IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL NO. AAU 61 OF 2011
(High Court HAC 154 of 2008)

BETWEEN	:	**JOSATEKI CAMA** **EMORI NAQOVA** **ASESELA TAWAKE** **KELEPI SERUKALOU** ***Appellants***
AND	:	**THE STATE** ***Respondent***
Coram	:	**Calanchini P** **Waidyaratne JA** **Temo JA**
Counsel	:	**Ms. S. Vaniqi for the 1st Appellant** **Mr. S. Kumar for the 2nd Appellant** **Mr. J. Savou for the 3rd Appellant** **Mr. S. Waqainabete for the 4th Appellant**
Date of Hearing	:	**9 February 2015**
Date of Judgment	:	**12 June 2015**

JUDGMENT

Calanchini P

[1] At the commencement of the appeal hearing I indicated to Counsel for the four Appellants and the Respondent that I had previously delivered rulings in relation to the Appellants' applications for leave to appeal and for bail pending appeal. Counsel were then invited to indicate whether any of the Appellants or the Respondent objected to my sitting in the appeal hearing. After consulting with the Appellants, each Counsel informed the Court that the Appellants had no objection. Counsel for the Respondent indicated that the State had no objection.

I have had the opportunity to read in draft the judgment of Waidyaratne JA and agree with his proposed orders.

Waidyaratne JA

[2] All four Appellants were convicted and sentenced for robbery with violence punishable in terms of section 293(1)(b) of the Penal Code Cap 17. The first three Appellants were convicted after trial while the 4th Appellant was convicted on his guilty plea. He pleaded guilty after his caution interview was admitted after the voir dire inquiry.

[3] The first three Appellants were sentenced to ten (10) years imprisonment with a non-parole period of eight (8) years and the 4th Appellant was sentenced to six (6) years imprisonment with a non parole period of four and half years (4½).

[4] On 20 March 2012, a single Judge granted leave to appeal to the first three Appellants against their convictions. On 4 August 2013, the 4thAppellant was granted leave against his sentence.

[5] Grounds of Appeal relied on by the first three Appellants are:

Ground 1

That the learned trial judge erred in directing the assessors relating to the quality of the identification evidence;

Ground 2

That the learned trial judge did not adequately explain to the assessors the law pertaining to joint enterprise;

[6] The 4th Appellant pursued his appeal only against the sentence. His grounds of appeal are:

Ground 3 (a)

The learned trial judge erred in law in the exercise of his discretion in arriving at a non parole period

Ground 3 (b)

The learned trial judge erred by taking into account the same factor in arriving at the starting point of sentencing and as an aggravating factor to increase the sentence.

Ground 3(c)

The learned trial judge failed to consider his guilty plea as a separate factor in calculating the term of imprisonment.

[7] At the hearing the first and third Appellants informed court that they only intend to pursue the first ground of appeal pertaining to the issues of identification. The second Appellant relied on the filed submission in relation to joint enterprise. Further, counsel for the 3rd Appellant agreed and concurred with the submissions of the counsels of 1st and 2nd Appellants.

[8] According to the evidence adduced at the trial, the incident had occurred at around 11 in the morning on 18 August 2008 near Westpac Bank at Nakasi. A Fijian youth had snatched a carton containing $ 62,972.34 and cheques to the value of $ 1033.76 from the manager of a supermarket who came over to the bank to deposit the money. This Fijian youth had got into a van which pulled up at the place of the incident.

[9] A police officer who was off duty had witnessed this incident and claimed that he recognized three persons who travelled in this van. In his testimony this police officer identified the first three appellants as the people who were in the van. According to this witness he had seen these three appellants several times prior to this date and knew them by name. This witness had been with his wife at the time the incident took place.

[10] At the trial the video evidence revealed that the person who snatched the carton is the 4th Appellant and it shows the 4th appellant grabbing the carton from the victim. It

further shows a van is proceeding and making a turn in the park and stopping to allow the 4th Appellant to get into the van and thereafter driving out of the car park.

[11] Further, the video evidence of Westpac Bank CCTV Cam 4 also shows the police officer walking from the park. After a while he is seen walking back with his wife and within a few seconds the snatching of the money takes place. At this time the police officer and his wife are seen walking in front of the bank. The recorded time is 11.03.36. The snatching by the youth is recorded at 11.03.39.

[12] The only witness who connects the three appellants with this incident is the police officer. He testified at the trial and identified the first three appellants who travelled in the van.

[13] This witness had chased behind the van along with another security guard and had witnessed the security guard hitting and breaking the rear back window on the side of the driver. He had further testified that the distance to the van was around 3.20 meters and that he did clearly see the inside of the van and therefore its occupants. In his details he had stated that it was in the morning and a clear sunny day. He had identified the 2nd Appellant as the person who was seated in the front seat while the 3rd Appellant was the driver. The 1st Appellant was identified as an occupant of the rear seat with another youth whom he could not identify.

[14] The witness had testified that he had known the above identified Appellants before by name and that he had seen them on several times almost hundred times before the incident.

[15] The witness in his evidence had stated that he had a look at the occupants of the van for about 15 seconds and also that it was a side view. Under cross-examination he acknowledged that the CCTV video revealed that it was only about 6 seconds of observation.

[16] In the first ground of appeal the Appellant submits that the learned trial judge erred in directing the assessors relating to the quality of the identification evidence. This is

extended to pointing out that the learned trial judge had failed to follow the guidelines set out in **R v. Turnbull and Others** [1976] 3 All ER 549 when directing in respect of the warnings to be given relating to identification and recognition in a case as in the instant case.

[17] Further, Appellants specifically submit that the issue of identity was the main thrust of their defence. The 1st Appellant in his submission specifically submits that he was not present at the place of the incident and that the prosecution case is based on a mistaken identification. In the above context, it was imperative that the learned trial judge should have directed the assessors properly and adequately relating to the principles as set out in the case of **R v. Turnbull** (supra). Hence the Appellants submit that the learned trial judge had erred as he had failed to do so.

[18] The direction of the trial judge to the assessors on identification is contained in paragraphs 19 and 20 of the summing up.

[19] It is clear from the above mentioned paragraphs that the learned trial judge had placed the summary of evidence of the identifying witness before the assessors. Thereafter, the learned trial judge had left the question of identity to be determined by the assessors as a question of fact.

[20] The learned trial judge having emphasized the training and the experience of the police officer had failed to draw the attention of the assessors on the possibility of a mistaken recognition rather than identification.

[21] As discussed earlier the evidence reveals that the police officer had only about 6 seconds and a side view of the persons who were in a moving vehicle whom he recognized as the first three appellants.

[22] In **Reid v. R**[1990] 1 AC 363 the Privy Council observed that

> *"Although the judge stressed that the witness was a police officer, and suggested that his ability to identify people could be greater than that of an ordinary member of the public, experience has undoubtedly shown that the police identification can be just as unreliable and is*

not therefore to be exempted from the well-established need for the appropriate warnings."

[23] Considering the evidence pertaining to recognition in this case, I am of the view that the learned trial judge should have directed and warned the assessors based on the Turnbull principles when he dealt with the identification evidence.

[24] Therefore, I am of the view that the non-direction has occasioned a miscarriage of justice which warrants this court's intervention.

[25] The Appellants further argued that the evidence of the identifying police officer should not be acted upon due to two infirmities. Firstly, it was submitted that the video recorded evidence failed to corroborate his oral evidence with regard to the time he had to observe the occupants in the vehicle. According to the oral testimony of the witness he had about 15 seconds whereas the video footage is only 6 seconds.

[26] Secondly, his evidence is contradictory to the video recording as he was not seen at certain times in the footage.

[27] Considering the totality of the evidence of this witness I am of the view that the above mentioned infirmities do not affect the credibility and the quality of the evidence of this witness. Therefore I hold that these submissions are without merit.

[28] However, for the reasons discussed above I am of the view that it would be wrong to allow the conviction to stand due to the gravity of the misdirection.

[29] Therefore, I am of the view that the conviction of the first three appellants should be quashed. I am of the view this is not a fit case to invoke the proviso to section 23 (1) of the Court of Appeal Act, Cap 12.

[30] Section 23 (2)(a) of the Court of Appeal Act, enables the appeal court either to acquit an appellant or to order a new trial when it decides to quash a conviction.

[31] In the case of **Au Pui-Kuen v. Attorney General of Hong Kong** ([1980] AC 351 at 356) Lord Diplock in delivering the opinion of the Privy Council has stated:

> *"The power to order a new trial must always be exercised judicially. Any criminal trial is to some degree an ordeal for the accused; it goes without saying that no (court) exercising the discretion judicially would require a person who had undergone this ordeal once to endure it for the second time unless the interests of justice required it."*

And later at p. 357:

> *"The interests of justice are not confined to the interests of the prosecutor and the accused in the particular case. They include the interests of the public ... that those persons who are guilty of serious crime should be brought to justice and should not escape it merely because of a technical blunder by the judge in the conduct of the trial or his summing up to the jury."*

[32] It has been held that the exercise of the discretion to order a retrial requires the consideration of several factors, some of which may favour a retrial and some against it.

[33] Public interest to prosecute offenders without terminating criminal proceedings due to a technical error by the trial judge and the availability of sufficient evidence against the accused are factors that could be considered in favour of an order for a new trial. Considerable delay between the date of offence and the new trial and the prejudice caused to the appellant due to non-availability of evidence at the new trial may favour an acquittal of the appellants.

[34] Considering the nature and the quality of evidence available in this case, the seriousness of the offence and the absence of a long delay requires, in the interests of justice, to order a new trial.

[35] Therefore I would quash the conviction of the 1st, 2nd and the 3rd appellants and order a new trial.

[36] Now I intend to proceed to deal with the ground of appeal against sentence by the 4th appellant. It was submitted that (a) the trial judge had erred in the exercise of his discretion in deciding the non-parole period, (b) the learned trial judge had taken into account the same factor twice in arriving at the starting point and also as an aggravating factor and (c) the learned trial judge failed to give any credit separately to the 4th appellant for his guilty plea.

[37] The 4th appellant after his conviction was sentenced to six (6) years of imprisonment with a non parole period of four and a half (4 ½) years.

[38] Section 293 (1)(b) prescribes life imprisonment as the maximum sentence for robbery with violence. The learned trial judge considering certain decided cases fixed the tariff between 7 and 14 years imprisonment in relation to the 4th appellant. Thereafter, considering the nature and the facts of the offence – *"that it was a well planned robbery and was committed in broad day light at a public place"* - had fixed the starting point at ten (10) years. Thereafter, it appears that the learned trial judge had considered the same two factors along with the value of the amount robbed and enhanced the sentence by three (3) years.

[39] It is clear from the sentencing order dated 19 May 2011, that the learned trial judge has mentioned the two factors referred to above to describe and explain the nature of the offence in determining the starting point. In my view there is no prejudice caused to the 4th appellant as it is evident that the learned trial judge had treated the 4th appellant leniently and fairly when he fixed the starting point at the mid level of the tariff at ten (10) years, Therefore, I am of the view that there is no merit in this ground of appeal.

[40] In the sentencing order the trial judge has taken into account the guilty plea entered after the voir dire inquiry and the fact that he was remorseful as mitigatory factors along with five other factors. A total of seven (7) years had been deducted in favour

of these mitigatory factors. In this process the learned trial judge had failed to comply with section 4(1)(2)(f) of the Sentencing and Penalties Decree 2009.

[41] Further, I observe that the learned trial judge had also erred by considering an irrelevant factor which is at paragraph [13] ground (g) that the police had recovered $1000 as a mitigatory factor.

[42] In the circumstances, I am of the view that the failure to consider guilty plea of the 4th appellant separately in calculating the final sentence has not caused any substantial prejudice to the 4th appellant. Therefore I am of the view that there is no merit in this ground of appeal.

[43] The remaining ground of appeal against the sentence of the 4th appellant is that the trial judge erred in exercising his discretion in arriving at the non parole period.

[44] Section 18 (1) of the Sentencing and Penalties Decree, 2009 provides:

> *"Subject to subsection (2) when a court sentences an offender to be imprisoned for life or for a term of two years or more the court must fix a period during which the offender is not eligible to be released on parole."*

[45] Section 18(4) of the Sentencing Decree provides:

> *"Any non-parole period fixed under this section must be at least Six months less than the term of the sentence."*

[46] In the instant case the trial judge had imposed a term of 6 years imprisonment and had ordered a non-parole period of four and a half years. Thereby the learned trial judge had acted in accordance with section 18 (1) and 18(4) of the Sentencing and Penalties Decree, 2009.

[47] It is settled law that a trail judge is not bound to give reasons unless he decides not to impose a non-parole period in pursuant to section 18(2) of the Sentencing and Penalties Decree, 2009.

[48] In the instant case the learned trial judge was privy to all mitigatory and aggravating factors as well as all the circumstances under which the offence was committed at the time when he decided on the length of the non-parole period.

[49] In my view taking into account all these factors, the trial judge had not acted unfairly or unlawfully in exercising his discretion when fixing the non-parole period. He had acted reasonably when he fixed the non parole period at 4 ½ years whereas he could have fixed it at 5½ years in pursuant to section 18(4) of the Sentencing and Penalties Decree of 2009.

[50] In view of above I conclude that this is not a fit case for this court to intervene against the judge's discretion, by way of an appeal.

[51] Therefore there is no merit in this ground of appeal against the sentence of the 4th appellant.

[52] Therefore the above reasons I dismiss the appeal against the sentence of the 4th appellant.

Temo JA

[53] I agree with the decisions and reasons of Waidyaratne JA.

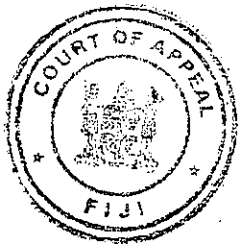
Orders of the Court

1. Appeal against the convictions of first, second and third Appellants allowed and their convictions are set aside.
2. A new trial is ordered for the first, second and third Appellants.
3. Appeal against the sentence of fourth Appellant is dismissed
4. The Sentencing order dated 19 May 2011 against the fourth Appellant is affirmed.

5. The first, second and third Appellants are remanded in custody to appear before a different Judge of the High Court at Suva on 25 June 2015.

6. Production orders issued.

Hon. Mr Justice Calanchini
PRESIDENT, COURT OF APPEAL



Hon. Mr Justice Waidyaratne
JUSTICE OF APPEAL

Hon. Mr Justice Temo
JUSTICE OF APPEAL