IN THE HIGH COURT OF FIJI
AT LAUTOKA IN THE WESTERN DIVISION
APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO. HAA 50 OF 2023
(Ba Magistrates Court Criminal Case No: 249 of 2019)

BETWEEN: **VILIKESA RAILAGI**

APPELLANT

AND

STATE

RESPONDENT

Counsel: Appellant in Person
Ms. R. Uce for Respondent

Date of Hearing: 5 February 2024
Date of Judgment: 19 February 2024

JUDGMENT

1. This is a timely appeal filed by the Appellant against the conviction recorded by the learned Magistrate at Ba.

2. The Appellant was charged with two counts of Aggravated Robbery contrary to Section 311 (1)(b) of the Crimes Act No. 44 of 2009. The Appellant pleaded not guilty to the charges in the High Court. Exercising the powers vested in the High Court under Section 4(2) of the

Crimes Act, the matter was remitted to the Magistrates Court at Ba to be tried in extended jurisdiction.

3. At the trial before the Magistrates Court, the Appellant, on 2 June 2023, was convicted of the 1st count and acquitted of the 2nd Count. On 18 July 2023, the Appellant was sentenced to 9 years and 10 months imprisonment term with a non-parole period of 8 years.

4. On 11 August 2023, the Appellant filed his timely appeal appealing his conviction only.

5. The Grounds of Appeal are:

    a. That the learned Trial Judge may have fallen into an error of law when he failed to give the Appellant the right of election as per Section 4(1)(b) of the Criminal Procedure Act on the charge of Aggravated Robbery.

    b. That the learned Magistrate erred in law and in fact when he did not properly consider and analyse inconsistency in the evidence of the State witness thus rendering the conviction unsafe.

Ground (a) Right of Election

6. The Appellant contends that he was denied the right of election to select the forum in which he should be tried. The Appellant was charged with Aggravated Robbery contrary to Section 311(1) which is described in the section as an indictable offence. Therefore, in terms of Section 4(1) of the Crimes Act, the Appellant shall be tried by the High Court.

7. However, by virtue of Section 4(2) of the Crimes Act, notwithstanding the provisions of sub-Section 4(I) above, a judge of the High Court may, by order under his or her hand and the seal of the High Court, in any particular case or class of cases, invest a magistrate with jurisdiction to try any offence which, in the absence of such order, would be beyond the magistrate's jurisdiction.

8. There is no right of election provided in law for an accused who is charged with an indictable offence. Therefore, there was no need for the Learned Trial Judge to put the right of election to the Appellant.

9. Therefore, this ground has no merit and is bound to fail.

Ground (b): Failure to analyse inconsistency in evidence.

10. The Appellant in his written submissions has not elaborated how the Learned Magistrate erred in fact and in law in not properly analyzing the inconsistency of the state's witnesses. At the hearing, the Appellant appeared to argue that the Learned Magistrate's analysis of evidence on visual identification was not proper.

11. At the trial, the prosecution called two witnesses, one of whom is a police witness. The complainant (PW-1) is the only eye witness called by the Prosecution. According to his evidence, the robbery took place at around 8 p.m. when he was about to have his dinner with his wife. An iTaukei man pretending himself to be a land officer had entered the house followed by three masked men. One of the masked men had punched PW1 on his head causing him to fall. After being held by his neck and cello taped around his head, legs and hand, the house had been ransacked.

12. The Learned Magistrate correctly and properly analysed the visual identification evidence, bearing in mind the Turnbull Guidelines[1] to ensure that PW1 was not mistaken in his identification. The Turnbull guidelines on visual identification have been accepted in Fiji. The guidelines which the Learned Magistrate considered 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

[11] R v Turnbull[1977]QB224 (CA)

> 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.

13. According to PW1's testimony, the iTaukei man's face was closely observed by PW1 without any obstruction when his neck was being pressed. The complexion of this iTaukei man was not very dark and not very fair either, like that of PW1 himself. He was a bit shorter than PW1 and would be below 60 years of age. The observation was made in the light that was switched on during the robbery. It was not a fleeting glance observation as the robbers had been inside the house for 15-20 minutes. During which time, PW1 had observed the iTaukei man's face clearly at a close range and for a considerable time.

14. PW1 made a dock identification in Court. There had been a proper foundation for a dock identification. At the police identification parade conducted on 29 May 2019, just one week after the robbery, PW 1 had confidently and positively identified the Appellant as one of the robbers. The police inspector who conducted the identification parade (PW2) testified in Court. There had been no objection to the identification parade which appears to have been conducted properly by following the Force Standing Orders.

15. Having properly identified the Appellant in the dock during evidence-in-chief, PW1 appears to have been not so much confident under cross-examination that the person in the dock was the same person who was pressing his neck during the robbery. His evidence was that 'I think' the Accused was the same person he had pointed at in the ID parade. He was sure however that the man whom he identified at the ID parade was one of the robbers who had entered his house.

16. The Learned Magistrate accepted the evidence of PW1for the reasons she recorded in her Judgment. Having carefully analyzed the evidence, the Learned Magistrate was satisfied that the visual identification of PW 1 was not mistaken. She gave cogent reasons for her decision. The trial had taken place approximately 4 years after the robbery. PW1 was 74 years of age at the time of his testimony. The eyesight and memory of PW1 were bound to frail as time passed by. When the things were still fresh in his memory, PW1 had identified the Appellant confidently and positively at an ID parade conducted soon after the robbery. In these circumstances, the Learned Magistrate is justified in accepting PW1's dock identification evidence despite it being weak during cross-examination.

17. Bearings in mind that the Appellant had nothing to prove, the Learned Magistrate proceeded to analyse the evidence of the Defence and rejected the same for the reasons she recorded. The two *alibi* witnesses who testified for the Defence were close relatives of the Appellant who had a real interest in the Defence.

18. DW1 was the wife of the Appellant. She, in her evidence testified to what allegedly took place at home on a particular Tuesday and a Wednesday. She was sure that on that particular Tuesday night the Appellant was home as it was his day off. On Wednesday, he had gone for work after 5 p.m. She could not say where the Appellant had been after leaving home. The date the robbery took place (22 May 2019) was a Wednesday. Therefore, evidence of DW1 does not support the *alibi* that was taken up by the Defence. It could not create any reasonable doubt in the version of events of the prosecution case.

19. DW 2 was the son of the Appellant. He could not say where the Appellant would have been after dinner which happened at around 7 p.m. after which he had gone to sleep. The robbery had taken place after 8 p.m. These reasons were as good as the reasons attributed for the rejection of DW 1's evidence. Further, DW2 never said, as opposed to what his mother said, that they had some visitors staying at home on that day.

20. The learned Magistrate had carefully evaluated all the evidence led at trial in coming to the decision that the Appellant was guilty of the 1st count he was charged with.

21. The primarily concern of an appellate court would be to see whether the conclusion reached by the trial court could reasonably be supported on the evidence adduced. The principle on which an appellate court should proceed is conveniently stated by Lord Thankerton in **Watt v. Thomas** [1947] 1 All ER 587:

> I. Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion.
>
> II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.
>
> III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.

22. In **Shinodra v State** [1988] SPLawRp 58; [1988] SPLR 150 (2 December 1988), it was stated:

> Where a case depends essentially, as the present case does, on the credibility of witnesses and findings of fact connected therewith, an Appellate Court ought to be guided by the impression made on the Magistrate who saw and heard the witnesses and not by its own evaluation of the printed evidence which can be misleading.

23. The appellant must show that there was no evidence on which the trial magistrate could reach the conclusion which he did reach if he properly directed himself (Kamchan Singh v The Police (1953) 4 F.L.R.69; and as was said by Widgery L.J in R. v Cooper (1968) 53 Cr. App. R. 82 at p.p. 85 – 86 the circumstances in which the Court will interfere with the findings are as follows:

> However, now our powers are somewhat different, and we are indeed charged to allow an appeal against conviction if we think that the verdict of the jury should be set aside on the ground that under all the circumstances of the case, it is unsafe or unsatisfactory. That means that in cases of this kind the court must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such: it is a reaction which can be produced by the general feel of the case as the court experiences it.

24. In short, an appellate court would be loath to interfere with a finding of credibility or finding of facts of a court below which had been arrived at after it having had the benefit of seeing each witness give evidence firsthand. The Learned Magistrate who was called upon to determine facts in this case had the benefit of seeing and hearing the witnesses firsthand. PW1 had given a description of the robber (age, complexion, height etc.) in comparison to his own which only the Learned Magistrate had the benefit of observing.

25. I can find no inconsistency in evidence as alleged by the Appellant. This Court should not interfere with her finding. There is no error on the part of the Learned Magistrate. The appeal ground (b) should be dismissed.

26. The Following Orders are made:

    (i) The Appeal is dismissed.

    (ii) The conviction recorded by the Learned Magistrate at Ba is affirmed.

HIGH COURT OF FIJI LAUTOKA

Aruna Aluthge

Judge

At Lautoka

19 February 2024

Solicitors: Appellant in Person

Office of the Director of Public Prosecution for Respondent