IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL NO. AAU 0082 of 2012
CRIMINAL APPEAL NO. AAU 0075 of 2012
(High Court HAC 251 of 2011)

BETWEEN : **ISOA KOROIVUKI**

TILA WILLIAMS

Appellants

AND : **THE STATE**

Respondent

Coram : **Chandra JA**
Fernando JA
Rajasinghe JA

Counsel : **Mr. S. Waqainabete for the Appellants**
Ms. P. Madanavosa for the Respondent

Date of Hearing : **4 May 2017**

Date of Judgment : **26 May 2017**

JUDGMENT

Chandra JA

[1] The Appellants were jointly charged before the Magistrate's Court at Suva with one count of Aggravated Robbery contrary to section 311(1)(a) of the Crimes Act No.44 of 2009. They were found guilty after trial and convicted.

[2] On 27th August 2012 the 1st Appellant was sentenced to 9 years and 1 month and the 2nd Appellant was sentenced to 9 years and 7 months imprisonment with a non-parole period of 7 years for each of the Appellants.

[3] The Appellants appealed against their conviction and sentence and the single Judge of the Court of Appeal granted leave against conviction on ground 5 of the grounds of appeal against conviction and on ground 2 of the grounds of appeal against sentence.

[4] The grounds on which leave was granted are:

Against Conviction:

"That the learned trial Magistrate erred in law and in fact when he allowed dock identification in the absence of compliance of Turnbull guidelines which was prejudicial to the Appellants".

Against Sentence:

"That the learned Trial Magistrate erred in law and in fact when he failed to take into account the full remand period of both Appellants".

[5] **Factual Background**

Five witnesses gave evidence on behalf of the prosecution, the 1st Appellant gave evidence on his behalf while the 2nd Appellant remained silent. The Appellants had on 7th August 2011 entered the Giant Whale Shop where Yuan Hua Ye was working alone at about 11.40 a.m. The shop being at Walu Bay near the wharf. They had pulled her out from where she was and kept on the edge, tied her hands, covered her mouth with a cap and had been told to shut up. They had then pulled the cash till and taken all the money,

her laptop, purse, DS game boy, flashnet and small fan which was used for the laptop. These items were produced when she gave evidence and she had identified them. She had stated that she could not identify the two men. Sireli Watisoko, security at Professional Security Services who had been on guard duty at the entrance of Solander Pacific gave evidence and stated that he had identified the two Appellants on that day when they went in and came out after sometime. He had known the two Appellants, the 1st Appellant as he worked for Solander Pacific and the 2nd Appellant as he had known him earlier. He stated under cross examination that he did not give the names of the Appellants to the Police when he made his statement to the Police. Mareta gave evidence to the effect that when she was at home at midday on 7th August 2011 a small boy had come and told her that Isoa (1st Appellant)wanted to see her. She had gone and met Isoa who was drinking at a house close to her house. That Isoa was drinking with Tila and another person. That Isoa had passed the bag to her after Tila had given it to Isoa. She had taken the bag which had a laptop, flash net, purse, USB connection for a game, to her house and kept it there. When the Police had come to her house, she had given the bag as she was told that it contained stolen items. She identified the bag when it was shown to her in Court while giving evidence.

The 1st Appellant gave evidence and stated that he was not at the Wharf on the day in question and that he did not go past security at Solander on that day and that the Security Guard Sireli was lying. He said that the bag which he gave Mareta was given to him by a friend who had asked him to come for some drinks. He has said that the friend who gave the bag was one Tila but not Tila Williams, the 2nd Appellant.

[6] There was a voir dire inquiry held by the learned Magistrate and the caution interview statement of the 1st Appellant was admitted after inquiry where he had given a detailed version of the robbery.

[7] The learned Magistrate in his judgment had analyzed the evidence of the prosecution and the 1st Appellant along with his caution interview statement which was admitted after the

voir dire inquiry and had been satisfied that the prosecution had proved the charge against the Appellants beyond reasonable doubt.

[8] **Consideration of the Appeal**

Ground against Conviction:

The Appellants were relying on the grounds on which leave had been granted. The ground against conviction on which leave was granted was in relation to the identification of the Appellants.

[9] Counsel submitted that there was no identification parade held, that there was only dock identification of the Appellants and that the Turnbull guidelines were not followed by the learned Magistrate. Counsel cited the decision in **Tiritiri v State** [2015] FJCA 147; AAU0009.2011 (2 October 2015) in support of his submissions. The decision in Tiritiri is distinguishable from the present case as the Appellant in that case had not disputed his identification although it was taken up as a ground of appeal. The judgment of the Court of Appeal while rejecting that ground made observations regarding first time dock identification and the law relating to such instances. However, this aspect will be dealt with in this judgment after setting out the evidence that was led in the case.

[10] The complainant of the Robbery, Yuan Hua Ye from whom the items were robbed in her evidence stated that she could not identify the Appellants as the persons who had entered her shop and robbed the items.

[11] The evidence regarding identification was mainly from the Security Guard at Solander Pacific, Sireli Watiroko and was as follows:

"I was on guard for 2 weeks at Solander Pacific. My job is to see all the workers who walk in and out of the area. I am familiar with employees of Solander Pacific. On 7th August I was on guard. I saw Isoa asking to go in and see Joe Pita. Isoa works for Solander Paciic. Isoa was with someone else when he came to me. Isoa is 1st Accused in the witness box. Accused 2 was with Isoa, its Tila. Know Tila. I used to stay in Raiwaqa once. He stayed there. They did not have anything when they approached me. I did tell them to go in because I know Isoa. I let them in. They walked in at 11 am. I saw both persons again at 11.50 (came out at this time). When I saw them again one of them was pulling Isoa's T-Shirt and said please don't cheat. Isoa had a black bag. They came out from entrance they walked in and walked toward Narain Jetty. They (Isoa) had a black bag. Black school bag type. They did not hold any bag when they went in only when they came out. Isoa was wearing a cap when he went in and when he came out he did not wear it. Can identify Isoa and other man in court today. Witness pointed to Isoa and Tila. It was fine weather. Many people around. When I allowed Isoa and Tila to enter they were about 1 metre to me. When I saw them with bag they were far from me. From witness box to clerks table (2-1/2 – 3) metres. When I saw them leaving with bag. 2nd time I saw them with bag they came along walking. They out for the office side of Solander Pacfic. They were walking along Solander Office. When they were walking towards Narain Jetty. Then came running a Chinese lady crying that a robbery occurred there at their shop. I am familiar with Chinese lady. Shop was near to the wharf. My duty is guard for Solander but I usually go to shop and buy Noodles.

Cross-Examination:

Accused No. 1: Remember 7th August 2011. That day I was at guard at Solander Pacific. I told Police about Isoa as in court today. Shown police statement, I did not mention Isoa's name to police. Told police I know him. I am not lying in court today. Did not see robbery. Did not see from where I was standing to robbery.

Accused No.2: As Security at Solander not Giant whale. Know 2 persons who walked in and out that day. When they came in they walked in. They ran out. Accused No.2 stayed

in Raiwaqa once. I used to live in black house where Tila William came once. Black house where my father stayed. Tila William did business. Do not know Accused No.2 partner's name. Accused No2 is a part. I am not lying. Do not know Accused's No. 2 brother and sister, No identification parade at Police Station. Did not see Accused 2 rob Giant Whale. Did not see Accused No.2 with items was with accused No. 1. Did not give names to police. Know faces of gentleman.

Re-Examination – read statement.

> *"Can recall at 11 -2 Fijian youth asked to see Joe Pita at Solander".*
>
> *(2 Fijians were – Isoa and Tila).*
>
> *I identify them in Court today.*

[12] From the evidence given in Court by witness Sireli, it is clear that he had not given the names of the two Appellants when he made his statement to the Police. His evidence shows that he knew the 1st Appellant as he worked at Solander and he also knew Tila (the 2nd Appellant) since Tila had come to his house once. The question therefore arises as to whether it was necessary for the learned Magistrate to follow the Turnbull guidelines in those circumstances.

[13] The Court of Appeal in **Savu v State** 2014 referred to the application of the Turnbull Guidelines as follows:

> *[6] In **R v Turnbull** [1977] 63 Criminal Appeal R.132, the English Court of Appeal enunciated guidelines to assess the quality of disputed visual identification evidence by removing the dangers of mistaken identification or recognizance. The guidelines are found at p137 of the judgment:*
>
> *"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*

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.

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

*[7] The **Turnbull guidelines** have been accepted as the law in Fiji (**Semisi Wainiqolo v The State** unreported Criminal Appeal. No. AAU0027 of 2006; 24 November 2006 at [9], **Mesake Sinu v The State** unreported Criminal Appeal No. AAU0037 of 2009; 13 March 2013) at [21]).*

[14] The learned Magistrate in Savu's case, had 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. Goundar J in the Court of Appeal stating that the learned Magistrate was in error went on to state that:

*"[9] ....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].*

[15] In Wainiqolo v The State [2008] FJSC 45; CAV0007.2007S (27 February 2008) it was stated that where the witness had recognized the accused at the time of the robbery, as she had claimed to know him already, the formal identification in Court added nothing of any materiality and caused no prejudice.

[16] The learned Magistrate in the present case did not refer to the Turnbull Guidelines in his judgment nor did he say that it was inappropriate to apply the guidelines. Therefore it would be necessary to see whether any material prejudice was caused to the Appellants by the manner in which the learned Magistrate was satisfied as to their identification.

[17] It is clear from the evidence of witness Sireli, that he had known the 1st Appellant well as he was working for Solander and that on the day in question he had come up to him at about 11 a.m. and wanted to go in to see Joe Pita at Solander. He further stated that the weather was fine and that the 2nd Appellant was with him at that time and that they were about 1 metre away from him. It was therefore possible for him to have identified the 2nd Appellant as he had recognized him as the person who had come to his house once. He had also seen the two of them when they were going out although they were about 3 metres away. The witness went on to say that when they went in they did not have a bag but that the 1st Appellant was carrying a bag on the way out. The witness also stated that the 1st Appellant was wearing a cap on the way in but was without it on the way out. The learned Magistrate referred to these matters in arriving at his conclusion. These items of evidence contained matters that would have been necessary, in respect of identification even according to the Turnbull Guidelines. The learned Magistrate has considered these items of evidence regarding his conclusion on recognition?

[18] In his judgment the learned Magistrate also stated that he noted the evidence of the 1st Appellant in Court and that he does not believe his evidence but was accepting his version as detailed in his caution interview. The caution interview statement of the 1st Appellant was admitted after the voir dire inquiry wherein he had confessed to the commission of the robbery.

[19] Witness Sireli had known the 1st Appellant earlier as he was working in the same establishment where he was doing security duties. In those circumstances there would be no issue as far as the identification of the 1st Appellant was concerned. The fact that this witness had not stated the names of the Appellants in the Police Statement was therefore in the circumstances not prejudicial to the case of the 1st Appellant.

[20] The 2nd Appellant was identified by the same witness as being with the 1st Appellant on that day while coming in and going out of that place. He also stated that he had known him before as he had come to his father's house. Therefore it was a case of recognizing the 2nd Appellant when he saw him with the 1st Appellant on the day in question. It was not a case of seeing the 2nd Appellant for the first time in Court after the commission of the offence nor a situation of a fleeting glance, it was an instance of recognition.

[21] The 2nd Appellant had stated to the Police when questioned that he would answer to Court, unlike the 1st Appellant who had confessed. Therefore it was necessary for the learned Magistrate to consider the evidence that transpired at the trial against the 2nd Appellant. The learned Magistrate had in his judgment specifically dealt with the identification of the 2nd Appellant. He stated:

> *"The 2nd accused was positively identified by the 2nd prosecution witness who had known him for sometime as being with the 1st accused at Solander Pacific., close to the shop where the complainant was. The complainant had stated in Court there were 2 persons who had robbed her. The Court also notes that the 2nd accused was with the 1st accused at the drinking party when the bag was passed to Mareta. She identified the 2nd accused in Court. The 2nd accused had stated to the police he will give evidence in Court. He remained silent in Court. The Court draws no adverse inference from the exercise of this right by the 2nd accused person."*

[22] It would be seen therefore that the learned Magistrate had used not only the evidence of the 2nd prosecution witness but also the evidence of the 3rd prosecution witness to justify the identification of the 2nd Appellant.

[23] In the above circumstances the ground that there was no compliance of the Turnbull Guidelines cannot succeed as the learned Magistrate has used relevant items of evidence that transpired at the trial and no prejudice has been caused to the Appellants .

[24] Therefore this ground of appeal of the Appellants against conviction regarding identification fails.

Ground against Sentence

[25] The 1st Appellant was sentenced to 9 years and 1 month and the 2nd Appellant to 9 years and 7 months imprisonment with a non-parole period of 7 years for each of them.

[26] The Appellants have urged that the learned Magistrate had not considered the full period that they were in remand when the sentences were imposed on them.

[27] Section 24 of the Sentencing and Penalties Act 2009 states that:

> *"If an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of the matter or*

matters shall, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender."

[28] In the present case the 1st Appellant had spent 1 year and 18 days in custody while the 2nd Appellant had spent 1 year and 11 days in custody. The learned Magistrate in imposing the sentences on the Appellants had deducted a period of 11 months for both Appellants as the period which they had been in custody.

[29] Learned Counsel for the State in her written submissions has agreed that the full period in remand had not been discounted and that this ground of appeal should be allowed.

[30] In **Sowane v State** CAV 0038 of 2015; 21 April 2016 [2016 FJSC 23], the application of S.24 of the Sentencing and Penalties Act was discussed. The Supreme Court endorsed the practice of arriving at the head sentence after considering the aggravating and mitigating factors as 'it has the advantage of simplicity and clarity' and thereafter regard any period of remand already served by the Appellant and give a substantial allowance for that period and that such reduction need not be the exact days or even weeks spent on remand.

[31] In the present case as it has been conceded by the State, that the Appellants have not had the benefit of the full period spent in custody, the appeal would be allowed on that ground granting a further reduction of one month from the head sentences imposed on them.

[32] Giving effect to such reduction of one month for each Appellant, the 1st Appellant's sentence would be 9 years and the 2nd Appellant's sentence would be 9 years and 6 months, with a non-parole period of 7 years for each of them.

Fernando JA

[33] I agree with the Judgment and reasoning of Chandra JA.

Rajasinghe JA

[34] I agree with the Judgment and reasoning of Chandra JA.

Orders of Court:

(1) The appeal of the Appellants against conviction is dismissed.

(2) The appeal of the Appellants regarding sentence is partially allowed and the sentence of the 1st Appellant shall be 9 years, and the sentence of the 2nd Appellant shall be 9 years and 6 months, with a non-parole period of 7 years for each of them.

Hon. Mr. Justice Chandra
COURT OF APPEAL

Hon. Mr Justice Fernando
JUSTICE OF APPEAL

Hon. Mr. Justice Rajasinghe
JUSTICE OF APPEAL