IN THE COURT OF APPEAL, FIJI
On Appeal from the High Court of Fiji at Suva

CRIMINAL APPEAL AAU 174 of 2019
[Suva High Court Criminal No. HAC 299 of 2017]

BETWEEN **LORIMA KOROITAMANA**

Appellant

AND **THE STATE**

Respondent

Coram **Mataitoga, AP**
Qetaki, JA
Winter, JA

Counsel **Appellant: Ms. Ratidara.L.**
Respondent: Mr. Singh. A.

Date of Hearing : **7th November 2024**

Date of Judgment : **28th November 2024**

JUDGMENT

Background

[1] A wrongful conviction is one of the worst errors of the criminal justice system. Alarmingly, mistaken identification is one of the principal causes of the conviction of an innocent person.

[2] In criminal proceedings where the identification of the offender is disputed, eyewitness identification can be extremely persuasive. However, the inherent unreliability of memory, combined with the difficulty of determining the accuracy of an identification, leads to a risk of mistaken identification and potentially, a wrongful conviction. Those risks are compounded when the identification witness has never previously identified the accused out of court.

[3] A dock identification refers to the situation where a witness identifies the accused as the offender during a criminal trial. This involves the witness stating that the person in the dock is the offender, whether having previously identified the accused out-of-court or not. However, the identity of the accused is usually clear to all in the courtroom. Thus, a dock identification will provide little probative value with potentially significant prejudicial effect.

[4] That is particularly so when the witness is confirming the accused's identity for the very first time. The Court of Appeal has on many occasions suggested dock identifications should only occur in the most exceptional circumstances[1] and would be admissible only when found to be reliable. If admitted, then assessors must be properly directed as to the danger of convicting an accused based on that opinion evidence alone.[2]

[1] *Edwards v. Queen* [2006] UKPC 23 (25 April 2006)
[2] *Maxo Tido v The Queen* (2010) 2 Cr. App. R23, PC, [2011] UKPC 16

[5] The appellant was charged along with others under section 311 (1) (a) of the Crimes Act 2009, for the AGGRAVATED ROBBERY of a currency exchange business and its manager on 25 September 2017 at Sports City, Suva.

[6] This appellant was dock identified at his trial by the complainant for the first time. Following the unanimous opinion of his assessors he was convicted on two counts of aggravated robbery contrary to section 311 (1) (a) of the Crimes Act 2009

[7] The appeal was found timely. In a ruling of the 17 February 2021 the Resident Justice of Appeal combined grounds 2,3,4,5,6,7, and 8 into two main issues. First, was the dock identification wrongly admitted into evidence when it should have been excluded. Secondly, was there a failure by the trial judge to properly direct the assessors as to the inherent danger and unreliability of first-time dock identification. Leave to appeal conviction was granted.

The facts

[8] The complainant Ms. Roseline Mudaliar (PW1) was employed as a teller for the Real Forex Exchange Office at Sports City, Suva. Around 8.30 am the 25 September 2017 Ms. Mudaliar opened the shop front door. She then went into her office, which was separated from the customer area by a counter and glass partition. Suddenly the robbers came through the front door. One of them climbed over the counter and glass partition and went into her office. He opened the office door and let the other robber into the room. The two then threatened Ms. Mudaliar not to raise the alarm, or they would kill her. They demanded money. They punched her on the head and back. They then forced her to open the office safe. The two then stole the items mentioned in count no. 1 from the office safe. They also stole some of Ms. Mudaliar' s property detailed in count no.2. The two then fled the crime scene, along with others who had functioned as lookouts near the front door. The incident was over quite quickly. The total value of the property the robber's stole was FJD$4221.50 from the business and a handbag and FJD$500.00 from Ms. Mudaliar. Nothing was recovered.

[9] The case against the appellant stood or fell on whether the assessors accepted the complainant's identification of Mr. Koroitamana at the crime scene at the material time. No other evidence implicating him in the crime was called.

[10] The complainant described the robber in her evidence in chief as an i-taukei man, partly dark, not really fair, a bit taller than herself neither fat nor slim with a little gap in his front tooth[3]. Under cross examination the witness conceded the robber wore a hoody covering his head the whole time. That there was a lot of movement between them as the robbers did different things and her focus was on her safety and she "only saw them when she was traumatized". When shown her police statement the witness conceded her original description of the offender shortly after the robbery was only that the man was i-taukei and wore a grey hoodie. The complainant did not tell the police anything about his height, body shape, the presence or absence of facial hair nor comment on the gap in his front tooth[4]. The description of the offender was vague and generalised.

[11] The witness told the court this was a shocking incident for her, and she was very frightened during the 5 minutes it took for the robbers to break into her office, overcome her and runaway with the stolen property. The complainant did not know, nor had she seen the accused before this day. Her identification of him relied on seeing the accused for an estimated one and a half minutes in a clearly fast-moving scene where the witness was traumatized and focused on keeping herself safe. The witness conceded 1 and a half years later it was difficult to remember detail. There was no police identification parade to identify the appellant before trial, there was no photographic identification before trial either, the witness had not known the robber before the offence, the witness had not seen him nor any photograph of him since the offence.

[3] Judges Notes of trial at p29, record page 290
[4] Judges notes of trial page 31 record at 292

The Law

[12] Leaning into commonwealth precedent particularly from the United Kingdom Privy Council the tests in Fiji were formulated in *Naicker v State*[5], *Saukelea v State*[6] and on first time dock identification directions *Korodrau v State.*[7] The Appellant submits that the learned trial judge should not have allowed a dock identification to take place and excluded that evidence.

[13] In *Naicker v State* the Hon. Keith J makes the following comments in relation to dock identifications:

> *'The dangers of a dock identification (by which is meant offering a witness the opportunity to identify the suspect for the first time in court without any previous identification parade or other pre-trial identification procedure) have been pointed out many times. The defendant* is *sitting in the dock, and there will be a tendency for the witness to point to him, not because the witness recognizes him, but because the witness knows from where the defendant is in court who the defendant* is *in court who the defendant* is and *can guess who the prosecutor wants him to point out. Unless there is no dispute over identity, and the defence does not object to a dock identification, it should rarely, if ever, take place. If it takes place inadvertently, a strong direction is needed to the* assessors.*to ensure that they do not take it into account.*

[14] I agree. However, the Supreme Court in Naicker went on to say that the critical question is whether ignoring the dock identification of the appellant, there was nonetheless sufficient evidence, even of a circumstantial nature, on which the assessors could express the opinion that he was guilty, and on which the judge could properly find the accused guilty.

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[5] *Naicker v State* CAV0019 of 2018: 1 November 2018 [2018] FJSC 24
[6] *Saukelea v State* [2018] FJCA 204; AAU0076.2015 (29 November 2018)
[7] *Korodrau v State* [2019] FJCA 193; AAU090.2014 (3 October 2019)

[15] Going further, the Supreme Court formulated a two-tier test to be applied when dock identification evidence was led, and no adequate warning given by the trial Judge.

> *First, ignoring the dock identification of the appellant, whether there was sufficient evidence on which the assessors could express the opinion that he was guilty, and on which the judge could find him guilty. Secondly, whether the judge would have convicted the appellant, had there been no dock identification of him. In my view, the first threshold relates to the quantity/sufficiency of the evidence available sans the dock identification and the second threshold is whether the quality/credibility of the available evidence without the dock identification is capable of proving the accused's identity beyond reasonable doubt.*
>
> *If the prosecution case fails to overcome the first hurdle the appellate court need not look at the second hurdle. However, if the answers to both questions are in the affirmative, it could be concluded that no substantial miscarriage of justice has occurred as a result of the dock identification evidence and want of warning and the proviso to section 23(1) of the Court of Appeal Act would apply and appeal would be dismissed.*

[16] A rare example of a dock identification being allowed is found in *Vulaca v The State*[8] The Court of Appeal did not disapprove of the 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 so the complainant had a choice of whom to pick as the offender she recognised.

[17] When the complainant pointed to the appellant in the court room 1 year and seven months after the event this was a first-time dock identification. The trial judge should have held a voir dire to determine the admissibility of the proposed evidence. If the trial judge had done so it would have been obvious the complainant's identification of the accused

[8] *Vulaca v The State* AAU0038 of 2008: 29 August 2011 [2011] FJCA 39

required scrutiny and exceptional reasons to admit it. If the evidence was to be left with the assessors, then a strong direction about the unreliability of this opinion evidence was required. This was not given.

[18] Furthermore, the State concede there is no other evidence than the complainants first time dock identification to support the conviction. Therefore, the proviso to section 23(1) of the Court of Appeal Act cannot apply.

Conclusion

[19] The conviction appeal is allowed. Given this conclusion, there is no need to consider the sentence appeal. There is no prospect of a retrial.

ORDERS

(1) The conviction appeal is granted.

(2) The conviction and sentence imposed are quashed.

(3) An acquittal is entered.

Hon. Mr Justice Isikeli Mataitoga
ACTING PRESIDENT, COURT OF APPEAL

COURT OF APPEAL FIJI

Hon. Mr Justice Alipate Qetaki
JUSTICE OF APPEAL

Hon. Mr Justice Gerard Winter
JUSTICE OF APPEAL