

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

**CRIMINAL APPEAL Nos: AAU 25**  
**AAU 26, AAU 27, AAU 36,**  
**AAU 50, AAU 51 OF 2015**  
**(High Court No. 338 of 2012)**

**BETWEEN** :  
**1. JOSAIA USUMAKI**  
**2. TEVITA SUGU**  
**3. KUNAL PRASAD**  
**4. DESHWAR DUTT**  
**5. SOLOMONI QURAI**

**Appellants**

**AND** : **THE STATE** **Respondent**

**Coram** : **Chandra JA**  
**Basnayake JA**  
**Fernando JA**

**Counsel** : **The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Appellants in person**  
**Mr. S. Waqainabete for the 2<sup>nd</sup> Appellant**  
**Ms. S. Nasedra for the 5<sup>th</sup> Appellant**  
**Mr. A. Jack for the Respondent**

**Date of Hearing** : **17 September, 2019**

**Date of Judgment** : **3 October, 2019**

# **JUDGMENT**

## **Chandra JA**

[1] I agree with the Judgment and conclusions of Basnayake JA.

## **Basnayake JA**

[2] This judgment is in respect of five appeals. The appellants were charged in the High Court as per amended information dated 9 February 2015 (pgs. 753-755 of the Record of the High Court (RHC)). The 1<sup>st</sup> and the 3<sup>rd</sup> appellants were charged together with others for committing aggravated robbery under section 311 (1) (b) of the Crimes Act. The 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> appellants were charged under section 306 (1) of the Crimes Act for receiving stolen property.

[3] On 23 February 2015 after trial all the appellants were found not guilty by the two remaining assessors (trial proceeded with two remaining assessors, as one of the assessors fell ill during the trial). However the learned High Court Judge, in terms of section 237 of the Criminal Procedure Act found all the appellants guilty as charged (pgs. 504 to 513 of the RHC). The 1<sup>st</sup> and the 3<sup>rd</sup> appellants were sentenced to 17 years and 12 years respectively with a non-parole term. The other appellants were sentenced to 4 years and less.

[4] The appellants having appealed against their convictions sought leave before a Justice of Appeal (Hon. President). Leave was granted to the 1<sup>st</sup> appellant (pgs. 8-21 of the RHC) on grounds 1, 4 and 5 of the amended grounds. In respect of ground 2, leave was not required, being one involving an error of law. The appeal was dismissed against the 3<sup>rd</sup> ground of appeal.

[5] As against the 2<sup>nd</sup> appellant leave to appeal against the conviction was granted. The application for an enlargement of time to appeal against the sentence was refused. As

against the 3<sup>rd</sup> appellant, leave has been refused on all the grounds of appeal urged. Leave has been granted in favour of the 4<sup>th</sup> appellant on 27 January 2016 (pgs. 23-28) against the conviction and the sentence. Leave has been granted on grounds 1 to 3 and 4 to 6 on a limited issue of material relating to the caution/charge statement of the 5<sup>th</sup> appellant.

[6] The facts of this case had been dealt with by Calanchini P from paragraphs 4 to 6 of the Ruling (pgs. 9 to 10) which I will reproduce for the sake of completion.

*“4. The background may be stated briefly. On 17 September 2012 Usumaki, Qurai, Sugu and Quraniqio were serving prisoners at Naboro Prison. Sometime after 8 pm on that day they managed to escaped to the main road. Prasad drove them in his vehicle to Veisari. At a bridge at Veisari a small outboard boat was waiting for them. It was well supplied with food, water and clothes. They got into the boat and travelled to Cave Island (adjacent to Novotel at Lami. At Cave Island they changed into civilian clothes.*

*5. On 19 September 2012 between 1.00pm and 2.00pm the BSP Bank at Samabula was attacked by a group of armed men. A vehicle was reversed into the Bank’s wooden wall creating an opening through which men entered with cane knives. They ransacked part of the Bank and stole \$70,000.00 Fijian and foreign currency. Usumaki was identified at the crime scene as one of the men who had robbed the Bank. Prasad admitted to police that he was the get-away driver for the robbers on the day in question. Both were convicted on the charge of aggravated robbery.*

*6. Usumaki later met Qurai, Sugu and Qaraniqio at Cave Island and gave them money. Prasad met Dutt soon after the robbery and drank “grog” (kava) with him. They later went to a night club. Prasad gave some money to Dutt which was later discovered in his possession and in his home. All four recipients of the money were convicted on the charge of receiving stolen property”.*

[7] Considering the evidence led in this case, I thought it is more appropriate to consider the appeal in the following order, namely;

- (1) The 1<sup>st</sup> appellant;
- (2) The 2<sup>nd</sup>, 4<sup>th</sup> to 5<sup>th</sup> appellants;
- (3) The 3<sup>rd</sup> appellant.

1<sup>st</sup> appellant

[8] The learned High Court Judge in his judgment (pgs. 504 to 513) specifically in paragraphs 8 to 15 considers the evidence against the 1<sup>st</sup> appellant and finds him guilty. According to the learned Judge, the evidence against the 1<sup>st</sup> appellant is three fold. Firstly the identification evidence; Secondly the seizure of \$1000 to \$2000 from the appellant on 21 September 2012; Thirdly the effect of photographs produced as Exhibit No. 2 of the money allegedly found with the appellant on 21 September 2012.

Identification evidence

[9] The 1<sup>st</sup> appellant was allegedly identified by PW4, namely, Alim Khan (pgs. 760/761). The evidence of Alim Khan is reproduced in verbatim due to its importance.

“PW 4 - Alim Khan  
Oath Taken- BSP Sigatoka, Senior ATM Support Officer.

*I have been with BSP for 3 ¾ year. On 19.9.12, at around 12 pm, I was at Samabula BSP to check the ATM defect. I went alone. I was working on the ATM when an interruption. The BSP ATM is next to Rewa Street. I was inside the BSP working in the ATM. I was interrupted. There was a loud bang on the wall 1 meter away from the ATM. I was 2 or 3 footsteps away from the bang. There was a small hole in the wall, which was partly broken. I saw a vehicle was moving to the front and then suddenly it reversed into the wall. It was white long van. I saw a masked person inside the van holding a cane knife. It was a black mask. The van moved forward and two men jumped out of the van. They were wearing ¾ trousers. One man was unmasked. He was standing outside the wall, and through the hole I saw him and he was 1 or 2 footsteps away from me. Nothing was obstructing my view. I observed him for 5 to 8 seconds. I looked at his face for that long.*

*I have seen the man's face before in the newspaper. I saw that face an hour before I came to the BSP Bank. The newspaper was Fiji Sun. It was a colour photo. His eyes were red. There were short beard on him. He was brown skinned. I did not have that Fiji Sun newspaper at the time. I saw that newspaper again, right after the incident. My boss brought the newspaper to me to identify the person. This was 45 minutes to 1 hour after the incident. The skin colour of the person I saw outside was like the one I saw in the paper. He had a small beard i.e. short beard. When the van made the second bang on the wall, causing a bigger hole, I saw him standing out there.*

*He was carrying a cane knife. I saw it. He was about to enter the hole. I gave the alarm to the BSP staff by shouting “Run! There are robbers!”. Some staff froze, they were in shock. Then we ran – four of us into the kitchen. While running, I saw the person I saw outside holding the cane knife enter through the hole. I could hear coins sounds in the tills in the bank. This man I saw outside the hole and coming into the bank through the hole, I could recognize him again if I saw him again. [PW 4 looks around in the courtroom]. **I see that person in the courtroom today. That person is Accused No. 4** (emphasis added).*

*Cross Examination by Leweni (A1) - Nil*  
*Cross Examination by Koroi (A2) - Nil*  
*Cross Examination by Drau (A3) - Nil*

**Cross examination by Singh (A4)**

*I saw his picture passport size. It was a major newspaper. He had a short beard. The man I described today, he had no beard.*

*Singh: Apply to put photocopy of Fiji Sun to PW4 as part of my cross examination. It is a photocopy.*

*Prosecution: We have no objection to Mr. Singh doing the above. We have no objection with the photocopy tendered as evidence.*

*Court: Given that there is no objection from the prosecution for the use of the photocopy of the Fiji Sun dated 19.9.12, it may be used and tendered as evidence, I order so accordingly.*

*[Photocopy Fiji Sun abovementioned shown to PW4]. This is the copy of the newspaper I saw that morning. [PW4 points at photo no. 4, as the photo of the person he saw outside the hole on that day]. **The person I saw on that day is Tevita Sugu and that’s the photo I pointed out.***

**I gave a police statement after the incident on the same day. I told the police in my statement the name of the person I saw on the day. I told the police, it was Tevita Sugu I saw on that day** (emphasis added).

**Court:** *I. In the interest of justice, I am giving A1’s counsel the right to cross examine PW4 again, although she chose not to cross examine PW4 initially.*

**Cross Examination by Leweni (A1):**  
**The person I picked out in court is the person I saw on the day.**

*Cross Examination by A5: Nil*  
*Cross Examination by S.Kumar (A6): Nil*

**Re-examination – Nil**

[10] As per the evidence of Khan, it was the 2<sup>nd</sup> appellant/4<sup>th</sup> accused that was identified by Khan and not the 1<sup>st</sup> appellant/1<sup>st</sup> accused. However, the learned High Court Judge in paragraph 11 of his judgment (pg. 507) has mistakenly stated that it was the 1<sup>st</sup> appellant/1<sup>st</sup> accused that was identified by Khan. The judgment relating to the identification is reproduced as follows;

*“11 .PW4 said, he saw a man come out of the van and was coming through the hole in the wall. He was 1 or 2 footsteps away from him. He observed his face for 5 to 8 seconds. Nothing was obstructing his view. It was broad daylight. He said, he saw the man’s face in the front page of the “Fiji Sun newspaper” an hour before the incident. The front page of the “Fiji Sun” newspaper was tendered as Defence Exhibit No. 1, and the photo was in colour. He said, the man’s eyes were red, he was brown skinned and had a short beard on him. PW4 said, the man was carrying a cane knife. PW4 was given two opportunities to observe anyone in the courtroom who resembled the man he saw on that day. He walked around the courtroom, in front, side and back of the dock. **He pointed Mr. Usumaki as the man he saw on that day** (emphasis added).*

*12. I have warned myself in accordance with what I said in paragraph 35 of my Summing Up. I am also examining the circumstances in which PW4 identified Mr. Usumaki. PW4 observed the accused for 5 to 8 seconds. I’ve looked at my watch, and 5 to 8 seconds is a long time to observe a person’s face in any situation. PW4 said the accused was 1 to 2 footsteps away from him at the time. That was very close indeed. It was between 1pm and 2pm on 19 September 2012, in broad daylight. The lighting was excellent in this identification. PW4 said there was no impediment in the way while observing the accused’s face. PW4 said, he had not seen his face before, but observed his face in that day’s front page of the Fiji Sun Newspaper. **In court, PW4 identified the face in the Fiji Sun newspaper as Tevita Sugu**, rather than Usumaki. PW4 said the accused had a small beard. On trial date, both Mr Usumaki and Mr Sugu had shaved themselves. In the Fiji Sun photograph, both Mr. Sugu and Mr. Usumaki had small beards, although Mr. Usumaki’s beard was smaller than Mr. Sugu.*

13. *Was there any specific weaknesses in PW4's identification evidence against Mr. Usumaki. The first one, was when PW4 said the man he saw was the one he pointed out in the courtroom [ie. Mr. Usumaki], and then went out to point to Mr. Sugu in the "Fiji Sun" front page photo as Mr. Sugu. Second, there was no police identification parade done in this case to test the veracity of PW4's identification evidence. Third, on the beard issue, it appeared the photos in the Fiji Sun showed Mr. Usumaki with the smaller beard and Mr. Sugu with the bigger beard – in any event, there were two men with two beards in the photos.*
  
14. *There are eight factors to be examined and considered in testing the quality of PW4's identification evidence, given the circumstances surrounding the identification. In those factors, in only two, the identification evidence was weak ie. no police identification parade and the mistaken identification through the Fiji Sun newspaper. On the other factors, PW4's identification of Usumaki was strong. Because of the above, I have come to the conclusion that PW4's identification of Mr. Usumaki at the material time at the Bank of South Pacific [BSP] robbery was of a high quality, and I accept the same as true and correct.*
  
15. *Furthermore, the evidence of PW15 and PW18, the accused's own sworn evidence, including PW4's identification evidence of Mr. Usumaki, at the crime scene, provide strong circumstantial evidence to link Mr. Usumaki to the alleged BSP bank robbery. PW15 [DC 5035] said, when the police arrested Mr. Usumaki on Cave Island on 21 September 2012 [4 days after the Naboro Prison Escape], they found \$1,000 to \$2,000 Fijian currencies in his pockets, in \$100 and \$50 bills. PW18 [PC 4309] took photo 30, 31 and 32 of Prosecution Exhibit NO. 2, as evidence of the money allegedly recovered from Mr. Usumaki. I direct myself on "circumstantial evidence" as described in paragraph 41 of my Summing Up. What do all the above evidence suggest? In my view, when looking at all the available evidence in its totality, it does connect Mr. Josaia Usumaki to the alleged BSP robbery at Samabula on 19 September 2012, between 1pm and 2pm. As the final judge of fact, I find as a matter of fact that, Mr. Josaia Usumaki, was one of those men that violently robbed BSP Bank of \$70,000 on 19 September 2012, between 1pm and 2pm. I find the prosecution witnesses against him all credible witness. I reject his denials. I find Mr. Usumaki not a credible witness. For a start, he was an escape prisoner, a serving prisoner, and from the start, had chosen to live outside the law. How can I expect him to be a credible witness, and place any reliance on his denials. On the evidence, I don't accept the assessor's opinion, and I find Mr. Usumaki [Accused No. 1] guilty as charged on count no. 1."*

- [11] PW4 Alim Khan apart from pointing at the second appellant (4<sup>th</sup> accused) said that he identified Tevita Sugu (second appellant/4<sup>th</sup> accused). He also said that he told the police in his statement that it was Tevita Sugu that he identified as one of the robbers.
- [12] I am surprised as to why the learned Judge said in paragraph 11 of the judgment (pg. 507) that the witness (PW4) pointed at Mr. Usumaki (1<sup>st</sup> appellant/1<sup>st</sup> accused) as the man he saw on that day when in fact the record bears out that the witness had pointed to the 4<sup>th</sup> accused (2<sup>nd</sup> appellant). I have even perused the original notes of the learned Judge to check the veracity and found no mistake in the typed script. The 1<sup>st</sup> appellant was convicted on the basis of a positive identification. I find that the learned Judge has erred in finding the 1<sup>st</sup> appellant guilty on the identification evidence.
- [13] The other evidence available against the 1<sup>st</sup> appellant was the fact of finding \$1000 to \$2000 Fijian currencies in the pockets of the 1<sup>st</sup> appellant in \$100 and \$50 bills and the photographs taken (Exhibit 2) of the money recovered. Unfortunately this money was not identified as stolen from BSP Bank on 19 September 2012 and the Exhibit 2 (photographs) is of no value. At the end I find no evidence to convict the 1<sup>st</sup> appellant on the 1<sup>st</sup> charge.

Evidence available against the other appellants (2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup>)

- [14] The 2<sup>nd</sup> appellant was said to be in possession of \$1041 (pg. 771). From the 4<sup>th</sup> appellant (6<sup>th</sup> accused) the amount recovered was \$6300. This money was recovered from the 4<sup>th</sup> appellant's house. The 5<sup>th</sup> appellant was said to be in possession of more than \$3000 Fijian and USD 100 and AUD 100. The money recovered from the 1<sup>st</sup> to the 6<sup>th</sup> appellants was \$8600 (PW19 DC 3036 Amani Satuwere (pg 776)). The witnesses from the BSP Bank during the time of the robbery, namely, Mr. Peni Basalusalu (pg. 850), Mr. Eta Vakarakawa (pg. 806), Thomas Tuimavana (pg. 807) were unable to identify any currency allegedly recovered from the appellants as monies that were robbed from the Bank on 19 September 2012.



[15] With the failure to identify the money recovered from the appellants as belonging to the BSP Bank the prosecution fails to prove that the property recovered was stolen property. The only evidence is that some monies have been recovered. The amount allegedly robbed was \$70,000 (as per the amended information at page 756). With that failure the prosecution fails to prove the appellant's involvement in the robbery and the resultant offence. For those reasons I am of the view that charges against, the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> appellants has to fail. The charges against the 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> appellants have been the commission of the offence of receiving stolen property contrary to section 306 (1) of the Crimes Act. On the failure to prove that the property was stolen, charges relating to section 306 (1) has to fail. On the same footing, owing to a failure to prove that the money recovered was from the loot, the robbery charge also has to fail.

Evidence against the 3<sup>rd</sup> appellant (Kunal Prasad)

[16] The 3<sup>rd</sup> appellant was charged with the 1<sup>st</sup> appellant and others for the robbery of the BSP Bank on 19 September 2012 and stealing \$70,000 cash in Fijian and foreign currencies. As related by the learned High Court Judge in his judgment in paragraphs 16, 17, 18 19 and 20 (pgs. 509 and 510) the 3<sup>rd</sup> appellant has allegedly confessed to the charge statement for aiding and abetting the robbers of the BSP Bank on 19 September 2012 whereby he was found guilty of robbery under section 311 (1) of the Crimes Act. Even if there was such a confession, on the failure of the prosecution to prove the involvement of the appellant to the robbery, this charge too has to fail.

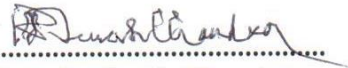
[17] For the above reasons I am of the view that the judgment of the learned High Court Judge should be set aside and the appeals of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> appellants be allowed and the said appellants acquitted.

**Fernando JA**

[18] I agree with the Judgment and conclusions of Basnayake JA.

**Orders of Court**

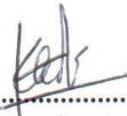
1. Judgment dated 23 February 2015 set aside.
2. Appeals of 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> appellants allowed.
3. 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> appellants acquitted.



Hon. Justice S. Chandra  
**JUSTICE OF APPEAL**



Hon. Justice E. Basnayake  
**JUSTICE OF APPEAL**



Hon. Justice A. Fernando  
**JUSTICE OF APPEAL**