

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

CRIMINAL APPEAL NO. AAU 0018 OF 2013
(High Court HAA 007 of 2012)

BETWEEN : SAULA MALATOLU

Appellant

AND : THE STATE

Respondent

Coram : Chandra RJA

Counsel : Mr. S. Waqainabete for the Appellant
Mr. S. Babitu for the Respondent

Date of Hearing : 13 March 2018

Date of Ruling : 19 March 2018

RULING

- [1] The Appellant was charged before the Magistrate's Court for Robbery with Violence punishable under Section 291(1)(b) of the Penal Code.

- [2] On 25th April 2008 , when the complainant , his wife and small child were sleeping in their bedroom, at around 1.45 a.m. the Appellant and another who had covered his face, had entered the house punched the complainant and assaulted him., Thereafter they had robbed items worth \$390.00 from them. The Complainant had gone to hospital and from there he was taken to the Police Station, where he had seen the Appellant and identified him as the person who entered his house.
- [3] After trial the learned Magistrate found the Appellant guilty, convicted him and imposed a sentence of 7 years and 6 months with 3 years non-parole term.
- [4] The Appellant appealed against his conviction to the High Court. The High Court having heard the appeal dismissed it.
- [5] This is an appeal against the judgment of the High Court sitting in appeal from a judgment of the Magistrate's Court.
- [6] The Appellant relies on the following ground of appeal which is against his conviction:

"The learned Magistrate erred in law and in fact when he failed to warn itself in its judgment the unreliability of the dock identification without laying prior foundation through a photo identification or the identification parade unless with your Appellant's objection."

- [7] An appeal lies from the High Court exercises appellate jurisdiction in terms of section 22 of the Court of Appeal Act (Cap.12).
- [8] Section 22(1) states:

"Any party to an appeal from the Magistrate's Court to the High Court may appeal, under this Part, against the decision of the High Court in such Appellate jurisdiction to the Court of Appeal on any ground of appeal which involves a question of law only..."

- [9] The ground of appeal raised by the Appellant is in respect of the issue of dock identification without the laying prior foundation through a photo identification or an identification parade.
- [10] It was submitted on behalf of the Appellant that the learned Magistrate had not explicitly stated the test in *Turnbull* during the course of his judgment. That the Court should have considered the dock identification as very unreliable without a proper foundation being laid and that should be reflected in the judgment before making its decision.
- [11] In **Wainiqolo v. The State** [2006] FJCA 70; AAU0027.2006 (24 November 2006), the Court of Appeal held in a similar situation where the learned Magistrate had not explicitly stated the test in *Turnbull* during the course of his judgment, that it was abundantly clear that the judgment showed the learned Magistrate had clearly relied on the *Turnbull* principles in coming to his ultimate conclusion.
- [12] A similar view was expressed in **Koroicakau v. State** (2009) FJHC 124; HAA102.2008 (17 June 2009) and **Koroivuki & Anor v. State** (Cr. Appeal AAU0082/2012 (26 May 2017) where the learned Magistrate had not explicitly stated the *Turnbull* principles but the judgments clearly showed that the principles had been applied.
- [13] In the present case too, the learned Magistrate had applied the principles in *Turnbull* in regard to the question of identification as there had been sufficient light in the room where the complainant first saw him, that the complainant had challenged the Appellant and saw them making their getaway from the house, identified him half an hour later at the Police Station, which identification he had done on seeing him and from the T shirt he was wearing. The identification was not one of a fleeting glance. The learned Magistrate had considered the entirety of the evidence in arriving at the conclusion that the Appellant had been identified by the Complainant. The learned High Court Judge too had been satisfied with the manner in which the learned Magistrate had dealt with the identification of the Appellant when dismissing the appeal to the High Court.

- [14] It was submitted on behalf of the Appellant that the learned Magistrate should have cautioned himself when relying on dock identification and cited the Court of Appeal decision in **Tiritiri v. State** AAU 009 of 2011 which was in relation to a trial before the High Court, and involved cautioning the Assessors on the dangers of relying on first time dock identification. The decision in **Tiritiri** is clearly distinguishable as the present case is one where the trial was in the Magistrate's Court.
- [15] The question of identification is one which involves a mixed question of law and fact and is not a question of law only. (**Ilaisa Sousou Cava v. State** Criminal Appeal No.CAV0007 of 2010 (14 November 2011).
- [16] Since an appeal lies from the High Court exercising its appellate jurisdiction only on a question of law the appeal of the Appellant fails.
- [17] As there is no question of law involved in the appeal of the Appellant the question arises whether the appeal can be dismissed in terms of Section 35(2) of the Court of Appeal Act.
- [18] The situations in which an appeal can be dismissed on the ground of being vexatious or frivolous was dealt with in detail by the Supreme Court in **Simeli Bili Naisua v. The State** Criminal Appeal No.CAV0010 of 2013 (20 November 2013). Accordingly, appeals based on issues of mixed law and fact from the appellate jurisdiction of the High Court have been considered as situations where S.35(2) can be applied when there is no question of law in the grounds of appeal. The caveat has been included that the Court of Appeal in exercising its jurisdiction in terms of section 35(2) should state the reasons for doing so.
- [19] In the present application for leave to appeal, the only ground relied on by the Appellant is a question of mixed law and fact. Since an appeal lies only on a question of law only as required by section 22(1) of the Court of Appeal Act, the application of the Appellant for leave to appeal from the judgment of the High Court exercising appellate jurisdiction, is frivolous and is devoid of merit.

[20] For the above reasons the application of the Appellant is dismissed in terms of section 35(2) of the Court of Appeal Act.

Orders of Court:

The application of the Appellant for leave to appeal is dismissed in terms of Section 35(2) of the Court of Appeal Act.





Hon. Justice S. Chandra
RESIDENT JUSTICE OF APPEAL