IN THE HIGH COURT OF FIJI

AT LAUTOKA

IN THE WESTERN DIVISION

APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO. HAA 52 OF 2016

SAULA MALATOLU

-v-

STATE

Counsel:	Appellant in Person
	Mr S. Kiran for the Respondent
Date of Hearing:	9th March 2017
Date of Judgment:	11th April 2017

JUDGMENT

INTRODUCTION

1. This is a timely appeal filed by the Appellant against the conviction and sentence of the learned Magistrate at Lautoka.

2. The Appellant along with three others were charged with one count of Robbery with Violence contrary to Section 293(1) (a) of the Penal Code Cap 17. The particulars of the offence are as follows:

> *Timoci Waqa, Saula Malatolu, Kaminieli Donu and Epali Tuimateo on the 25th day of February 2008 at Lautoka in the Western Division robbed Ganga Dharan Sami of cash $6000 and immediately before time of such robbery did use personal violence to the said Ganga Dharan Sami.*

3. The third accused pleaded guilty and was sentenced on the 8th June 2010. Thereafter, the Appellant (who was the 2nd accused) made an application to the High Court for a permanent stay of proceedings on the grounds *inter alia* of inordinate delay. The High Court having found that there was an inordinate delay in the prosecution of the case nevertheless dismissed the application on the basis that the Appellant had also contributed to the delay and that he failed to prove any prejudice caused to him by the delay. In its Ruling dated 3rd March 2016 the High Court ordered the Magistrate to conclude the matter within 60 days.

4. The first accused was absconding and, having considered an application by the Prosecution, the Magistrate decided to conduct the trial in the absence of the first accused.

5. At the ensuing trial, the Prosecution called three witnesses and closed its case whereupon all the accused opted to remain silent.

6. On the 15th day of June 2016, the trial Magistrate delivered his judgment by which he found the Appellant guilty. On the 6th day of September, 2016,

Appellant was sentenced to eight years' imprisonment with a non parole period of five years.

7. The trial Magistrate found first and fourth accused not guilty of the charge and acquitted them accordingly. He found identification evidence of PW.2 unconvincing against fourth accused and excluded the caution statement of the first accused as it was not tested against voluntariness at a *voir dire* proceeding.

8. GROUNDS OF APPEAL

CONVICTION

I. The Learned Magistrate erred in law in failing to apply the Turnbull requirement for identification;

II. The Learned Magistrate erred in law and in fact when he allowed prosecution witness Isoa to identify the appellant in dock without a prior foundation of ID parade or photograph ID;

III. The Learned Magistrate erred in law and in fact when he failed to treat Isoa as an accomplice and also failed to direct himself on the requirement of accomplice warning;

IV. The Learned Magistrate did not afford him a fair trial within a reasonable time considering the ruling in stay application HAM 198/15.

SENTENCE

I. Learned Magistrate failed to apply Section 18(2) of the Sentencing and Penalties Act 2009 in that he had to exercise his discretion not to impose a non-parole period;

II. Learned Magistrate did not give him sufficient discount as a remedy to reflect the violation of fair trial within a reasonable time;

III. He has been deprived of one third remission on his sentence term under Section 27 and 28 of the Corrections Act;

IV. Prison Commissioners practice in deprivation of one third remission breaches Section 27 and 28 of the Corrections Act;

V. Sentence is harsh and excessive.

9. **FACTUAL MATRIX**

The complainant (PW1) was a truck driver of Punjas and Sons. On the 25th February, 2008, he was returning to Lautoka with cash of $ 6000 after delivering goods at Sigatoka. He went to drop the lorry boy Isoa (PW 2) around 9 p.m. When he stopped to drop the lorry boy, four persons who approached the lorry tried to pull the complainant and punched him. Two people entered from the passenger side door and robbed the bag containing money and fled the scene.

ANALYSIS

Grounds i and ii -Identification/ Recognition

10. Grounds one and two are considered together as they challenge the visual identification of the Appellant.

11. The Appellant says that the dock identification should not have been allowed without proper foundation (identification parade/ photograph identification). He complains that the learned Magistrate failed to direct himself to the guidelines in the case of ***R v Turnbull*** [1977] 63 Criminal Appeal R.132 and consider the dangers of mistaken identification or recognition.

12. The trial Magistrate allowed dock identification of the Appellant by witness Isoa (PW.2) and convicted the Appellant on the strength of recognition evidence that PW2 had known the Appellant prior to the incident.

13. The Respondent submits that PW.2's identification was not a 'fleeting glance' and therefore Turnbull warning was not required.

14. ***Turnbull*** guidelines have been accepted as the Law in Fiji. The guidelines are contained in the following passage by Widgery LCJ:

> *"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.

15. There is confusion about the difference between recognition and identification and where one begins and the other ends. See Archbold 14-19.

16. Essentially, recognition is a type of identification. This was acknowledged in *R v Turnbull (supra)*. 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.** Thus, even in **recognition cases, a Turnbull warning is necessary** - see *R v Bowden [1993] Crim LR 379.*

17. In ***R v Thomas*** [1994] Crim. LR 128, CA, it was held that where there has been some form of recognition, the risk does not lie in the witness picking out the wrong person at an identification parade but in the fact that at the time the person witnessed the offence he was mistaken in his purported recognition of the offender.

18. The guidelines in ***Turnbull*** are aimed at assessing the quality of the identification. The guidelines are to remove the dangers of mistaken identification or recognition. ***Rokovaka v State*** [2007] FJHC 74; HAA 115.2007 (19 November 2007)

19. In ***Wainiqolo v The State***, Crim. App. No. AAU0077 of 2006, the Court of Appeal held that an identification parade adds nothing to the accuracy of previous identification of the accused by the witness, where the witness has recognized rather then identified the accused. **When recognition evidence is allowed, the reliability of such evidence is a matter for the assessors taking into account the *Turnbull* guidelines against the circumstances in which the sighting occurred.** *(emphasis added)*

20. In R v Cape [1996] 1 Cr. App. R191 the Court of Appeal stated at page 197 that:

> *"The Turnbull direction needs to be given in those cases where the case against the accused depends wholly or substantially on the correctness of an identification of the accused which the defence alleges to be mistaken."*

21. In ***R v Curry*** and ***R v Keeble*** [1983] Crim LR 737, the trial judge had told the jury to be aware of the risk of mistaken identification and to evaluate it, and that the risk would be high where the sighting had only been a fleeting glance, but that in every case it was a matter of degree. The defence appealed on the basis that there should have been a full ***Turnbull*** warning. The English Court of Appeal dismissed the appeal stating that the warning in ***Turnbull*** was not intended to deal with every case involving a minor identification

problem but only with the ghastly risk run in cases of fleeting encounters.

22. This is a case where the case against the accused depends wholly or substantially on the correctness of an identification of the accused which the defence alleges to be mistaken.

23. The trial Magistrate completely rejected vague identification evidence adduced by the Complainant (PW.1) concerning the Appellant. He also rejected identification evidence given by PW.2 concerning the 4th accused. However, he accepted identification/ recognition evidence given by the same witness (PW.2) concerning the Appellant and convicted him accordingly.

24. I reproduce the relevant parts of PW.1's evidence below: (pages 53, 54 and 60 of the copy record) as they throw some light on the circumstances (in relation to Turnbull guidelines) under which the offence was committed.

Q: *By having so closer look were you able to recognize the person who was holding you on that day?*

A: *Sir I can remember their face if they come near me. It has been a long time too sir. It's about 8 years but if I have a closer look, I will be able to recognize them.*

Q: *Mr. Sami from that two boys any of them is in court today?*

A: *Sir they were wearing pompom hats and one of them was wearing a cap hat sir. One was toll and the other was short.*

Q: *I am putting the question again to you Mr. Sami any one of them present in court today or no?*

A: *The two boys sitting looks familiar sir.*

.....

Answering the questions posed by Appellant PW.1 said:

Q: *Can you identify me as one of the robbers?*

A: *I can't say that one of them was toll and the other one was short and they were wearing hats.*

Q: *Can you identify me as one of the robbers?*

A: *I can't say that I do not know. The lorry boy gave all the names. First he named Timoci and Timoci gave the other boys names. They know each other.*

Q: *Can you tell the colour, other types of cloths the boys were wearing?*

A: *The door was high I just saw the top part and and it was not bright over there. It was 8.30 and it was getting dark. ....*

Q: *Can you identify me as one of the boys robbing that day?*

A: *I didn't see the whole face. Face was covered and I could only see the front portion of the face and the head was covered. If I had seen the heir style I would have been able to recognize properly and I came to court three times and I would have known if I had seen them. .....*

Q: *After that you got off at the Lautoka Police Station and reported the matter?*

A: *First I asked Isoa who the boys were and he said he didn't know them. And then I told him to come with me to the station and then I called my manager too.*

25. According to PW.1's evidence the robbery had taken place during night under poor lighting condition although there were street lamps. The robbers had been wearing pompoms/ hats covering portion of their faces. The robbers had been under witnesses' observation only for a few minutes under a difficult condition. Soon after the incident Isoa (PW2) had denied having recognized any of the robbers during the incident.

26. In his judgment, the learned Magistrate, having quoted a relevant portion of evidence of Isoa (PW.2) dealt with the issue of identification as follows:

> *Q:* *When you were approaching your drive way your house what happened? Did you see anything on that day?*
>
> *A :* *Whilst approaching where the driver was to drop me sir, at the foot path there were a couple of boys. Once the vehicle parked there were a couple of boys standing behind the truck.*
>
> *Q:* *You are saying couple of boys. Did you know them?*
>
> *A:* *That was before I went down. Yes sir I knew Soula.*
>
> *Q:* *Who is this Saula? Is he present in court today?*
>
> *A:* *Yes sir.*
>
> *The witness identified the Second Accused, Saula Malatolu. Further the witness said that there was enough light to see as there were two street lights nearby. Further the witness said that it was Saula who entered the vehicle from the passenger side door and took the bag containing money. During cross examination the witness said that he had known Saula before, as his mother knows the grandmother of the witness. He further said that 'I only see him when he comes along Banarsa when goes through the cross cut to go to rifle*

range"

27. Just because a witness claims to have known the person, there remains a possibility of mistake. The trial Magistrate's analysis of the identification issue is not accurate. He found that PW2 knew the Appellant beforehand. There was no reliable evidence that PW.2 knew the Appellant. Appellant was neither his friend nor a relative. PW.2 only said that he knew the Appellant *'as his mother knows the grandmother of the witness'*. He further said that *'I only see him when he comes along Banarsa when goes through the cross cut to go to rifle range'*.

28. When recognition evidence is allowed, the reliability of such evidence is a matter for the trial Magistrate and he should take into account the ***Turnbull*** guidelines against the circumstances in which the sighting occurred.

29. PW.2 was not consistent in his own evidence as to his previous knowledge of the Appellant and his recognition evidence was highly unreliable.

Q: How long have you known Saula?

A: Sir I only see him when he comes along Banaras when goes through the cross cut to go to Rifle Range.

Q: You belong to the same neighborhood as Saula?

A: No sir not in the same neighborhood I am staying this side he resides towards Sanatan sir.

Q: And you are familiar with who Saula is?

A: Yes sir I know him sir his mom knows my grandmother. That's how I know him.

30. Soon thereafter, he goes back on his own statement and said that he did not know where Saula was residing and that he was not familiar with him.

Q: *Did you know me?*

A: *No sir.*

Q: *Did you know where I am staying?*

A; *No sir.*

Q: *Have you seen me playing for the Topline Rugby Club?*

A: *No sir I don't know him.*

Q: *have you seen me around the Topline area?*

A: *Yes sir only sometimes when he hangs out with his friends.*

Q: *Are you familiar with me?*

A: *No sir.*

31. PW.1 said in his evidence on three occasions that Isoa (PW.2) told him soon after the incident that he did not know any of the robbers. *"First I asked Isoa who the boys were and he said he did not know them"*. If Isoa had known Saula before the incident, he would have told PW.1 that he recognized Saula as one of the robbers.

32. PW.1 said that Isoa (PW.2) had given the name of Timoci to police and Timoci had given other names. However, Isoa admitted in his evidence that it was he who gave Saula's name to police. When the Investigating Officer Manoa was giving evidence Prosecution failed to elicit from him whether Isoa had

revealed the name of Saula to police.

33. Two issues of credibility arise out of this evidence. If Isoa knew that Saula was one of the robbers, why didn't he mention that fact to PW.1 when inquired soon after the robbery and mentioned it only to police? Secondly, if Saula's name was already known to police, why was not PW.1 called to an identification parade upon Saula's arrest?

34. PW.1 said he was not called by police for an identification parade. Isoa said that he was summoned to police and asked to identify Saula at an identification parade. Isoa said:

> *"Before I was shown the boys sir I was shown the computer. There was a computer shown to me with photos of these boy's sir. I was able to identify Saula sir and the police officers had pointed out Epeli as one been told by Timoci. Timoci had named Epeli sir. So it was shown to me sir and then we were taken outside and that's when I was able to identify Epeli outside when he was standing".*

35. Isoa, under cross examination said that he pointed out Saula at the identification parade.

> *Q: At the identification parade did you point out to Saula?*
>
> *A: Yes sir.*
>
> *Q: Are you sure about that that you had pointed out to Saula?*
>
> *A: Yes.*
>
> *Q: And he was standing there at the parade?*

A: *Yes sir.*

Q: *Do you recall giving your statement about the identification parade to the police?*

A: *Yes sir.*

Q: *You gave it voluntarily not forced you to sign it to confirm that it was yours?*

A: *Sir I was assaulted by the police officers. They had hit me on my sides they were telling me to say this is the one. They assaulted me so I was scared and I said yes that's the one.*

Q: *Were you forced out to Saula at the parade?*

A: *Sir they had informed me that was Saula and go and point it out that is Saula so I had gone outside and pointed out that is Saula.*

36. This piece of evidence leads to an inevitable inference that Isoa's identification evidence had been obtained forcefully and under highly suspicious circumstances.

37. Furthermore, in what can be described as highly contradictory evidence *vis a vis* PW.2 's evidence, the investigating officer vehemently denied that an identification parade ever took place to identify any of the suspects.

38. The trial Magistrate rejected PW.2's identification evidence concerning the fourth accused as unreliable and accepted identification evidence against the Appellant.

39. In these circumstances trial Magistrate's reliance on Isoa's evidence against

the Appellant is highly questionable.

40. Furthermore, in weighing up the quality of identification, the trial Magistrate failed to analyze the surrounding circumstances of the identification made by PW2 in accordance with the ***Turnbull*** guidelines. Although no full ***Turnbull*** warning was required, the learned Magistrate should have at least directed his mind to the possibility of mistaken identification and ruled out that possibility in light of the Appellant's challenge to the identification evidence by PW2. The trial Magistrate failed to direct his mind to following issues: *How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as, robbers were wearing pompoms/hats covering portion of their faces. How often had the witness seen the accused before? If only occasionally, had he any special reason for remembering the accused?*

41. The failure to address these issues and the erroneous finding that PW2 knew the Appellant well when there was no reliable evidence to that effect, and allowing dock identification after approximately eight years without proper foundation, in my view, prejudiced the Appellant. This ground of appeal should succeed.

<u>Appeal Ground 3 - Accomplice's evidence?</u>

42. The Appellant contends that the learned Magistrate erred when he failed to treat Isoa as an accomplice and also failed to direct himself on the requirement of accomplice warning.

43. There is no direct evidence to suggest that Isoa was an accomplice strictly

within the meaning of *participes criminis* in respect of the actual crime charged, whether as principal or accessory before or after the fact.

44. However, in view of following pieces of evidence, the trial Magistrate should have appreciated the need to have Isoa's evidence corroborated by an independence source.

a. Isoa admitted that, prior to the incident, he was talking to Timoci (1st Accused) who was also his workmate about their trips and money kept in the truck.

b. PW.1 said that every time Isoa got off of the truck he used to wind the glasses up and lock the door but on this day he didn't do that.

c. When the vehicle reached Banaras Junction Isoa turned on the radio loudly. PW.1 suspected that it was a signal for robbers.

d. Isoa was assaulted by police during interrogation and as a result of which he pointed out Saula at the identification parade.

e. Isoa denied having recognized Saula as one of the robbers when asked by PW.1 soon after the incident. Under police interrogation, Isoa said that he recognized Saula as one of the robbers. He had said this to police in an interrogation process where he was allegedly assaulted by police.

45. In these circumstances, acceptance of Isoa's evidence when it was not supported by an independent source, in my opinion, should be called into question. This ground should succeed.

Ground iv - Prejudice caused by delay

46. The Appellant filed an application in the High Court seeking a permanent stay of proceedings. The High Court found the delay of nearly eight years to be inordinate and directed the Magistrate to concluded the case within six months. The stay application was dismissed mainly because the Appellant failed to prove any prejudice caused by delay.

47. Having perused the judgment and evidence led at magistracy I now find that delay had caused prejudice to the Appellant in his trial. The Robbery happened in 2008 and the trial took place approximately eight years after the incident. At the trial, the trial Magistrate relied solely on identification evidence given by Isoa (PW.2), including dock identification done eight years after the incident to find the Appellant guilty.

48. The trial Magistrate however rejected PW.2's identification evidence including the dock identification in respect of the fourth accused Epeli on the basis that witness gave 'contradictory evidence on identification'.

49. The trial Magistrate also observed a few inconsistencies in the evidence of the witnesses (inconsistencies between evidence of PW.2 and PW.3's). He highlighted some contradictions at paragraphs 10, 11 and 14 of his Judgment. To justify his reliance (despite some contradictions) on prosecution evidence against the Appellant, the learned trial judge stated at paragraph 14:

> *'The Court is mindful of the fact that the alleged incident has happened almost 8 years ago. Therefore, the court has to be cautious when considering inconsistencies in the evidence.*

50. Having said that trial Magistrate relied on PW.2 's identification evidence to find the Appellant guilty and at the same time to find the 4th Accused not guilty. It seems that the trial Magistrate appreciated the fact that the contradictions are possible with fading memory when a witness is called upon to give evidence in a delayed trial. I find that the reason (the delay) advanced to justify the reception of PW.2's evidence despite contradictions was to the detriment of Appellant's right to a fair trial.

51. It is impossible to say to what extent the delay may have materially affected the ability of PW.2 to recall the relevant events. I take the view however that the delays are of an order where the presence of prejudice may be inferred. As was held in *Seru* Crim App. AAU.0041/42 0f 1995, the ground of delay alone is sufficient to quash a conviction and sentence if prejudice thereby caused is proved.

52. I find that the inordinate delay in this case had caused prejudice to the Appellant and denied him a fair trial. This ground should succeed.

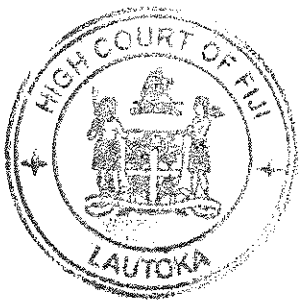
Conclusion

53 The Appellant was not convicted according to law. Consequently, I would allow the appeal and set aside his conviction and sentence.

54. A retrial should only be ordered if the interests of justice so require. In *Au Pui-kuen v Attorney-General of Hong Kong* [1980] AC 351, the Privy Council said that the interests of justice are not confined to the interests of either the prosecution or the accused in any particular case. They also include the interests of the public that people who are guilty of serious crimes should be

brought to justice. Other relevant considerations are the strength of evidence against an accused, the likelihood of a conviction being obtained on a new trial and any identifiable prejudice to an accused whilst awaiting a retrial. A retrial should not be ordered to enable the prosecution to make a new case or to fill in any gaps in evidence (*Azamatula v State* unreported Cr App No AAU0060 of 2006S: 14 November 2008).

55. The alleged offence is now more than eight years old. There was not a strong body of evidence upon which a court properly directed might well have convicted the Appellant. I am of the opinion that interests of justice will not be served by an order for a retrial.



Aruna Aluthge

Judge

At Lautoka

11th April, 2017

Solicitors: **Appellant in Person**

Office of the Director of Public Prosecution for the Respondent