IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO.AAU 057 of 2016
[In the High Court of Suva Case No. HAC 145 of 2014S]

BETWEEN	:	**ERONI QIO**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Appellant in person**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	:	**30 July 2020**
Date of Ruling	:	**31 July 2020**

RULING

[1] The appellant had been charged in the High Court of Suva on one count of aggravated robbery contrary to section 311(1)(a) of the Crimes Decree, 2009 committed on 11 March 2014 at Mulomulo Place, Nakasi in the Central Division.

[2] The information read as follows.

'Statement of Offence

AGGRAVATED ROBBERY: *Contrary to section 311 (1)(a) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

ERONI QIO *with others on the 11th day of March 2014 at Mulomulo Place, Nakasi in the Central Division, stole cash in the sum of $4,110.00, 1 Ripcurl*

*bag valued at $105.00, 1 pair of canvas shoes valued at $100.00, 5 x 22 carat gold chain valued at $3,000.00, 3 pairs of gold earrings valued at $2,000.00, 1 x bracelet valued at $2,000.00, 10 x gold rings valued at $3,000.00, all to the total value of $14,315.00 from **NISHA SHAH** and immediately before stealing used force on the said **NISHA SHAH**.*

[3] After trial, on 13 May 2016 the assessors unanimously found the appellant guilty of aggravated robbery as charged and delivering his judgment on the same day the learned High Court judge agreed with the assessors and convicted the appellant of aggravated robbery. He had been sentenced on 20 May 2016 to imprisonment of 16 years with a non-parole period of 15 years.

[4] The appellant being dissatisfied with the conviction had in person signed a timely appeal against conviction on 20 May 2016 (received by the CA registry on the same day). Thereafter, the appellant had filed several amended grounds of appeal and submissions from time to time. However, he informed this court that he would rely on the grounds of appeal numbered from (a) to (f) and submissions contained in his hand written document signed on 16 October 2017 and received by the Maximum Correction Centre and the CA registry on 23 October 2017 and 27 October 2017 respectively. The respondent's written submissions in reply to the same had been filed on 10 June 2020.

[5] In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. The test for leave to appeal is '**reasonable prospect of success**' (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019) in order to distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 and **Naisua v State** [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds. This threshold is the same with leave to appeal applications against sentence as well.

[6] Grounds of appeal against conviction:

> *'Ground A - That the Learned Trial Judge erred in law in not considering the events which lead to the appellant being before the Court ought to render the prosecution an abuse of process of the Court and a miscarriage of justice in the circumstances of the case".*
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> *Ground B/C – That the Learned trial Judge erred in law in not considering of how the Appellant was identified from the crime scene to the Police by photograph identification and before the Court ought to render the prosecution on poor quality and unsafe identification of Nisha Shah (PW2) that led to unfairness and a miscarriage of justice in the circumstances of the case".*
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> *Ground D - That Appellant submit that the direct by the learned Trial Judge that the fact that the State was not charging the "others" does not affect the validity of the information. However, these direction were not in compliance with the law creating the offence of aggravated robbery offence in Section 311(1)(a) of the Crimes Decree 2009 which stipulates : Section 311(1). A person commits an indictable offence if he or she (a) commits a robbery in accompany with one or more other persons....".*
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> *Ground E – The Appellant submit that as Nisha is the principal witness in this case, the learned Judge should have impressed upon the assessors the fact that such inconsistencies between her evidence before Court and her statement to Police can also affect the credibility of the case. The trial Judge had failed in to considering regarding this matter".*
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> *Ground F - The learned trial Judge erred in law in not evaluating the evidence and making an independent assessment thereof the verdict unsafe and dangerous having regard to the totality of evidence in the case".*
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> *Ground G - This ground (filed on 13 February 2020) related to allegations of incompetency of the appellant's trial Counsel however the appellant voluntarily informed this Court that he does not wish to proceed with this ground and in any event without compliance as to required steps to argue such a ground, as per the guidelines of the Court of Appeal in Chand v State [2019] FJCA 254; AAU 0078.2013 (28 November 2018) this ground cannot be entertained by this court.*

[7] The evidence of the prosecution as summarised by the learned trial judge in the summing-up is as follows.

> *14. 'The prosecution's case was as follows. On 11 March 2014, at about 4 am in the morning, the complainant's (PW2) family were fast asleep in their house at Mulomulo Place, Nakasi, in the Central Division. The house was a two storey building and the complainant's family lived in the top storey. The*

house was a four bedroom house, with a sitting room, dining room, kitchen, bathroom and toilet.

15. The complainant (PW2) was sleeping in the master bedroom at the back, her mother and daughter were sleeping in another bedroom, while her father (PW1) was sleeping in the sitting room. PW2 was awoken from her sleep at 4 am on 11 March 2014, when she heard her mother calling out for her. PW2 rushed to her mother's bedroom and saw 3 masked men threatening her, ransacking the room, and stealing their properties. She managed to turn on the bedroom light, a 4 feet tube light. She met one of the men at the bedroom door and the two struggled.

16. The man put a knife to her head, and they started to push each other. PW2 saw that the man's left fingers were deformed, while they were struggling against each other. She also saw another masked man attacking her father (PW1) in the sitting room. The man was punching PW1 repeatedly. She went to assist her father. Then she went again to assist her mother. PW2 said, she saw the 3 men in her mother's room packing jewelleries and other items in a bag. Thereafter, they fled through the main door. Two 2 feet tube lights were turned on in the sitting room.

17. PW2 said, she followed the last man out the front door. The man went into the porch and bend down to pick up a bag. There was a 2 feet tube light turned on in the porch. The man's mask appeared to have fallen off. PW2 said, she saw the man's face clearly. He was one foot away. PW2 said, this was the same man she struggled with in her mum's bedroom. According to the prosecution, PW2 identified this man to be the accused. The matter was reported to police.

18. An investigation was carried out. The accused was arrested by police on 2 May 2014. He was interviewed by police on 4 and 5 May 2014. He was taken to Nasinu Magistrate Court on 7 May 2014 charged with "Aggravated Robbery" against the complainant. Because of the above, the prosecution is asking you, as assessors and judges of fact, to find the accused guilty as charged. That was the case for the prosecution.

[8] The appellant's position had been described as follows in summary.

20. The defence case was very simple. On oath, the accused (DW1) denied being part of the four masked men that violently robbed the complainant (PW2) and her family on 11 March 2014. He said, he was at his home at Lot 3 Lagakali Road, Kalabu Housing on 10 March 2014. He was with Opetaia Komai, Joji Rakicake and his family. He said, at 10.30 pm on 10 March 2014, Aminiasi Lealeacagi (DW2), came to his house and invited him to drink grog.

21. They went to DW2's house at Lot 10 Jale Street, Kalabu Housing. According to the accused, he and DW2 drank grog until the early morning. They never went anywhere else that night. The accused said, after drinking

grog, he returned to his house. DW2 gave evidence. He confirmed what the accused said.

Ground of appeal (A)

[9] The complaint of the appellant is that certain pre-trial events tainted the proceedings in the High Court. He argues that his unlawful detention beyond 48 hours without being brought before a court of law in violation of section 13(1)(f) of the Constitution and denial of access to a lawyer in violation of section 13(1)(c) of the Constitution amounted to an abuse of process of court and conviction should be set aside due to such violations alone.

[10] Similar arguments based on alleged violation of section 13(1(f) have been advanced in relation to the admissibility of confessional statements. For example in **Heinrich v State** [2019] FJCA 41; AAU0029.2017 (7 March 2019) having considered several previous judicial decisions the Court of Appeal remarked

> *'[32] Considering all the matters discussed above, I am of the view that though an accused in criminal proceedings against him is not prevented from making a collateral attack on his confessional statement on the bases of a breach of Article 13(1)(f) by the investigators, despite Article 44 making specific provision for enforcement of his rights under Bill of Rights, the breach of Article 13(1)(f) by itself would not be a bar for the admission of the caution interview in a court of law. However, the presiding Judge in any criminal proceedings is entitled to consider the fact of wrongful detention, length of time the accused was held under arrest, reasons for the delayed production of the accused before court, what impact the prolonged detention has had on the accused etc. in the broader context of oppression vis-à-vis the voluntariness of his confessional statement towards its admissibility. After the judge rules the caution interview voluntary and admissible, he may consider, whether it should be excluded on the general ground that it may operate unfairly against the accused, if required by the nature of the case or if the circumstances so warrant or demand.*

[11] Therefore, since detention beyond 48 hours of arrest without the accused being brought before a court of law has not been held to be absolutely critical and decisive to the admissibility of a confessional statement, it is *per se* unlikely to be affecting the validity of trial proceedings. In any event, if bringing a person arrested or detained before a court of law not later than 48 hours after the time of arrest is not reasonably

possible that person could be so produced as soon as thereafter in terms of section 13(1)(f) of the Constitution.

[12] It is not clear whether the appellant defended by his counsel raised this issue at the trial so as to afford an opportunity for the law enforcement authorities to explain, if possible, as to why it was not reasonably possible to bring the appellant before a court of law not later than 48 hours after the time of arrest. Nor has he sought constitutional redress. Neither has the appellant demonstrated how and why such a delay, even if unreasonable, in producing him before a judge should *ipso facto* nullify the entire trial. The outcome of the trial proceedings culminating the appellant's conviction could not have been influenced by the initial delay complained of by the appellant.

[13] The same reasoning goes with his complaint of not having been permitted to communicate with a legal practitioner whilst in detention. He had been fully represented at the trial. Even if the appellant's allegation is true (there is no material before me to conclude that in fact he had been denied such communication or at least he had taken up that issue at the trial) it cannot affect adversely the legal proceedings at the trial.

[14] The appellant's both complaints would have had a much deeper significance had a confessional statement made by him whilst in custody been sought to be led at the trial against him. In fact it is the appellant who had produced his cautioned interview at the trial as part of his case because it was exculpatory in nature as far as this charge was concerned. Therefore, the appellant's both complaints do not carry much weight

[15] This ground of appeal has no reasonable prospect of success.

Ground of appeal (B/C)

[16] The appellant's complaint here is based on his identification. His position at the trail had been that it was a case of mistaken identity. He challenges the identification evidence of PW2 - Nisha Shah and submits that the poor quality of her identification should make the conviction unsafe which had led to a miscarriage of justice: therefore, he argues that the conviction should be quashed.

[17] To understand the force of the appellant's submission one has to understand the evidence of identification led at the trial. I quote from the summing-up.

> *28. 'To connect the above aggravated robbery to the accused, the prosecution relied on Nisha Shah (PW2) identifying him in the house at the material time. PW2 said, when her mother called her at 4 am on 11 March 2014, she awoke from her sleep and rushed to her bedroom. She said she turned on her mother's bedroom light, which is a 4 feet tube light. The light logically would light the bedroom up. PW2 said, she saw 3 masked men shouting at her mother. They were ransacking the bedroom. PW2 said she met one of the men blocking the bedroom door. He put a knife to her head, and they started to push each other.*
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> *29. PW2 said the man held her left hand. PW2 said, she noticed the man had deformed fingers in his left hand. Note that when the accused gave evidence, he showed us and admitted that his left fingers were deformed. PW2 said, the man was wearing dark clothings. PW2 said the men were packing jewelleries and other items into a bag. The men then further assaulted PW2's father before they fled through the front door. PW2 said, she followed the last man out. PW2 said, the sitting room light was turned on. These consisted of two 2 feet tube lights. PW2 said, the last man bend down in the porch to pick up a bag. She said, by this time his mask had fallen off. PW2 said, she saw his face. The 2 feet tube light in the porch was turned on. PW2 said, there was no impediment in the way. PW2 said, when she saw his face, he was one foot away. She said, she observed his face for 25 seconds. She talked to him and he swore at her.*
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> *30. PW2 said, the man was i-taukei, well-built and taller than her. She said, he was the same man she struggled with at her mum's bedroom door, and the one with the deformed left fingers. PW2 said, she followed the men to the boundary of their compound. She observed the men fled through a short-cut towards Vavalagi street and onto Bhawani Dayal Primary School. She later called the police. <u>While back at work, PW2 said the police came and saw her. PW2 said, they showed her some photographs and asked her to identify the men who came to her house on 11 March 2014 at 4 am. PW2 said, she saw the photos and picked the man who came to her house on 11 March 2014. PW2 said, the man was in the courtroom. She pointed out the accused as one of the men who came to her house on 11 March 2014.</u>*

[18] Thereafter, the trial judge, as was expected of him, had given the circumstances of the identification and delivered a full Turnbull direction on PW2's identification evidence.

> *31. In assessing the quality of PW2's identification evidence against the accused, I must direct you as follows. First, whenever the case against the accused depends wholly or substantially on the correctness of one*

identification of the accused which the defence may alleged 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, because an honest and convincing witness may be mistaken. Second, you must carefully examine the circumstances in which the identification was made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way? Had the witness ever seen the accused before? How often? Was there any special reason for remembering the accuseds' faces? Was a police identification parade done? Third, are there any specific weakness in the identification made. The answers to the above questions will determine the quality of the identification evidence. If the quality is good, you may rely on the identification evidence. If its otherwise, you may reject it.

32. In this case, PW2 said she saw the accused's face for 20 to 25 seconds. PW2 said, she was standing one foot away from him. PW2 said, the 2 feet tube light in the porch was turned on, so was the two 2 feet tube lights in the adjoining sitting room. So, it would appear there was enough light in the area to show both accused and PW2's face. PW2 said, her observation of the accused's face was not impeded. PW2 said, this was the first time she saw the accused. PW2 said, a special reason for remembering his face was what he did to her that night and when they struggled against each other near her mum's room and she noticing his deformed left fingers. PW2 said, no police identification parade was done in this case.

33. Are there any special weakness in PW2's identification evidence? It was unfortunate that a police identification parade was not held. This would certainly test the veracity of PW2's identification evidence. However, you must take note that the accused refused a police identification parade and also consider his reasons for not doing so. PW2 identified the accused first when the police showed her a number of photographs, and later she identified him in the dock during trial, as one of the persons who came to her house on 11 March 2014. On PW2 identifying the accused through photographs given by police, I must direct you not to look at it in a negative light. The police keep photographs for various reason, and most of it for positive and good reasons. As the accused is presumed innocent until proven guilty beyond reasonable doubt, do not make any negative inferences against the accused as a result of the photos the police showed PW2. If, after considering the above, you think PW2's identification of the accused was good and of a high quality, you may use it to connect the accused to the crime. If otherwise, you will have to work on the other evidence to connect the accused to the crime. It is a matter entirely for you.

[19] Therefore, PW2 had not identified the appellant for the first time in the dock after the incident of aggravated robbery. There was a clear photographic identification when her memory was still fresh with having seen the appellant in the midst of the incident.

[20] However, PW2's evidence was not the only evidence connecting the appellant with the aggravated robbery. PW3's evidence is very much relevant in this regard. The learned trial judge had narrated his evidence as follows in the summing-up.

> *'34. Timoci Kunacei (PW3) said on 11 March 2014, he lived at Lot 1 Vishnu Deo Road, Nakasi, and had worked for Suva Correction Centre for 16 years. PW3 said, on 11 March 2014 at 4.30 am, he was waiting at Bhawani Dayal Secondary School bus stop, with other fellow workers, to go to work. PW3 said Bhawani Dayal Secondary School shared the same compound with Bhawani Dayal Primary School. PW3 said, he heard footsteps behind the bus stop. He looked and saw 4 men in black clothings. PW3 said, he recognized one of them as the accused. He was 5 footsteps away. There was a street light eight footsteps away and it lighted the area. There were other nearby streets lights on the road. PW3 said, he observed the accused's face for 3 minutes. There was a slight obstruction from a small tree, but the wind bend the same and he saw the accused. PW3 said he called out his name, and he and his mates walked away. PW3 said he recognized the accused with his shaved head and his deformed left fingers. PW3 said, he had seen the accused numerous times before on work related matters. PW3 said, the last time he saw him was in February 2014. PW3 said, he had known the accused for 12 years.*
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> *35. PW3 said, he and his fellow workers followed the accused and his friends. They went towards Gulam Mohammed Hardware Shop at Nakasi. PW3 said, he saw the accused and his friends cross the road and fled into the Nasinu Cemetery. Near the Hardware shop, PW3 said he found 2 pinch bars and a cane knife wrapped in a plastic jacket left behind by the accused and his friends. He later took the same to Nakasi Police Station.'*

[21] Then, as with PW2 the trial judge had directed the assessors on the quality of PW3's evidence:

> *36. 'When assessing the quality of PW3's identification of the accused on 11 March 2014 after 4.30 am, please take on board the directions I gave you in paragraph 31 hereof. PW3 said, he observed the accused's face for 3 minutes. PW3 said, the accused was 5 footsteps away from him. PW3 said, a street light was 8 footsteps away from the accused and it lighted the area. There were other street lights along the road. PW3 said, a small tree partly impeded his view, but when it moved because of the wind, he saw the accused's face clearly. PW3 said, he knew the accused well and had known him for the previous 12 years. PW3 said, a special reason for remembering his face was because of his shaved head and his deformed left fingers, which he saw that night. No police identification was done. However, in cases of recognition, it was often said that a police identification parade was often prejudicial to the accused because the witness already knew and would pick him out in a parade.*

37. Are there any specific weaknesses in PW3's identification of the accused? There appeared to be none, but it must be noted that this was an alleged identification of the accused near a bus stop near the crime scene. It was not an identification at the crime scene, that is, at the Shah's family house. In any event, if you think the quality of PW3's identification of the accused was good, you may accept it. If you think otherwise, you may reject it. It is a matter entirely for you.

38. If you accept PW3's identifying the accused at the bus stop on 11 March 2014 after 4.30 am, it could possibly be used as circumstantial evidence against the accused. Circumstantial evidence means that the prosecution is relying upon evidence of various circumstances relating to the crime and the defendant which they say when taken together will lead to the sure conclusion that it was the defendant who committed the crime. The Shah's family had been violently robbed by 4 masked men at Lot 25 Mulomulo Road, Nakasi, on 11 March 2014 at about 4am. According to PW1 and PW2, pinch bars and cane knifes were used in the robbery. PW2 said, she identified the accused as one of the men who violently robbed them that morning. PW2 said, she saw the man with deformed left fingers. PW3 knew the accused had deformed left fingers and saw the same on the accused on 11 March 2014 after 4.30 am. The accused in court showed everyone that his left fingers were deformed. The bus stop, where PW3 identified the accused, was near to Mulomulo Road where the Shah family lived. PW3, at the time, lived at Vishnu Deo Road, which was near Shah family's residence. Mulomulo Road is also near the Gulam Mohammed Hardware Shop at Nakasi. PW3 found 2 pinch bars and a cane knife wrapped with a jacket, which allegedly was abandoned by the accused and his friends when they fled to the Nasinu Cemetery.

[22] Then in general, the trial judge had directed assessors on the evidence of PW2 and PW3 with regard to their evidence as to the culpability of the appellant in the crime.

39. You must examine the above evidence with care. Does the evidence lead you to the sure conclusion that the accused committed the offence? Or does it lead you to the sure conclusion that the accused did not commit the crime. If you think the above evidence lead you to the sure conclusion that the accused committed the crime, you may use the same against him. If its otherwise, you may reject the evidence. It is a matter entirely for you.

[23] The learned trial judge had also addressed the appellant's defense of *alibi* since, if believed, it had the effect of negating the evidence of PW2 and PW3 on his identity at the scene of the crime.

'41. On oath, the accused gave an alibi defence. He said, on 10 March 2014, he was at his home at Lot 3 Lagakali Road, Kalabu Housing. At 10.30 pm, he said, a friend of his, Aminiasi Lealeacagi (DW2) came to his home, and invited him to a grog party. They then left his home to go to DW2's house at

Lot 10 Jale Street, Kalabu Housing. The accused said, they drank grog until the morning. He said, they never left the house. After the grog session, he returned home when it was daylight. In questions and answers 11 to 24 of Defence Exhibit No. 1(B), the accused repeated the above version to the police. The only variation is question and answer 22 where he said he slept over at DW2's home. DW2 also gave evidence for the accused, and confirmed the above version of events.

42. If you find the accused and DW2 as credible witnesses, and you accept their evidence, you will have to find the accused not guilty as charged. If you reject the accused's alibi defence, you will still have to look at the prosecution's whole evidence to find out whether or not they had made you sure of the accused's guilt. The burden to prove the accused's guilt beyond a reasonable doubt is still on the prosecution, even if you reject the accused's alibi defence. The defence is entitled to put in their alibi defence, but that does not mean the burden of proof had shifted to them. It never shifts to them. It is always on the prosecution from the start to the end of the trial.

[24] The learned judge in agreeing with the assessors had stated in the judgment that he accepted the identification evidence of PW2 and PW3.

[25] Therefore, in the totality of the evidence, both direct and circumstantial, and the directions given by the trial judge the appellant second ground of appeal has no respect of success.

Ground of appeal (D)

[26] The appellant argues that the trial judge's direction in paragraphs 12 and 13 of the summing-up that the absence of 'others' as stated in the information in court though it alleges that the appellant committed the offence with 'others' does not affect the validity of the information, was wrong.

*'12. You will notice in the information that the prosecution, in their particulars of offence, began with the phrase, **"...ERONI QIO with others,..."** The prosecution was alleging that the accused committed the offence as part of a group. In other words, the offence was allegedly committed by the accused, while offending in company with others. To make them jointly liable, the prosecution appeared to be relying on the concept of "complicity and common purpose".*

13. "Complicity and common purpose" means as follows. When a person aids, abets, counsels or procures the commission of an offence by another person, he is deemed, as a matter of law, to have committed that offence also, and is punishable accordingly. To aid a person is simply helping a person do

*something easily. To abet is to help or encourage somebody do something wrong. To counsel is to advise someone to do something. To procure is to obtain something that's difficult. The prosecution was alleging in this case that the accused aided and abetted the others to commit "aggravated robbery" on the complainant, at the material time. The fact that the **State** was not charging the "others", does not affect the validity of the information.*

[27] I think that this ground of appeal is frivolous and vexatious. I do not think that there is anything wrong with the impugned direction which had been meant to remove any confusion in the minds of laymen sitting as assessors as to why only the appellant was in the dock whereas the information states that he had committed the offence with others. Obviously, the rest of the group members had not been identified to be brought to books but PW1 and PW2 had clearly spoken to the presence of 04 masked men in the act of robbing their house and only the appellant had been identified.

Ground of appeal (E)

[28] The appellant's complaint is that the trial judge had not addressed the assessors about inconsistency in the evidence of crucial witness PW2 namely that she had not mentioned or not stated accurately about his deformed finger and shaved head in her police statement. It does not appear that she had said anything about the shaved head even at the trial. The appellant had demonstrated that he in fact had a deformed finger/s on his left hand at the trial.

[29] I cannot verify this compliant without the complete appeal record as the summing-up or the judgment makes no reference to such an inconsistency or omission. PW3 had confirmed the appellant's shaved head and deformed left fingers when he saw him in wee hours of the morning on 11 March 2014.

[30] The full court could look into this argument of the appellant with the benefit of the complete appeal record in the light of the legal position set down in **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) where the Court of Appeal held as follows.

'[13] Generally speaking, I see no reason as to why similar principles of law and guidelines should not be adopted in respect of omissions as well. Because, be they inconsistencies or omissions both go to the credibility of the witnesses

*(see **R. v O'Neill** [1969] Crim. L. R. 260). But, the weight to be attached to any inconsistency or omission depends on the facts and circumstances of each case. No hard and fast rule could be laid down in that regard. The broad guideline is that discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance (see **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280).*

Ground of appeal (F)

[31] The appellant finally argues that the learned trial judge had not independently assessed and evaluated the evidence against him in the judgment. He draws the attention to paragraph 3 of the judgment where the trial judge had said *'I have reviewed the evidence called in the trial and I have directed myself in accordance with the summing up I gave the assessors today.'*

[32] However, the learned judge had also said as follows

> *4. The assessors' verdict was not perverse. It was open to them to reach such conclusion on the evidence.*
>
> *5. I agree with the assessors and I accept their opinion. Like them, I find the prosecution's three witnesses credible and I accept their evidence. I accept PW2 and PW3 identification evidence of the accused. I reject the accused's sworn denials. He was not a credible witness and I therefore reject his version of events.*
>
> *6. On the basis of the above, I find the accused guilty as charged and I convict him accordingly.*

[33] The complaint arising from this ground of appeal should be looked at in terms of the duty of a trial judge in agreeing with the assessors as in this case which is different to a situation where he disagrees with the majority of assessors.

[34] I made the following observations on section 237(3) and (5) of the Criminal Procedure Act, 2009 in **Lilo v State** [2020] FJCA 51; AAU141.2016 (13 May 2020) where I had the occasion to deal with section 237 of the Criminal Procedure Act. I reiterated those sentiments in **Ferei v State** [2020] FJCA 77; AAU073.2019 (11 June 2020), **Valevesi v State** AAU 039/2016 (22 June 2020), **Tikoigiladi v State** [2020]

FJCA 86; AAU138.2016 (23 June 2020), **Kumar v State** AAU185 of 2016 (22 July 2020) and **Raitekiteki v State** AAU 011 of 2017 (29 July 2010).

> *'A judgment of a trial judge cannot not be considered in isolation without necessarily looking at the summing-up, for in terms of section 237(5) of the Criminal Procedure Act, 2009 the summing-up and the decision of the court made in writing under section 237(3), should collectively be referred to as the judgment of court. A trial judge therefore, is not expected to repeat everything he had stated in the summing-up in his written decision (which alone is rather unhelpfully referred to as the judgment in common use).*

[35] It was stated in **Kumar v State** [2018] FJCA 136; AAU103.2016 (30 August 2018) by the Court of Appeal

> *'[4] ..... Furthermore there is no requirement for the judge to give any judgment when he agrees with the opinions of the assessors under **section 237(3) of the Criminal Procedure Act** 2009. Although a number of Supreme Court decisions have indicated that appellate courts would be assisted if the judges were to give brief reasons for agreeing with the assessors, it is not a statutory requirement to do so. See: **Mohammed –v- The State** [2014] FJSC 2; CAV 2 of 2013, 27 February 2014.'*

[36] The appellant relies on **Ram v The State** (1960) 7 FLR 80 which, however, dealt with a situation where the trial judge had disagreed with the majority of assessors and it was reiterated in **Singh v State** [2020] FJSC 1; CAV 0027 of 2018 (27 February 2020) where again the trial had disagreed with the majority of assessors. Therefore, in my view the observations by the Supreme Court in both decisions should be confined to situations where the trial judge disagrees and overturns the majority decision of the assessors.

[37] Therefore, this is ground of appeal too does not have a reasonable prospect of success.

Order

1. Leave to appeal against conviction is refused.

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL