted that under the circumstances the learned trial judge ought to have warned the assessors and give a special directions on the *Turnbull* principle, failing which,

the conviction cannot stand. Put another way, the failure of the learned trial judge to give such a direction was fatal to the conviction. As a consequence, the appellant submitted that *"the appeal against conviction be allowed and a re-trial not to be considered unless the Honorable Court thinks otherwise in the interest of justice."* This to me means that the appellant requests that the conviction be quashed and the appellant be freed under the circumstances.

[29] The appellant raised issue against the Summing Up, especially paragraph 10 thereof at page 54 of the Record of the High Court, in which the learned trial judge stated:

> *"10.You will note that the defence are not disputing that this happened to Koleta against her will but they are saying that it was* ***not*** *Uliano. That remain then the sole issue for you to decide assessors, was it Uliano or not?"*

[30] Prior to that (paragraph 10) the learned trial judge informed the assessors of the following:

> *"8. As you are aware, the accused has been charged with rape. For the purpose of this trial the Law says the rape is committed when a man penetrates a woman's vagina with his finger or fingers without her consent.*
>
> *9. Therefore before you can find Uliano guilty you must be sure that it was Uliano and that he had used his finger or fingers to penetrate Koleta vagina that night and it was without her consent."*

[31] The appellant, in his submission in paragraphs [9]-[19] above, amongst other issues, asserts that the Summing Up was inadequate to resolve the issue of the identification of the appellant as the person who committed the rape on the complainant. To the appellant, recognition is not sufficient. That, taking the appellant's submissions in totality, the learned trial judge had erred in not administering the warning in accordance with the *Turnbull* principles/guidelines.

[32] In **Savu v State** (supra), a case in which the appellant was granted leave to appeal against his convictions on the ground that the learned Magistrate erred in law and fact in failing to direct himself on the *Turnbull* guidelines on the visual identification evidence that formed the basis of the convictions, the Court stated:

"[6] *In **R v Turnbull** [1977] 63 Criminal Appeal R.132, the English Court of Appeal enunciated guidelines to assess the quality of disputed visual identification evidence or recognition. The guidelines are found at page 137 of the judgment:*

"First, whenever the case against an accused depends wholly or substantially on 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. 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 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 observation 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? ...Finally he should remind the jury of any specific weakness which had appeared in the identification evidence.

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.. AAUU00

*[7] The Turnbull guidelines have been adopted into law in Fiji **(Semisi Wainiqolo v The State)** unreported Criminal Appeal No. AAUU027 of 2006, 24 November 2006 at [9]; **Measke Sinu v The State** unreported Criminal Appeal N0.AAU0037 of 2009; 13 March 2013 at [21]]*

[33] I agree with the respondent and also accept that the *Turnbull* in the strict sense of the guidelines/ principles were not followed by the learned trial judge, but it does not mean that the learned trial judge had not addressed himself or the assessors on the matter of identification. As apparent from the Record of the High Court, that all of the considerations covered under the *Turnbull* principles/guidelines were covered both in the

evidence and in the learned trial judge's Summing up (Ref. Submissions filed by Office of DPP at pargaraphs12-15).These considerations are:

(i) It was uncontested that the victim had 15 minutes in which to identify the appellant (Court Record p.115), Evidence at p.55 (Summing-up at paragraph 13).

(ii) It was similarly uncontested that the appellant was very close to the victim from much of that time. The victim says in her evidence he was on top of her, (Court Record p.111), Evidence at page 54 (Summing Up at paragraph 13).

(iii) The victim gave evidence, unshaken on cross examination, even though it was night time she could clearly see the appellant's face illuminated by the light in the kitchen as he fled the scene. (Court Record p.114), Evidence at page 54 – 55 – Summing up [13]).

(iv) She was similarly clear that while there was a curtain over the door between the bedroom and the kitchen it was not pulled, so there was nothing to obstruct her view of the appellant as he fled the scene. (Court Record page 120) Evidence of page 55, 13.

(v) It was uncontested that the victim identified the appellant as the rapist within hours of the rape, to the Turaga-ni-Koro and the very next day to Police. (Court Record p.117, Evidence page 58, 13).

(vi) After the appellant fled the scene, the victim called for help. When her uncle responded she did not name the appellant as the rapist. It was put to her under cross examination that this was inconsistent with her subsequent identification of the appellant as the rapist just a short time later to Police. The victim explained she did not use his name because she was ashamed at what had just happened to her. It is quite clear that the court took into account this purported inconsistency when

assessing the reliability of the victim's identification of the appellant as the rapist. (Court Record page 125). Evidence page 55, 13.

(vii) It was uncontested that the victim and the appellant had known each other for 14 years. (Court Record at p.114).

(See respondent's submissions)

[34] It is difficult to ascertain whether or not the learned trial judge did conscientiously consider all the possible factors which might have affected the victim's identification of the appellant as the rapist. However, it is clear from the totality of the Record and evidence that all of the issues which ought to be put to the assessors by way of warning in line with the ***Turnbull*** principles/ guidelines, were generally covered in the evidence at the trial and the learned trial judge's Summing Up –see paragraph [33] above. Any deficiency would not have caused a miscarriage of justice.

[35] Given the guidance provided by this Court in **Kishore v The** State (supra) and applied in **Tabuduadua v State** (supra), and bearing in mind that the learned trial judge had the benefit of watching the victim in this matter give evidence, and tested under cross examination, I am of the view that, any reasonable fact finder would have convicted the appellant on the evidence before the High Court.

[36] Under the circumstances, the directions by the learned trial judge on identification were adequate. I am satisfied that any deficiencies were minor in nature, and not significant to render the appellant's conviction as unreasonable, unsupported by the evidence, grounded on a wrong decision of any question of law, or constituted a miscarriage of justice, substantial or otherwise.

[37] The appeal against conviction is dismissed and the conviction affirmed.

Morgan, JA

[38] I have read the draft judgment of the Hon Justice Qetaki, JA and agree with the reasoning and conclusions of the judgment.

Order of Court:

1. *Appeal against conviction is dismissed.*
2. *Conviction is affirmed.*

Hon Mr Justice Isikeli Mataitoga
JUSTICE OF APPEAL

Hon Mr Justice Alipate Qetaki
JUSTICE OF APPEAL

Hon Mr Justice Walton Morgan
JUSTICE OF APPEAL

SOLICITORS:

Office of the Legal Aid Commission for the Appellant
Office of the Director of Public Prosecutions for the Respondent