

IN THE MAGISTRATES' COURT OF FIJI
AT NASINU
EXTENDED CRIMINAL JURISDICTION

High Court Criminal Case No. 120 of 2014
Magistrates' Court Criminal Case No. 540 of 2014

STATE

v.

JOSAIA LABATI

For the State: Constable G. Prasad

For the Defendant: Ms. N. Pratap, *of counsel*, of the Legal Aid Commission

JUDGMENT

1. You stood trial for *Aggravated Robbery* contrary to section 311 (1) of the **Crimes Act 2009** in that you “with others on the 20th day of April 2014, at Nasinu in the Central Division stole \$5, 250.00 cash, 1 x Laptop valued at \$1, 500.00, Lap Top bag valued at \$85.00, 1 x Hand bag valued at \$50.00 and 1 x wallet valued at \$25.00, all to the total value of \$6, 910.00, the property of **Razeem Zamil Khan** and at the time of the robbery had an offensive weapon with them.”
2. On 18 April 2016, the State called **Razeem Zamil Khan** to the stand. **Mr. Khan** testified that on 20 April 2014, he was branch manager at Khan Holdings in Nausori. He kept the money belonging to the business he said. Khan Holdings did sales on Thursday. On Friday and Saturday he had opened up the shop and sales continued on to Saturday afternoon. It had been the Easter weekend and he had kept the money belonging to the business in a knapsack along with some documents.
3. On 19 April 2014, he had been at home with his family. They had gone to sleep and he had stayed up watching a movie until 1.00am the next morning. He then went to bed. In the early hours of the morning of 20 April 2014, they heard the dog barking.

He asked his wife to go and quieten the dog. She went to the washroom and saw that both the grill to the front door and back door open. When she returned to the room he heard glass breaking. He got out of bed to investigate and when he looked out of his bedroom he saw a hand trying to open the door. The hand was reaching in from the outside.

4. **Mr. Khan** testified that he brought an electric fan to hit the person with. The person persisted so he used a sofa set against the person. They threw sticks at him. He then picked up a stick inside the sitting but four people were inside his home by this point. Their faces were wrapped in shirts. Two were small in build. They asked him for money and they told him to be sure to give them what they wanted.
5. **Mr. Khan** was made to sit in the sitting room he said. Two remained in the sitting room with him. One was a meter away and the other 4 – 5 meters away. The one in front of him was wearing a vest. His wife started screaming and was told to be quiet in Hindi. The cloth covering the left side of the face of the person standing in front of him fell and **Mr. Khan** recognized the face of his neighbour, someone he saw daily. **Mr. Khan** testified that he saw that person for about 10 seconds. The light was on in the bedroom and the kitchen and nothing obstructed his view. The person he saw was clean shaven and had a buzz cut.
6. **Mr. Khan** testified that he had last seen that person on Friday. That Friday, **Mr. Khan** said, that person had had a beard. **Mr. Khan** did not say a word. He recognised the person's voice too. He said that he would talk to that person regularly. They were carrying a bolt cutter, a stick and a knife, he said. They took the sale bag containing \$5000.00 and more. They also took a Toshiba laptop valued at \$1500.00, a laptop bag valued at \$85.00, his wife's handbag and purse. They left his premises. **Mr. Khan** then identified you in the Accused box.
7. Under cross-examination, **Mr. Khan** admitted that the lights in the sitting room had been off and that only the lights to the bedroom and kitchen were on.
8. The State then called **Mrs. Sheeta Khan**. **Mrs. Khan** testified that on 20 April 2014, she and her children had gone to bed at around 10.00pm. The dogs were barking so she went to the washing area to check on things. She told the dogs to be quiet. On her

way to the washing area she noticed that the grill to both their doors were open. She thought of her husband and went to the bedroom. Her husband got out of bed and he tried to stop the intruders from entering the house. The door broke and four intruders entered their home. They had a cane knife, bolt cutter and a rod. They wanted to know where the money was. **Mr. Khan** told them it was in the bedroom. Two of them guarded her and her husband. She was panicking and screaming and one of them told her to be quiet in Hindi. The children saw what was happening and they were shocked.

9. The kitchen and bedroom lights were on. She recognized the voice of the person who told her to be quiet. She said that they had had masks on but that the mask of one fell off around the right side of his mouth. You had shaved your hair bald. When she would see you, you had hair and a beard.
10. The matter was then adjourned and the State then called **Constable 3752 Ilaitia Drauradoko**. He was the Investigating Officer. He confirmed that you were arrested on 20 April 2014. That nothing had ever been recovered from you. He confirmed that no identification parade had been conducted in the lead up to the trial.
11. The State also tendered as **Prosecution Exhibit 1** the **Record of your Interview with the Police** and as **Prosecution Exhibit 2**, your **Charge Statement**. They contain no admissions and as such, have no probative value. The documents simply reference inadmissible out of court documents that do not fall under any of the exceptions to the hearsay rule.
12. Your counsel accepted that there was a case to answer and asked the Court to move on to the Defence's case. I explained the substance of the State's allegation against you to you. You said you understood. I put to you your three rights pursuant to section 178 of the **Criminal Procedure Act 2009**. You said you understood. You opted to remain silent and you chose not to call any witnesses. We then adjourned for judgment.

Presumption of Innocence

13. I remind myself that you are presumed innocent, unless and until, you are proved guilty.

Burden and Standard of Proof

14. I remind myself that it is the State that bears the burden of proving each and every element of the offence against you and I further remind myself that they bear the burden of proving each of these elements beyond reasonable doubt.

Elements

15. The elements that the State must prove beyond reasonable doubt are as follows:

- (i) You
- (ii) In company with and acting in concert with
- (iii) Another or others
- (iv) Immediately before
- (v) committing theft
- (vi) Threatened to use force on another person

Analysis

16. I am satisfied beyond reasonable doubt that four people, in company and acting in concert with each other had menaced **Mr. and Mrs. Khan** with weapons immediately before stealing over \$5000.00 in cash, 1 x Laptop valued at \$1, 500.00, Lap Top bag valued at \$85.00, his wife's handbag and her purse.

17. This is case that depends *wholly* on the correctness of your identification. You claim that that identification is mistaken. I warn myself of the special need for caution in these circumstances. I remind myself that:

- (i) there is a need for caution to avoid the risk of injustice;
- (ii) a witness who is honest and convinced in his own mind may be wrong;
- (iii) a witness who is convincing may be wrong;
- (iv) more than one witness may be wrong;

- (v) a witness who is able to recognise the defendant, even when the witness knows the defendant very well, may be wrong.

18. More, I must and do carefully examine the circumstances in which the identification came to be made:

- (i) How long did the witness have the accused under observation?
- (ii) At what distance?
- (iii) In what light?
- (iv) Was the observation impeded in any way, as for example by passing traffic or a press of people?
- (v) Had the witness ever seen the accused before?
- (vi) How often?
- (vii) If only occasionally, had he any special reason for remembering the accused?
- (viii) How long elapsed between the original observation and the subsequent identification to the Police?
- (ix) 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?
- (x) Are there any specific weaknesses that had appeared in the identification evidence?

19. Finally, in **Lotawa v. State** [2014] FJCA 186, the Court of Appeal said:

“Dock identification is completely unreliable in the absence of a prior foundation of identity parade or photograph identification because it then becomes the ultimate leading question. The answer is obvious to any witness, the person to be identified is sitting in the dock...It has been decided now in a line of English cases that it should be refused by a trial judge except in situations where the accused has refused to participate in a formal identification parade or where he has otherwise avoided attempts at identification. Even then very strong directions must be given as to how little weight is to be placed on such identification.”

20. I remind myself that:

*'The dangers of a dock identification (by which it 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 recognises him, but because the witness knows from where 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.'*¹

21. This was a first time dock identification. There is no admissible reference to either **Mr. or Mrs. Khan** having seen you between the Friday before the robbery and the days that they testified in Court. That was a period of over 2 years. The last time they had each seen you properly, you had had long hair and a beard.

22. Moreover, **Mr. Khan** said that he had only seen the side of one intruder's face for a period of 10 seconds. **Mrs. Khan** said that she had only seen the side of the person's mouth. Both **Mr. and Mrs. Khan** testified that the lights in the sitting room where this identification took place had been off. The only source of light came from the kitchen and the bedroom and how much of that light filtered into the sitting room remains unclear. Moreover, both **Mr. and Mrs. Khan** said that the person before them in the living room had been clean shaven and had a buzz cut. You, on the other hand, had had a beard and long hair in the instances they had met you prior. The State offered no evidence regarding what you looked like at the time of your arrest that morning.

23. Finally, it is clear to me that **Mr. Khan** and **Mrs. Khan** had either initially thought it might be you but they were not certain or worse, had had no idea it was you but were then moved by inadmissible hearsay evidence to pick you out. **Mr. Khan** testified:

"I saw one of his uncle on his porch next door. I told him situation. Uncle said no, nobody home. Uncle brought him one hour later. Confirmed Accused. He

¹*Naicker v State* CAV0019 of 2018: 1 November 2018; [2018] FJSC 24

was denying, he did not know. People shouting. Uncle turned on lights on porch. Known him for 7 – 8 months.”

24. **Mrs. Khan** testified:

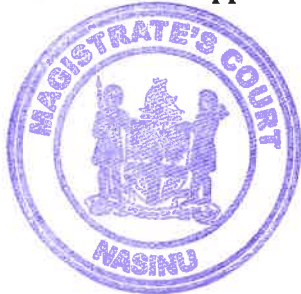
“We got confirmation on him.”

25. After carefully considering the evidence before me, I find the initial 10 second sighting in uncertain lighting and the subsequent first time identification in the dock some two years later unreliable. It would be unsafe to convict on such tenuous grounds.

Result

26. In the result and for the reasons set out herein, I find you not guilty and I acquit you of **Aggravated Robbery** forthwith.

27. **Any party not satisfied with the judgment of this Court is at liberty to appeal to the Court of Appeal within 30 days.**




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Seini K Puamau
RESIDENT MAGISTRATE

Dated at NASINU this  day of FEBRUARY 2020