

IN THE HIGH COURT OF FIJI
AT LAUTOKA
[APPELLATE JURISDICTION]

CRIMINAL APPEAL NO. HAA 51 OF 2023

AND

CRIMINAL APPEAL NO. HAA 54 OF 2023

IN THE MATTER of an Appeal against the
Decision of the Magistrate's Court of Lautoka, in
Criminal Case No. 501 of 2019.

BETWEEN: **KELEMEDI WAQA**

APPELLANT IN CRIMINAL APPEAL NO. HAA 51
OF 2023

SIMIONE DERURU

APPELLANT IN CRIMINAL APPEAL NO. HAA 54
OF 2023

AND: **STATE**

RESPONDENT

Counsel: The Appellants Appeared in Person
Mr. Alvin Singh for the Respondent

Date of Hearing: 19 June 2024

Judgment: 30 August 2024

JUDGMENT

- [1] This is an Appeal made by the two Appellants against their conviction imposed by the Magistrate's Court of Lautoka.
- [2] In the Magistrate's Court of Lautoka, the two Appellants were jointly charged, with one count of Aggravated Robbery, contrary to Section 311 (1) (a) of the Crimes Act No. 44 of 2009 (Crimes Act). The charge (filed on 11 June 2019) read as follows [Vide page 63 of the Magistrate's Court Record]:

CHARGE

Statement of Offence (a)

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

Particulars of Offence (b)

SIMIONE DERURU and KELEMEDI WAQA, with another, on the 8th day of June 2019, at Lautoka, in the Western Division, robbed **MOSESE LOMAIBATI KI** of a Toyota Succeed Vehicle Registration Number JG 922, valued at \$22000.00 the property of the said **MOSESE LOMAIBATI KI**.

- [3] As could be observed, in the Magistrate's Court of Lautoka, Simone Deruru, the Appellant in Criminal Appeal No. HAA 54 of 2023 was named as the 1st Accused; and Kelemedi Waqa, the Appellant in Criminal Appeal No. HAA 51 of 2023 was named as the 2nd Accused.
- [4] Since Aggravated Robbery is an indictable offence, the Learned Magistrate, Magistrate's Court of Lautoka, transferred the matter to the High Court. However, pursuant to the provisions of Section 4 (2) of the Criminal Procedure Act No. 43 of 2009 (Criminal Procedure Act), the High Court had invested jurisdiction (extended jurisdiction) to the Learned Magistrate, Magistrate's Court of Lautoka, to try this case. Accordingly, this matter had been transferred back to the Magistrate's Court of Lautoka for trial [This is reflected at page 41 of the Magistrate's Court Record].

- [5] On 21 February 2020, the two Appellants pleaded not guilty to the charge and the matter proceeded to trial.
- [6] The hearing in this matter commenced on 26 March 2021 and continued on 14 April 2021. The prosecution called three witnesses and closed its case [Vide pages 18 to 31 of the Magistrate's Court Record for the testimony of the prosecution witnesses]. At the end of the case for the prosecution, the Appellants made an application for No Case to Answer.
- [7] On 30 May 2022, the Learned Magistrate, Lautoka ruled that there was a case for the Appellants to answer and called for their defence [Vide pages 11 to 16 of the Magistrate's Court Record for the Ruling on No Case to Answer].
- [8] Both Appellants opted to give evidence on oath and thereafter the defence closed its case [Vide pages 32 to 40 of the Magistrate's Court Record for the testimony of the two Appellants].
- [9] On 12 September 2022, the Learned Magistrate delivered his judgment finding the two Appellants guilty of the charge of Aggravated Robbery and convicting them of same.
- [10] On 3 July 2023, the Learned Magistrate pronounced the sentence in respect of Kelemedi Waqa, the Appellant in Criminal Appeal No. HAA 51 of 2023, and sentenced him to 2 years and 8 months imprisonment, with a non-parole period of 2 years.
- [11] On 24 July 2023, the Learned Magistrate pronounced the sentence in respect of Simone Deruru, the Appellant in Criminal Appeal No. HAA 54 of 2023, and sentenced him to 2 years and 8 months imprisonment, with a non-parole period of 2 years.
- [12] Aggrieved by the said Order, on 11 August 2023, the Appellant Kelemedi Waqa, filed an appeal in the High Court. The Appeal filed is only in respect of the conviction.
- [13] Similarly, aggrieved by the said Order, on 28 August 2023, the Appellant Simone Deruru, filed an appeal in the High Court. The said Appeal filed is also only in respect of the conviction.
- [14] Although the two appeals were filed a few days out of time, the State had no objection to the late filing of the two appeals, since the delay was not substantial. Therefore, this

Court enlarged the time period of limitation prescribed and granted leave for the two appeals to be filed out of time.

[15] This matter was taken up for hearing before me on 19 June 2024. During the hearing both Appellants agreed that the two appeals be consolidated and for one judgment to be written. During the hearing the two Appellants and the Learned State Counsel for the Respondent were heard. Both Appellants and the Learned State Counsel filed written submissions, and referred to case authorities, which I have had the benefit of perusing.

[16] In the documents titled 'Application for Leave to Appeal against Conviction' [filed on 11 August 2023 by the Appellant Kelemedi Waqa; and filed on 28 August 2023 by the Appellant Simone Deruru], the two Appellants submitted the following Grounds of Appeal against Conviction:

1. That the Learned Magistrate erred in law thus failed to consider the charges of Aggravated Robbery are defective where the Summary of Facts in fact does not disclose the charges of Aggravated Robbery.
2. That the prosecution's office failed to analyse thus (and) amend the charges to Theft.

[17] However, in their written submissions filed, the two Appellants submitted further Grounds of Appeal.

[18] As per the Grounds of Appeal filed by the Appellant Kelemedi Waqa the Grounds of Appeal against conviction are as follows:

Grounds of Appeal against Conviction filed by Kelemedi Waqa

GROUND 1

That there has been a substantial miscarriage of justice when the Learned Prosecutor produced the charge to the Learned Magistrate which was defective when in fact the Appellant should have been charged for Theft only.

GROUND 2

That the Learned Magistrate erred in law and in fact when he allowed the State witness Mosese Lomaibatiki, the Complainant, during trial to identify the Appellant in the witness box without prior foundation of identity parade or photograph identification.

GROUND 3

That the Learned Magistrate erred in law in admitting the Medical Report of the Complainant when that evidence was hearsay produced in evidence by the prosecution but not by its maker Doctor Repa Ben.

GROUND 4

That the Trial Magistrate in his judgment failed to provide a warning or sufficient warning as to the care with (which) the testimony of Apenisa Nakete should be approached.

[19] As per the Grounds of Appeal filed by the Appellant Simone Deruru the Grounds of Appeal against conviction are as follows:

Grounds of Appeal against Conviction filed by Simone Deruru

GROUND 1

That there has been a substantial miscarriage of justice when the Learned Prosecutor produced the charge to the Learned Magistrate which was defective when in fact the Appellant should have been charged for Assault only.

GROUND 2

That the Learned Trial Magistrate erred in law and in fact when he allowed the State witness Mosese Lomaibatiki, the Complainant, during the trial to identify the Appellant in the witness box without prior foundation of identity parade or photograph identification.

GROUND 3

That the Learned Magistrate erred in law in admitting the medical report of the Complainant when that evidence was hearsay produced in evidence by the prosecution but not by its maker Doctor Repa Ben.

The Law and Analysis

[20] Section 246 of the Criminal Procedure Act deals with Appeals to the High Court (from the Magistrate's Courts). The Section is re-produced below:

“(1) Subject to any provision of this Part to the contrary, any person who is dissatisfied with any judgment, sentence or order of a Magistrates Court in any criminal cause or trial to which he or she is a party may appeal to the High Court against the judgment, sentence or order of the Magistrates Court, or both a judgement and sentence.

(2) No appeal shall lie against an order of acquittal except by, or with the sanction in writing of the Director of Public Prosecutions or of the Commissioner of the Independent Commission Against Corruption.

(3) Where any sentence is passed or order made by a Magistrates Court in respect of any person who is not represented by a lawyer, the person shall be informed by the magistrate of the right of appeal at the time when sentence is passed, or the order is made.

(4) An appeal to the High Court may be on a matter of fact as well as on a matter of law.

(5) The Director of Public Prosecutions shall be deemed to be a party to any criminal cause or matter in which the proceedings were instituted and carried on by a public prosecutor, other than a criminal cause or matter instituted and conducted by the Fiji Independent Commission Against Corruption.

(6) Without limiting the categories of sentence or order which may be appealed against, an appeal may be brought under this section in respect of any sentence or order of a magistrate's court, including an order for compensation, restitution, forfeiture, disqualification, costs, binding over or other sentencing option or order under the Sentencing and Penalties Decree 2009.

(7) An order by a court in a case may be the subject of an appeal to the High Court, whether or not the court has proceeded to a conviction in the case, but no right of appeal shall lie until the Magistrates Court has finally determined the guilt of the accused person, unless a right to appeal against any order made prior to such a finding is provided for by any law.”

[21] Section 256 of the Criminal Procedure Act refers to the powers of the High Court during the hearing of an Appeal. Section 256 (2) and (3) provides:

“(2) The High Court may —

(a) confirm, reverse or vary the decision of the Magistrates Court; or

*(b) remit the matter with the opinion of the High Court to the Magistrates Court;
or*

(c) order a new trial; or

(d) order trial by a court of competent jurisdiction; or

(e) make such other order in the matter as to it may seem just, and may by such order exercise any power which the Magistrates Court might have exercised; or

(f) the High Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the Appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

(3) At the hearing of an appeal whether against conviction or against sentence, the High Court may, if it thinks that a different sentence should have been passed, quash the sentence passed by the Magistrates Court and pass such other sentence warranted in law (whether more or less severe) in substitution for the sentence as it thinks ought to have been passed."

The Grounds of Appeal against Conviction

[22] As could be observed from the Grounds of Appeal filed by the two Appellants, the Grounds of Appeal 1, 2 and 3, taken up by both Appellants are identical (except the fact that in Ground 1, Kelemedi Waqa states that he should have been charged for Theft, whereas Simone Deruru states that he should have been charged for Assault). The Appellant Kelemedi Waqa has taken up an additional Ground of Appeal (The 4th Ground of Appeal against Conviction). Therefore, the said Grounds of Appeal will be discussed together as Grounds of Appeal Nos. 1, 2, 3 and 4.

GROUND 1

[23] This Ground of Appeal against Conviction is that there has been a substantial miscarriage of justice when the Learned Prosecutor produced the charge to the Learned Magistrate which was defective when in fact the Appellant Kelemedi Waqa should have been charged for Theft only/the Appellant Simone Deruru should have been charged for Assault only.

[24] The above Ground of Appeal against Conviction is based on the fact that during the course of the investigations in this case by the Lautoka Police, the Appellant Kelemedi

Waqa was charged with one count of Theft, contrary to Section 291 (1) of the Crimes Act [Vide pages 121 to 122 of the Magistrate’s Court Record for the Charge Statement of Kelemedi Waqa]. Similarly, during the course of the investigations in this case by the Lautoka Police, the Appellant Simione Deruru was charged with one count of Assault, contrary to Section 275 of the Crimes Act [Vide pages 109 to 111 of the Magistrate’s Court Record for the Charge Statement of Simione Deruru].

[25] However, it is trite law that the defence cannot dictate to the prosecution on the charges it chooses to prosecute against the Appellants and as to how the prosecution should conduct the trial. In this case, based on the evidence available, the Lautoka Police had decided to charge the two Appellants for the offence of Aggravated Robbery, contrary to Section 311 (1) (a) of the Crimes Act. It is wrong in law to submit that the charge is defective merely due to this fact.

[26] Section 311 (1) of the Crimes Act reads as follows:

“A person commits an indictable offence if he or she-

(a) Commits a robbery in company with one or more other persons; or

(b) Commits a robbery, and at the time of the robbery, has an offensive weapon with him or her.”

[27] Section 311 (2) of the Crimes Act provides that an offence against sub-section (1) is to be known as the offence of Aggravated Robbery.

[28] The offence of Robbery is defined in Section 310 (1) of the Crimes Act as follows:

“310. — (1) A person commits an indictable offence (which is triable summarily) if he or she commits theft and —

(a) immediately before committing theft, he or she—

(i) uses force on another person; or

(ii) threatens to use force then and there on another person —

with intent to commit theft or to escape from the scene; or

(b) at the time of committing theft, or immediately after committing theft, he or she—

(i) uses force on another person; or

(ii) threatens to use force then and there on another person—

with intent to commit theft or to escape from the scene.”

[29] Therefore, in order for the prosecution to prove the count of Aggravated Robbery, they had to establish beyond any reasonable doubt that;

- (i) The two Appellants;
- (ii) On the specified day (in this case the 8 June 2019);
- (iii) At Lautoka, in the Western Division;
- (iv) With another;
- (v) Robbed Mosese Lomaibatiki of his property – namely his Toyota Succeed Vehicle Registration No. JG 922, valued at \$22,000.00.

[30] The Learned Magistrate’s Judgment is found at pages 3-7 of the Magistrate’s Court Record. I find that the Learned Magistrate has correctly outlined the elements of the offence of Aggravated Robbery, contrary to Section 311 (1) (a) of the Crimes Act. He has summarized the evidence of the three prosecution witnesses and the two Appellants led during the trial. He has then briefly analysed the evidence in relation to the said elements of the offence. Accordingly, the Learned Magistrate has found the Appellants guilty of the charge of Aggravated Robbery and convicted them.

[31] I find that the Learned Magistrate has duly considered all the evidence prior to arriving at his conclusion that the Appellants were guilty of the charge. For the aforesaid reasons, I find that the said Ground of Appeal against the Conviction is without merit and should be rejected.

GROUND 2

[32] This Ground of Appeal against Conviction is that the Learned Magistrate erred in law and in fact when he allowed the State witness Mosese Lomaibatiki, the Complainant, during trial to identify the Appellant in the witness box [should be in the dock or dock identification] without prior foundation of identity parade or photograph identification.

[33] In this case, the Appellants totally deny the charge against them. They contend that the Learned Magistrate erred in law and in fact when he allowed the Complainant, Mosese Lomaibatiki, to identify the Appellants in the dock, without prior foundation of identity parade or photograph identification.

[34] 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."

[35] 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).

[36] 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]).*

[37] 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).

[38] In this case it is clear that the complainant Mosese Lomaibatiki had known the two Appellants prior to the incident. During the cross-examination of the Complainant this

fact has been further confirmed. The following questions that were put to the Complainant in cross-examination were pertinent:

Q. *The accused persons that are present in Court, do you know them personally prior to the incident?*

A. *Sir, I know because when I went to Tavakubu I saw them at Tavakubu Sir.*

Q. *And approximately how many times have you seen this person (these persons) prior to the incident?*

A. *Sir when I went to Tavakubu I saw them there.*

Q. *Do you recall the number of times?*

A. *Two times a week.*

[39] It is clear from the facts of this case that this was not a case of identification on a fleeting glance, but one of recognition. Therefore, it was permissible for the witness Moses Lomaibatiki to identify the Appellants in the dock.

[40] It must be highlighted that the two Appellants were represented by Counsel from the Legal Aid Commission during the trial in the Magistrate's Court. If the Appellants were objecting to the dock identification, the objection could have been made at that time. Perusing the record, no such objection has been made.

[41] Accordingly, I find that the said Ground of Appeal against the Conviction is also without merit and should be rejected.

GROUND 3

[42] This Ground of Appeal against Conviction is that the Learned Magistrate erred in law in admitting the Medical Report of the Complainant when that evidence was hearsay produced in evidence by the prosecution but not by its maker Doctor Repa Ben.

[43] The Medical Examination Report of the Complainant is found from pages 123 to 128 of the Magistrate's Court Record. The said Report was tendered to Court as Prosecution Exhibit 1 during the testimony of the Complainant (vide page 21 of the Magistrate's Court Record). The Medical Examination of the Complainant had been conducted by Doctor Repa Ben, Medical Officer at the Lautoka Hospital.

[44] As mentioned previously, the two Appellants were represented by Counsel from the Legal Aid Commission during the trial. No objection was taken at the time to the tendering of this Report through the Complainant. It is conceded that the Complainant was not the maker of the Report. However, if the Appellants wished that the maker of the Report, Doctor Repa Ben, should have been called to tender the Report, then the application should have been made at that time. However, perusing the record, no such application has been made at the time.

[45] Therefore, I am of the opinion that this Ground of Appeal against the Conviction is without merit and should be rejected.

GROUND 4

[46] This Ground of Appeal against Conviction is that Trial Magistrate in his judgment failed to provide a warning or sufficient warning as to the care with (which) the testimony of Apenisa Nakete should be approached.

[47] The two Appellants submit that prosecution witness Apenisa Nakete is an accomplice and should have been considered so. However, it is the position of the State that the said witness was not an accomplice.

[48] It is appropriate at this stage to refer to the evidence of the said Apenisa Nakete. During the trial in the Magistrate's Court of Lautoka, witness Apenisa Nakete was shown his statement made to the Police so as to refresh his memory. After having done so, the following questions had been put to him: *"Now can you turn to the next page of that statement. Can you read the third paragraph? Can you read out loud on the mic"*.

The witness answered as follows:

"I was still talking to the driver when Simione came around on the driver's side opened the driver's door and pulled him outside and at the same time Kelemedi sat on the driver's seat and drove off the vehicle. The vehicle admission (ignition) of the vehicle was still on and the driver was pulled out of the vehicle. Kelemedi drove the vehicle down to the roundabout along the Tavakubu Road and to stop the vehicle at the Tavakubu Market and I get off the vehicle because I was still in shock from the thing they did. I've

never witnessed this sort of things to happen before. My eyes at..... This was first experience as I only heard people doing it. I was really terrified....:"

[49] From the above portion of the evidence, it is apparent that witness Apenisa Nakete cannot be considered as an accomplice in this case. Therefore, it was not required for the Learned Magistrate to provide a warning or sufficient warning as to the care with which the testimony of Apenisa Nakete should be approached. The Learned Magistrate has considered the said Apenisa Nakete as a material witness for the prosecution.

[50] Therefore, I am of the opinion that this Ground of Appeal against the Conviction too is without merit and should be rejected.

Conclusion

[51] Accordingly, I conclude that the Appeals should stand dismissed and the conviction and sentences be affirmed.


FINAL ORDERS

[52] In light of the above, the final orders of this Court are as follows:

1. Both Appeals-HAA 51 of 2023 and HAA 54 of 2023 are dismissed.
2. The conviction entered by the Learned Magistrate, Magistrate's Court of Lautoka, in Criminal Case No. 501 of 2019 is affirmed in respect of both Appellants.



AT LAUTOKA
This 30th Day of August 2024


Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

Solicitors for the Appellants:
Solicitors for the Respondent:

Appellants Appeared in Person.
Office of the Director of Public Prosecutions, Lautoka.