IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO: AAU 154 OF 2014 & AAU 8 OF 2015
(High Court Criminal Case No: HAC 215/ 2011[Fiji])
(Magistrate's Court at Nasinu Criminal Case No: 722/09)

BETWEEN	:	**SATISH LAL** **ISAIA BOBO** ***Appellants***
AND	:	**THE STATE** ***Respondent***
Coram	:	**Gamalath JA** **Prematilaka JA** **Fernando JA**
Counsel	:	**Mr. T. Lea for the 1st Appellant** **Ms. S. Nasedra for the 2nd Appellant** **Ms. J. Prasad for the Respondent**
Date of Hearing	:	**14 September 2018**
Date of Judgment	:	**4 October 2018**

JUDGMENT

Gamalath JA

[1] I have read in draft the judgment of Fernando JA and I agree with the reasons and the conclusions therein.

Prematilaka JA

[2] I agree with the reasons and conclusions of Fernando JA.

Fernando JA

[3] The 1st Appellant has appealed against his conviction for aggravated robbery and theft while the 2nd appellant has appealed against his conviction for aggravated robbery and giving a false name to a police officer in due execution of her duty. Both Appellants have appealed against the sentences imposed on each of them on the ground that their respective remand periods had not been taken into consideration in sentencing them.

[4] The Appellants were charged as follows:

"Count 1
Statement of Offence

Aggravated Robbery contrary to section 311 (1) (a) of the Crimes Decree No: 44 of 2009.

Particulars of offence

Satish Lal Isaia Bobo and Another on the 4th day of July 2011 at Nasinu in the Central division, being armed with a cane knife, robbed one Mohammed Shahim of $1130 cash and a Nokia mobile phone valued at $ 25.00, spectacle valued at $ 180.00 with a total value of $ 1547.00 and immediately before and after such robbery threatened to use personal violence on the said Mohammed Shahim.

Count 2
Statement of Offence

Theft: Contrary to section 291 of the Crimes Decree No: 44 of 2009

Particulars of Offence

Satish Lal and Another on the 4th day of July 2011 at Nasinu in the Central Division stole $1000.00 the property of Nazmun Begam.

Count 3
Statement of Offence

Giving False Name to a Police Officer in due execution of her duty: Contrary to section 24 of the Police Act, Cap 85

Particulars of Offence

Isaia Bobo on the 6th day of July at Nasinu in the Central Division gave false name Joji Kawai to WSC 4095 Kelera Cokanasiga in due execution of her duty knowing same to be false."

[5] The Assessors at the conclusion of the trial had expressed their unanimous opinion that both Appellants are guilty of aggravated robbery, that the 1st Appellant is not guilty of the second count of theft and the 2nd Appellant is guilty of the 3rd count, namely giving a false name to a police officer. The learned Trial Judge had by his Judgment convicted both Appellants of aggravated robbery but stated that he cannot agree with the not guilty verdict against the 1st Appellant in respect of the second count and proceeded to convict him of theft. The 2nd Appellant had been convicted of the 3rd count.

[6] In **Ram Dulare & others –v- R [1955] 5 FLR 1** the Court of Appeal referring to the case of **Joseph –v- the King [1948] AC 215** said: *"...[the assessors'] duty is to offer opinions which might help the trial Judge. The responsibility for arriving at a decision and of giving judgment in a trial by the High Court sitting with the assessors is that of the trial Judge and the trial Judge alone and...he is not bound to follow the opinion of the assessors.*" In **Sakiusa Rokonabete –v- The State Criminal appeal No AAU 0048/05** this Court said: "*In Fiji, the assessors are not the sole judges of fact. The Judge is the sole Judge of fact in respect of guilt and the assessors are there only to offer their opinions based on their views of the facts*" However according to section 237(4) of the Criminal Procedure Act 2009, where the trial Judge disagrees with the majority opinion of the assessors, he must give written reasons for differing from the opinion and those reasons must be pronounced in open court. It has been held that the reasons of the presiding trial Judge must be cogent and they should be clearly stated. They must be founded on the weight of the evidence and must reflect the Trial Judge's views as to the credibility of witnesses and be capable of withstanding critical examination in the light of the whole of the evidence presented in the trial. See the cases of **Ram Bali –v- Reginam [1960] 7 FLR 80; Ram Bali –v- The Queen Privy Council appeal No 18 of 1961; Shiu Prasad –v- Reginam [1972] 18 FLR 70 and Setevano –v- State [1991] FJA 3.**

[7] A single Judge of this Court had granted leave to the Appellants to proceed on all the grounds of appeal that they had filed against conviction and the ground against sentence. The said grounds as contained in the Ruling are herein stated verbatim:

"The 1st Appellant's grounds of appeal in summary are:

(i) The trial judge gave no directions on the law on circumstantial evidence.
(ii) The trial judge failed to define the elements of dishonesty and appropriation in relation to the theft charge.
(iii) The trial judge gave no directions on prejudicial media publicity.
(iv) The directions on the law on joint enterprise were inadequate.
(v) The trial judge gave no directions on the law on recent possession.
(vi) The directions on caution interview were inadequate (this ground was abandoned at the leave hearing)
(vii) The trial judge gave no directions on the 2nd appellant's evidence implicating the 1st appellant.
(viii) Remand period not taken into account in sentence.

The 2nd appellant's grounds of appeal in summary are:

(i) The trial judge failed to direct on reliability of the identification evidence in accordance with the Turnbull guidelines.
(ii) The trial judge gave no directions on the law regarding alibi defence.
(iii) Remand period was not taken into account in sentence."

[8] It is pertinent to note the observations made by the learned single Judge of this Court in his Ruling in granting leave to appeal: "The only incriminating evidence against the 1st appellant was the possession of stolen property. There was no direct evidence that he was either involved in the alleged robbery or theft. The only incriminating evidence against the 2nd appellant was the identification evidence of one of the complainants. The 2nd appellant's defence was that the witness was mistaken in her identification, the police identification was defective, and that he was at his brother-in-law's house at the time of the alleged robbery. The summing up contains no directions on the identification evidence in accordance with the Turnbull guidelines and the law regarding alibi defence." He had also stated that the sentencing remarks in respect of both appellants make no reference to the remand period.

Evidence in Brief:-

[9] According to the evidence of Mohamed Shahim and his wife Nazmun Begam on the 4th of July 2011 at about 7 pm, they had returned home after closing their shop. On reaching their house Nazmun had got out of the car to open the gate when 4 men had suddenly come from behind the car, entered the car from the rear passenger door, assaulted Shahim who was still inside the driving seat of the car and taken away Shahim's bag and the hand bag of Nazmun. Shahim had not identified any one of their assailants. According to Shahim it was about to get dark and there was a street light about 4 meters away from where the car was parked. He had said that he "reversed the car to chase them off, my wife started running to sit in the car, so I have to stop for her to sit down, and this people rid off." He had said "she nearly got hurt because I was moving the car. And she was frightened." He had also said none of the four men had gone up to the wife to threaten her.

[10] Nazmun, while testifying before the trial court had stated that while opening the gate she had heard a loud noise and when she looked back had seen *"four Fijian boys"*. She had gone on to say: "When I looked back My Lord I was very afraid, all of a sudden one of them threw a knife at me and I started shouting screaming asking for help." She had said "I saw one Fijian boy in the dark side where my husband was sitting." When questioned by the Prosecutor as to who did she actually see out of the four persons her answer had been: "That passenger side near the door I saw one Fijian tall one was looking at him he was trying to move fast from that place." She had said the time then was "after 6.30 to 7 around." She had said that she was able to see the person because of the street light near their gate which was about one or two meters from the gate. She had also stated that she had seen the person "for more than three or four minutes" and had said that there was no obstacle between her and the person. On being questioned as whether she knew the person prior to the incident, she had said that it was the first time she had seen him. She claimed that she had identified the person whom she saw on the day of the incident at an Identification Parade (IP) held at the Police Station four days after the incident, and that was the 2nd Appellant. In Court she had said that the only distinctive feature about the

man she claimed to have seen at the time of the incident is that he had a beard. It appears that out of the 10 persons paraded at the IP, only the 2nd Appellant had a beard, which speaks a lot as to the shortcomings in holding an IP. Nazmun had said that the robbers had run away with Shahim's bag and her handbag. Inside her handbag was her ATM card and pin number, her wages and company's money amounting to about $280. Nazmun's ATM card was recovered from the possession of the 1st Appellant on the day following the robbery and had been identified by Nazmun as the one belonging to her as it bears her name.

[11] According to Nazmun when she checked the balance from the bank she had been informed by the bank that $ 1000 had been withdrawn from her account on the night of the incident from ATM Westpac Nakasi branch. This is pure 'Hearsay' evidence as no official from the bank had been called to testify in this case or any bank statement produced to prove that in fact $1000 had been withdrawn on the night of the 4th of July 2011. There is no evidence before the court as to the withdrawal of $ 1000 save that of the statement of Nazmun and that is based on hearsay evidence. This shows that no valid evidence had been placed before the Court to prove the second count referred to at paragraph 4 above. The second count is also defective as what was alleged to have been stolen according to the evidence led in this case from the possession of Naznum is an ATM card, which by itself could be the subject matter of a theft, and not cash $ 1000 as particularized in the second count.

[12] Under cross-examination that part of the statement pertaining to the identification of the 2nd Appellant made by Naznum to the police two days after the incident was put to her, namely on the 6th of July 2011, wherein she had stated: *"I went to open the gate and my husband sat on the vehicle waiting to take our vehicle inside after a few seconds when I turned around I saw 4 fijian running away from us with a bag with them."* She had been challenged on the basis that her evidence before the Court 3 ½ years later was contrary to what she had told the police when things were fresh in her mind, namely her evidence before the court that she saw the 2nd Appellant for 3-4 minutes when she turned around. This being a material contradiction it was incumbent in my view for the learned Trial

Judge to have specifically drawn the attention of the Assessors to this matter as this necessarily had a bearing on the identification of the 2nd Appellant. His failure to do so in my view was fatal to the conviction of the 2nd Appellant on count 1.

[13] In considering the identification of the 2nd Appellant by Nazmun we have to bear in mind her own evidence before the Trial Court that the incident happened all of a sudden, she was afraid since one of the four men threw a knife at her, that she started shouting, screaming and asking for help when the incident occurred, which shows her state of mind, that she saw the 2nd Appellant on the dark side where Shahim was sitting and that it was the first time she had seen the 2nd Appellant. Nazmun had not given any description of the 2nd Appellant to the police when she made her statement, not even the fact that he had a beard. There is also Shahim's evidence that Nazmun was frightened and started running towards the car and nearly got hurt in the process as he was reversing the car at that time. There is a contradiction between the evidence of Shahim and Nazmun about the distance between the gate and the street light. According to Shahim it was 4 meters but Nazmun had brought it closer to one or two meters. I have commented earlier about the holding of the identification parade.

[14] This was a case where the Turnbull guidelines necessarily come into application. It was held in **R –v- Oakwell 66 Cr. App R 174 CA** that: "*Turnbull is intended primarily to deal with the ghastly risk run in cases of fleeting encounters.*" Both Shahim's and Nazmun's evidence shows the speed at which the incident had taken place and the circumstances under which Nazmun claimed to have identified the 2nd Appellant.

[15] **Lord Widgery C.J. in R –v- Turnbull [1977] QB 224** had warned of the possibility that a mistaken witness can be a convincing one and a number of such witnesses can all be mistaken and that mistakes in recognition of close relatives and friends are sometimes made. A perusal of the Summing Up shows that the learned Trial Judge had not addressed the Assessors as to the possibility of a mistake made by Nazmun.

[16] In **Turnbull** it was held: "*When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification.*" In **R –v- Lang, 57 Cr.App.R.871** it was held: "*The trial judge should identify to the jury the evidence which he adjudges is capable of supporting the evidence of identification. If there is any evidence or circumstances which the jury might think was supporting when it did not have that quality, the judge should say so.*" A Turnbull direction is generally required in all cases where identification is a substantial issue. Only in the most exceptional circumstances would a conviction based on uncorroborated identification evidence be sustained in the absence of a Turnbull warning. Reliance is placed on **Scott – v- R. [1989] A.C. 1242 at 1261, PC; Beckford –v- R. 97 Cr. App. R. 409 at 415, PC; R –v- Hunjan, 68 Cr. App. R. 99 CA.** Identification by two or more witnesses; DNA or finger print evidence which links the accused to the offence; collapsed alibi evidence; lies told by a defendant which are deliberate and relate to the same issue, correct identification by a witness of other participants in the offence and similar fact and multiple offences committed by the same person may amount to evidence capable of supporting the identification. The instant case was essentially one where identification was a substantial issue.

[17] I have therefore no hesitation in quashing the conviction of the 2nd Appellant in respect of the 1st count and acquitting him forthwith.

[18] As regards the 3rd count against the 2nd Appellant it had been the evidence of the 2nd Appellant before the Trial Court that he is also known and uses the name Joji Kawai. There was no evidence by the prosecution to challenge this assertion. The 2nd Appellant had also said that the interviewing officer, WSC 4095 Kelera Cokanasiga had not asked him whether he was known by other names. This becomes clear when one examines the evidence of Kelera Cokanasiga before the court. This matter has not been addressed by the learned Trial Judge both in his Summing Up and Judgment and I am therefore of the

view that the conviction of the 2nd Appellant cannot stand in view of this fatal irregularity and I therefore quash his conviction in respect of the third count and acquit him forthwith of the third count.

[19] As correctly stated by the learned single Judge of this Court "At the trial, the only incriminating evidence against the 1st appellant was the possession of stolen property. There was no direct evidence that he was either involved in the alleged robbery or theft." This necessitates me to ascertain what was found in the possession of the 1st Appellant and what explanation had been offered by the 1st Appellant in regard to it.

[20] The investigating officer in this case, DC Semi Tabua, had clearly stated that "only the purse containing the ATM card was recovered from Satish Lal's (*1st Appellant*) possession my Lord". And this he had repeated on several occasions. The 1st Appellant had been arrested and searched at Drekula outside his sister's house on the day after the incident. The 1st Appellant had in his evidence before the Court admitted that the ATM card was in his pocket when the police arrested him but there was no purse. DC Tabua's had also specifically stated that the rest of the items, namely the laptop bag, the handbag, another purse, had been recovered from three other people. Having said that, DC Tabua had changed his position to state that all items were recovered after being directed by the 1st Appellant. The learned Trial Judge had challenged DC Tabua in regard to this contradiction and questioned him as to whether he had put an entry in his investigation notes to the effect that all items were recovered on being directed by the 1st Appellant, to which his answer was in the negative. This casts doubt on DC Tabua's evidence about the finding of the ATM card inside a purse belonging to Nazmun that was alleged to have been in the possession 1st Appellant.

[21] The 1st Appellant testifying before the Court states that he had been a taxi driver for the past 18 years and had been driving around in Nasinu (*where the robbery and theft took place*), Valelevu, Nakasi, Nadear, Davuilevu looking for customers on the 4th of July 2011 but cannot recall who his passengers were. He had finished work at around 10 pm and was at his brother's house cleaning his taxi when he found a Westpac ATM card at

the back of his car. His brother who was with him helping him out in cleaning the taxi had asked for the card. His brother had then gone away with the card and returned it to him at night. He had then put it back in his pocket. The next day, namely on the 5th of July he had been arrested when he was at his sister's place. In conducting a search Police had found the ATM card in his pocket. He had specifically said it was only the card that was found on him and denied that it was inside a purse belonging to the Nazmun. In cross-examination he had been asked by the prosecutor why he had not taken the card to Valelevu or Nasinu police station and his answer had been that he intended to take it to his boss and ask him what to do with it. He had specifically denied that he showed any other items to the police.

[22] The issue to be considered by this Court is whether guilt can be inferred against the 1st Appellant in respect of count 2 from the recent possession of the ATM card belonging to Nazmun by him. The onus of proving guilty knowledge always remains upon the prosecution. In **R –v- Aves, 34 Cr. App. R. 159 CCA**, it was held that, where the only evidence is that the defendant was in possession of property recently stolen, a jury may infer guilty knowledge if he offers no explanation to account for his possession, or if they are sure that the explanation he does offer is untrue; if, however, the explanation offered is one which leaves them in doubt whether he knew that the property was stolen, they should be told that the case has not been proved and therefore the verdict should be not guilty. In regard to this principle one must bear in mind the presumption of innocence in **article 14 (2) (a)** and the right under **article 14 (2) (j)** of an accused to remain silent, not to testify during the proceedings, and not…to have any adverse inference drawn from the exercise of this right, under the Bill of Rights enshrined in the Constitution of the Republic of Fiji.

[23] As stated in **Archbold 2018 at 21-277** what constitutes "*recent possession*" depends upon the nature of the property and the circumstances of the particular case. In this case the 1st Appellant has offered an explanation which is quite plausible, taking into consideration that he is a taxi driver who had been doing his rounds looking for customers in the Nasinu area where the robbery took place. In my view an ATM card is

something likely to be dropped by a person while travelling in a vehicle or while moving about and finding it in a taxi by its driver is not something improbable.

[24] It is not possible to link the theft charge in count 2 to the robbery charge in count 1 because there is no reference in count 1 to the theft of an ATM card or $ 1000 from the possession of Nazmun. Count 1 only refers to robbery of articles from Mohammed Shahim. **The Supreme Court of Canada in H. M the Queen –v- N. H. Rooke and R. C. De Vries, indexed as R. –v- Saunders [1990] 1 SCR 1020. 1990 CanLII 1131 (SCC)** stated: **"***It is a fundamental principle of criminal law that the offence, as particularized in the charge, must be proved. In Morozuk V The Queen, 1986 CanLII 72 (SCC), [1986] 1 S.C.R. 31, at p. 37, this Court decided ...To permit the Crown to prove some other offence characterized by different particulars would be to undermine the purpose of providing particulars, which is to permit "the accused to be reasonably informed of the transaction alleged against him, thus giving him the possibility of a full defence and a fair trial*": **R –v- Cote, [1977] CanLII (SCC), [1978] 1 S.C.R. 8, at p.13."** Thus there was no evidence whatsoever against the 1st Appellant in respect of count 1.

[25] As stated earlier in relation to count 2 there is only hearsay evidence before the Court in respect of the withdrawal of $1000 and no evidence as to who made the withdrawal in view of the 1st Appellant's uncontradicted evidence that his brother had taken the ATM card away after the 1st Appellant found it in his taxi. The second count is also defective as what was alleged to have been stolen according to the evidence led in this case from the possession of Naznum is an ATM card, which by itself could be the subject matter of a theft, and not cash $ 1000 as particularized in the second count.

[26] In view of what has been stated above I have no hesitation in quashing the convictions of the 1st Appellant in respect of both counts 1 and 2 and acquitting the 1st Appellant forthwith.

Orders of the Court:

1. *Appeal by the 1st Appellant against his conviction on counts 1 and 2 allowed.*
2. *Appeal by the 2nd Appellant against his conviction on counts 1 and 3 allowed.*
3. *Conviction and sentence against the 1st and 2nd Appellants set aside.*
4. *Both Appellants acquitted of all charges.*

Hon Mr Justice S Gamalath
JUSTICE OF APPEAL

Hon Mr Justice C Prematilaka
JUSTICE OF APPEAL

Hon Mr Justice A Fernando
JUSTICE OF APPEAL