

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 282 of 2019

STATE

V

MELI CAMA WELEILAKEBA

Counsel : Ms. Jayneeta Prasad with Ms. Nimisha Shankar for the State
Ms. Shantel Hazelman for the Accused

Dates of Trial : 21-24 and 28-29 September 2020

Summing Up : 2 October 2020

Judgment : 5 October 2020

JUDGMENT

[1] As per the Amended Information filed by the Director of Public Prosecution (DPP), the accused, Meli Cama Weleilakeba, was charged with the following offences:

COUNT 1

Statement of Offence

AGGRAVATED ROBBERY: Contrary to Section 311 (1) (a) of the Crimes Act 2009.

Particulars of Offence

MELI CAMA WELEILAKEBA with Others, on the 29th day of July 2019, at Nasinu, in the Central Division, robbed **PREM PRASAD** of FJD 10,000.00 cash, AUD 2,000.00 cash, 1 x Mangal Sutra Chain, 1 x Gold Chain, 1 x Gold Ring, 1 x Silver Ring, 1 x DELL Brand Laptop Bag, 1 x Grey HP Laptop, 1 x Hard Drive, 2 x USB Sticks, 1 x Passport of Prem Prasad, 1 x DKNY Wrist Watch, 1 x Blue Nike Canvas, 1 x Silver Samsung (S7) Phone, 1 x Wallet, 1 x BSP ATM Card, 1 x BSP Visa Card, 1 x ANZ Card, 1 x BNZ Visa Debit Card, 1 x Jeep 2012 Compass Car Key (Vehicle

Registration CHYVAN), 1 x Volkswagen Caddy Car Key (Vehicle Registration JU251) and 1 x House Key, the property of **PREM PRASAD**.

COUNT 2

Statement of Offence

THEFT: Contrary to Section 291 (1) of the Crimes Act 2009.

Particulars of Offence

MELI CAMA WELEILAKEBA with Others, between the 22nd day of July 2019 and the 1st day of August 2019, at Nasinu, in the Central Division, dishonestly appropriated 1 x Maroon Ford Fiesta (Vehicle Registration JA 710), the property of **JOSEPH WORK** with the intention of permanently depriving **JOSEPH WORK** of the said vehicle.

- [2] The accused pleaded not guilty to the charges and the ensuing trial was held over 6 days.
- [3] At the conclusion of the evidence and after the directions given in the summing up, by a unanimous decision, the Assessors found the accused not guilty of the two charges.
- [4] I have carefully examined the evidence presented during the course of the trial. I direct myself in accordance with the law and the evidence which I discussed in my summing up to the Assessors and also the unanimous opinions of the Assessors.
- [5] During my summing up I explained to the Assessors the salient provisions of Sections 310 (1), 311 (1) (a) and 291 (1) of the Crimes Act No. 44 of 2009 (Crimes Act).
- [6] The Assessors were directed that in order for the prosecution to prove the first count of Aggravated Robbery, they must establish beyond any reasonable doubt that;
 - (i) The accused;
 - (ii) On the specified day (in this case the 29 July 2019);
 - (iii) At Nasinu, in the Central Division;
 - (iv) With others;
 - (v) Robbed Prem Prasad of his property (the items listed in the charge).
- [7] Similarly, the Assessors were directed that in order for the prosecution to prove the second count of Theft, they must establish beyond any reasonable doubt that;
 - (i) The accused;
 - (ii) During the specified period (in this case between the 22 July 2019 and 1 August 2019);
 - (iii) At Nasinu, in the Central Division;
 - (iv) With others;

- (v) Dishonestly;
 - (vi) Appropriated 1 x Maroon Ford Fiesta (Vehicle Registration JA 710), the property of Joseph Work;
 - (vii) With the intention of permanently depriving the said Joseph Work of the said vehicle.
- [8] Each of the above individual elements were further elaborated upon in my summing up in respect of the two charges.
- [9] In support of their case, the prosecution called the complainant in Count 2, Joseph Work, the complainant in Count 1, Prem Prasad, witness Nacanieli Katonitunuma (a soldier with the Royal Fiji Military Forces (RFMF)), Police Constable 5620 Vosaki, Detective Corporal 3372 Ame Raogo and former Inspector of Police Laisiasa Tamani.
- [10] The accused testified on his own behalf and also called a witness Merewalesi Liku, his neighbour, to support his alibi.
- [11] In my summing up I have summarized the evidence of all witnesses led during the course the trial.
- [12] The prosecution version of the events is that on 22 July 2019 the maroon Ford Fiesta vehicle bearing registration number JA 710 and belonging to Joseph Work had been stolen between 3.00 a.m. and 6.00 a.m. from his residence.
- [13] On 27 July 2019, witness Nacanieli Katonitunuma had seen this vehicle parked on the driveway outside his house. At the time the vehicle had registration number JA 710. The next day, 28 July 2019, he had heard and later seen the vehicle reversing.
- [14] On 31 July 2019, the said Nacanieli had seen the vehicle parked at the same spot. However, at this time the vehicle had registration number IL 152. He had informed his Team Leader, since the registration number had been changed.
- [15] Police Constable 5620 Vosaki testified that on 1 August 2019, he had casted K9 Zamp within the said vehicle (the interior of the vehicle) whereby a scent was picked up by the K9. The K9 then followed the scent which he picked up from the vehicle along the common track for approximately 20 meters. The scent had led them to a green wooden house.
- [16] Early in the morning on 2 August 2019, the accused had been arrested from the said wooden house. He had been brought to the Nakasi Police Station and caution interviewed. On 3 August 2019, he had been identified by Prem Prasad at the Identification Parade held that evening, as one of the 3 persons (the person holding the screwdriver) who came to his residence on 29 July 2019 and robbed him. According to Prem Prasad the robbers had got away in vehicle bearing registration number IL 152.

- [17] The accused testified in Court and totally denies all the allegations against him. The accused is also taking up the defence of *alibi* in respect of the Aggravated Robbery charge, which allegedly took place on 29 July 2019 (the first count). For this purpose he is relying on the evidence of Merewalesi Liku, a neighbour of his.
- [18] I directed the Assessors on the defence of *alibi* and as to how such evidence should be analysed.
- [19] The prosecution led the evidence of Police Constable 5620 Vosaki, a Dog Handler attached to the K9 Unit. The K9 Unit is comprised of the Dog Section under the Fiji Police Force. I wish to make some observations concerning this evidence.
- [20] PC Vosaki testified that around 8.51 in the morning of 1 August 2019, he proceeded to the place where the maroon Ford Fiesta, which at the time had the registration number IL 152, was located. The vehicle was found abandoned around the round-about at Kapenaumi Feeder Road off Qaranivalu Road.
- [21] The witness said that that he then casted his K9 Zamp within the vehicle (the interior of the vehicle). The K9 is said to have picked a scent from the interior of the vehicle. This scent the K9 is said to have followed from the vehicle along the common track for approximately 20 meters leading to the green wooden house of the accused and from where the accused had been arrested the next day.
- [22] However, there is no evidence that was elicited by the prosecution to establish the accuracy or authenticity of this type of evidence. No evidence has been led by the prosecution to establish as to how long such dog scent evidence would last or to establish as to the distance the scent evidence could lead to.
- [23] The other important aspect is that the dog had stopped at the entrance to the wooden house. After conducting a general search around the premises of the wooden house, he then concluded the track as negative result since no one was in the premises. The witness further explained that by negative result he meant that no one was located within the premises. So they concluded that the track as a negative result.
- [24] In cross-examination the witness agreed that his dog Zamp did not confirm to whom the particular scent belonged to and he also agreed that the result he got was inconclusive.
- [25] In the light of the above, this Court cannot give any weight to this evidence, except to consider that the accused had been arrested from his residence.
- [26] In this case, it is clear from the evidence that the accused was not known to the complainant Prem Prasad, prior to the date of the alleged incident of robbery, which was 29 July 2019. It is also clear from the evidence that according to the complainant Prem Prasad he saw the accused for the first time on the date of the alleged incident. Thereafter, the complainant is said to have identified the accused at an Identification Parade held on 3 August 2019. Subsequently witness Prem Prasad identified the accused in Court during the course of his testimony.

[27] In this case the defence is challenging the manner in which the said Identification Parade was conducted by the police and submits that it was conducted unfairly. The defence has highlighted several infirmities or weaknesses in the manner in which the said Identification Parade was conducted.

[28] In the landmark case of *R v Turnbull* (1977) Q.B. 224, [1977] 63 Criminal Appeal Reports 132, [1976] 3 WLR 445, [1976] 3 All ER 549, at 551 to 552, the English Court of Appeal enunciated special guidelines to assess the quality of disputed visual identification. Lord Widgery CJ articulated the said guidelines in the following words:

"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.

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.

Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

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."

[29] The *Turnbull* guidelines have been accepted as the law in Fiji. This has been specifically stated by the Fiji Court of Appeal in *Semisi Wainiqolo v The State* [2006] FJCA 70; AAU0027.2006 (24 November 2006); and in *Mesake Sinu v The State* [2013] FJCA 21; AAU37.2009 (13 March 2013).

[30] In *Rusiate Savu v The State* [2014] FJCA 208; AAU0090.2012 (5 December 2014); the Fiji Court of Appeal held that the Learned Magistrate was in error when he concluded that the *Turnbull* guidelines did not apply to that case as it was not a situation of identification on a fleeting glance but one of recognition:

"Clearly, the learned trial Magistrate misdirected herself when she said the Turnbull guidelines are not appropriate here as this was not fleeting glance case but was of recognition. The Turnbull guidelines equally apply to cases of disputed recognition as was the case here. In R v Thomas [1994] Crim. LR 120, the English Court of Appeal held that where there has been some form of recognition, the risk that needs to be assessed is whether the witness is mistaken in his or her purported recognition of the accused. That risk is assessed by taking into account the Turnbull guidelines against the circumstances in which the sighting occurred (Wainiqolo (supra) at [18]).

[31] These principles were also considered by the Fiji Court of Appeal in *Isoa Koroivuki & Another v The State* [2017] FJCA 47; AAU0082.2012 (26 May 2017); and confirmed by the Fiji Supreme Court in *Isoa Koroivuki & Another v The State* [2017] FJSC 28; CAV7.2017 (26 October 2017).

[32] I now wish to make some observations regarding the manner in which the Identification Parade was conducted in this case.

[33] In this case the Identification Parade was conducted by Inspector Laisiasa Tamani. The Identification Parade had been held inside the Crime Office General Room. The witness explained as to the manner in which the Identification Parade was conducted.

[34] It was suggested to the witness and he agreed that the Fiji Police Force Standing Orders (FSO) mandates the procedures under which Identification Parades are to be conducted. The Learned Defence Counsel made specific reference to certain provisions of the said instrument. The witness agreed that as per the FSO, 9 members of the public should be picked for an Identification Parade. It was suggested to him that as per the FSO those 9 members should be of the same race and of similar build, complexion, height, age and appearance including clothing as the accused.

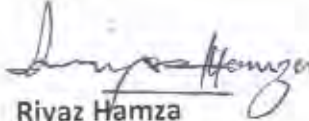
[35] It was suggested to the witness that in the conducting of this ID Parade the 9 members of the public were not of similar ages. The witness agreed to this suggestion. This is further confirmed by the statement made by the witness (although I am conscious of the fact that police statements are not evidence), where it is stated that the ages of the

- 9 members of the public vary from 16 years to 27 years. At the time of the alleged incident, the accused was 32 years of age.
- [36] It was suggested to the witness that the men that were lined up all had different complexions and the accused Meli was the fairest. The witness answered: *"No. There were some in the ID Parade as similar age as Meli Cama."*
- [37] It was also suggested to the witness that the accused was the only one with the beard whilst the other 9 members were clean shaven. The witness answered: *"That's not true. Few other members of the public had a beard."*
- [38] The witness agreed that the men in the line-up were not of the same height and build as the accused.
- [39] It was further suggested to the witness that the members of the public were all not of the same appearance. The witness answered: *"They were young. Not same appearance as Meli. For the ID Parade it is very hard to get similar persons as the person in custody."* The witness continued: *"... But at the time of the ID Parade it is very difficult process for the Police to get persons of similar age group and similar appearance"*.
- [40] It was further suggested to the witness that he had not followed the proper procedure in conducting the ID Parade (as set out in the FSO). The witness answered: *"Yes that is true. That's procedure/guideline – but to exactly follow for us is very hard practically."*
- [41] Although it is stated in the relevant FSO that "The conducting officer must make notes in his/her notebook of all that he/she and the witnesses and the suspect say or do" Inspector Tamani admitted that he does not have his Police notebook with him where he is said to have recorded all the happenings regarding the ID Parade.
- [42] However, apart from all the above, the fundamental issue is that although Prem Prasad had made two statements to the police regarding the incident (the first on 29 July 2019, which was immediately after the incident, and the next on 2 August 2019), he has not provided the police with any form of description of any of the 3 persons (the accused included) who came to his residence and had robbed him on 29 July 2019, in either of the two statements. This in my view is a serious omission on the part of the witness as well as the investigating officers.
- [43] One of the essential elements of the *Turnbull* guidelines is: "Is there any material discrepancy between description given to the Police by the witness when first seeing the accused and his actual appearance?" In this instance Court is not in a position to decide on this due to the failure by the witness and the police in recording this crucial piece of information.
- [44] Another matter of concern is that accused had been shown to the witness Prem Prasad the day before the Identification Parade was conducted. Although the investigating officers may have denied this, the complainant Prem Prasad has testified that the accused was shown to him. The witness has stated that he could not see the accused

clearly that evening as there was not enough light in the cell. However, the very fact that the accused was shown to the witness, the day before the Identification Parade, casts serious doubt on the integrity of the said parade.

- [45] The above factors create more than a reasonable doubt in the prosecution case.
- [46] These factors also gives credence to the accused's position that he was not at the crime scene but elsewhere at the time the crime was committed. The accused says that he was weeding in his plantation, adjoining his house, at the material time the alleged offence was committed on 29 July 2019. He called his neighbour Merewalesi Liku to give evidence on his behalf to support his defence of alibi.
- [47] At the conclusion of the evidence and after the directions given in my summing up, the three Assessors by their unanimous opinions have found the accused not guilty of the two charges of Aggravated Robbery and Theft.
- [48] In my view, the Assessors' opinion is justified. It was open for them to reach such a conclusion on the available evidence. Therefore, I concur with the unanimous opinions of the Assessors.
- [49] Considering the nature of all the evidence before this Court, it is my considered opinion that the prosecution has failed to prove the charges of Aggravated Robbery and Theft against the accused beyond reasonable doubt.
- [50] In the circumstances, I find the accused not guilty of the charges of Aggravated Robbery and Theft and he is accordingly acquitted of the charges.




Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA

Dated this 5th Day of October 2020

Solicitors for the State : Office of the Director of Public Prosecutions, Suva.
Solicitors for the Accused : Office of the Legal Aid Commission, Suva.