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

CRIMINAL APPEAL NO. AAU 068 OF 2015
[High Court Criminal Case No. HAC 147 of 2013]

BETWEEN : **TEVITA GONEVOU**

Appellant

AND : **THE STATE**

Respondent

Coram : **Gamalath, JA**
Prematilaka, JA
Nawana, JA

Counsel : **Ms. Ratu S. for the Appellant**
Mr. Burney L. J. for the Respondent

Date of Hearing : **04 February 2020**

Date of Judgment : **27 February 2020**

JUDGMENT

Gamalath, JA

[1] I have read in draft the Judgment and conclusions of Prematilaka, JA and agree with them.

Prematilaka, JA

[2] This appeal arises from the convictions and sentences of the appellant and two other accused in the High Court of Fiji at Suva. The appellant along with the other two accused had been charged with one count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009 (now Crimes Decree, 2009). All of them had been convicted and the appellant had been sentenced to 08 years and 10 months imprisonment with a non-parole period of 07 years. The details of the offence are as follows.

'Statement of offence

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

Particulars of offence

TEVITA GONEVOU, JOELI SOAQALI and PETERO TUIVAKALEA on the 2nd day of April 2013 at Pacific Harbour in the Central Division, stole $45,281.57 cash from CHANDRESHWARAN GOUNDER.'

Facts in brief.

[3] The appellant (first accused), the mastermind, through a contact in the complainant's supermarket came to know how the complainant does his banking at BSP Bank Pacific Harbour, and the amount of money involved. Since 2012 Christmas, he planned to rob the complainant's supermarket earnings to be collected over 2013 Easter weekend. On 01 April 2013, he contacted the co-appellant (second accused) and planned with him on how to rob the complainant. The latter brought the other co-appellant (third accused) with him to assist in the robbery of the complainant.

[4] On 02 April 2013, in accordance with their plan, co-appellants (accused No.2 and 3) waited near the Pacific Harbour Post Office, awaiting the complainant's banking run. The appellant was nearby to assist the other two. When the complainant's vehicle came towards the Pacific Harbour, one of the co-appellants (accused No.3) ran towards the complainant and grabbed his bag containing $45,281.57. They struggled and fell into a drain and 03rd accused punched the complainant in the face. The other co-appellant

(accused No.2) approached them, picked up a stone and hit the complainant's head three times with it. The complainant was injured and he let go of the bag. The co-appellants (accused No.2 and 3) fled with the bag containing $45,281.57 into the bush. The appellant approached the injured complainant offering to take him to hospital and even got into his case without any invitation by the complainant. Out of the stolen money $41,000/- was recovered by the police from the co-appellants. All three appellants made confessionary statements to the police which were admitted in evidence.

[5] All three accused including the appellant had sought leave to appeal against their convictions and sentences but all of them had also sought to abandon their appeal against sentence by the application dated 02 May 2018. The single judge of this court in the leave ruling delivered on 28 September refused leave to appeal against convictions and decided that the application for abandonment of appeals against sentences should be taken up before the full court.

[6] In the meantime, on 20 November 2019 the two co-appellants (accused No.2 and 3) had filed an application to abandon their appeals against convictions and sentences. Two judges of this court on 11 December 2019 had considered and granted their application and dismissed the appeals. Therefore, at the hearing on 04 February 2020 this court had to consider only the appellant's appeal against conviction and his application to abandon the appeal against sentence.

[7] At the outset, the court in keeping with the guidelines set out in **Masirewa v. State** Criminal Appeal No. CAV0014 of 2008S:17 August 2010 [2010] FJSC 5 (see also **Mani v. State** AAU0087 of 2013: 14 September 2017 [2017] FJCA 119) made inquiries from the appellant regarding the application to abandon the appeal against sentence. His counsel informed this court that the appellant had already tendered a Form 3 under Rule 39 of the Court of Appeal Rules dated 04 February 2020, which is filed of record, stating *inter alia* that he does not wish to prosecute the sentence appeal and that he applies to abandon the same. He confirmed at the hearing that his application to abandon the appeal against sentence was voluntary, had received legal advice and wished to abandon it for the reason that he had already served about half of his sentence and that he had understood that he would not be able to prosecute his appeal against sentence again once

it is dismissed by this court upon his application to abandon the same. Accordingly, the court allowed the application to abandon the appeal against sentence and it should therefore stand dismissed.

[8] Regarding the hearing into the appellant's appeal against conviction, his counsel informed court that she would confine it only to the sole ground of appeal set out in the Amended Notice of Renewal dated 04 February 2020. It was the first ground of appeal among four grounds urged before the single judge at the leave hearing and it was held to be unarguable for the reason that it was not sufficiently particularised. It goes as follows.

> '***THAT*** *the Learned Judge erred in law and fact when he failed to direct the assessors in regards to the inherent weaknesses of the prosecution case.'*

[9] However, the appellant's counsel in the written submissions dated 04 February 2020 had attempted to overcome the obstacle faced at the leave hearing by highlighting one area of the prosecution case which she had considered to be a weakness in the prosecution case so that it could be argued under the sole ground of appeal. The oral submissions made at the hearing on behalf of the appellant were on the same aspect.

[10] Before proceeding further, it would be pertinent to briefly make some comments on the aspect of drafting grounds of appeal, for attempting to argue all miscellaneous matters under such omnibus grounds of appeal is an unhealthy practice which is more often than not results in a waste of valuable judicial time and should be discouraged.

[11] Regarding a rehearing by the Court of Appeal, Rule 35(4) of the Court of Appeal Rules states that a notice of appeal shall precisely specify the grounds (including, if any, questions of law) upon which the appeal is brought. The same should obviously apply to notice of applications for leave to appeal as well. When an appeal is lodged from the High Court in its appellate jurisdiction, the notice of appeal shall state precisely the question of law upon which the appeal is brought [vide Rule 36(1) of the Court of Appeal Rules].

[12] In **Kini v State** AAU0041of 2002S: 26 November 2004 [2004] FJCA 55 the Court of Appeal dealing with section 22(1) of the Court of Appeal Act governing appeals from the High Court in its appellate jurisdiction where such appeals are to be based on grounds of appeal involving a question of law only, said

> *'Rule 35(4) of the Court of Appeal Rules requires the notice of appeal precisely to specify the question of law upon which the appeal is brought.'*
>
> *'Instead, counsel suggested that the question of law which needed to be answered was whether the Appellant had had a fair trial.'*
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> *'In our view, a question framed in these general terms does not comply with the Act or the Rules. Where a question of law is raised, the findings of fact, the conclusions at law and the precise question of law raised must be placed before the Court so that the Court can readily ascertain what is at issue (see e.g. **Police v. McNaugton** [1970] NZLR 889).'*

[13] **Yeung Sze Wail v State** AAU0013d of 97s: 16 January 1998 [1998] FJCA 1 the Court of Appeal in a similar situation said as follows.

> *'The Appellants are to comply with the requirement of Rule 36(1) of the Court of Appeal Rules by stating precisely in their notices of appeal the questions of law upon which the appeal is brought.'*

[14] In **State v Flour Mills of Fiji Ltd** HAA0009 of 2001: 30 August 2002 [2002] FJHC 310 Gates, J (as His Lordship then was) held that

> *'…… It is always helpful, indeed necessary, for grounds of appeal to set out succinctly the nature of the error, so as to enable the Respondent to respond, and the appeal court to comprehend the nature of the Appellant's complaint….'*

[15] In **Josefa v Police** [1953] FJLaw Rp 8; [1946-1955] 4 FLR 71 (17 April 1953) Hyne, C.J. observed as follows

> '*The following observations are based on comments by Du Parcq J. in Rex v Fielding 26 Cr.App.R. p.211. Particulars must be given in the grounds of appeal. If misdirection is complained of it must be stated whether the alleged misdirection is one of law or of fact, and its nature must also be stated. If omission is complained of it must be stated what is alleged to have been omitted. The prosecution is entitled to know precisely what case they have to meet, and it should not be necessary for the Court to go through the record to find out what may be the subject of complaint.*

I feel sure that Counsel will have regard to these observations when next preparing an appeal to this Court from a decision of a Magistrate.'

[16] In **Nakato v State** AAU74 of 2014: 24 August 2018 [2018] FJCA 129 it was held

> '…… This court does not have the benefit of having clear and concise grounds to deal with in this appeal. I consider it appropriate to quote from **Archbold** [2010 Edition, 7-164] with regard to the need for the careful preparation of concise grounds of appeal as highlighted by Lord Chief Justice of England and Wales in the guide that was published by the Registrar of Criminal Appeals in October 2008 titled, '*Guide to Commencing Proceedings in the Court of Appeal (Criminal Division)*' where it is stated as follows;
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> *"As Lord Judge C.J. points out in his forward, the guide provides "invaluable advice as to the initial steps for commencing proceedings" in the criminal division. His Lordship then underlines the importance of well drafted grounds of appeal, which "assist the single judge when considering leave and serve to shorten any hearing before the full court", whereas "ill-prepared and prolix documents necessarily lead to wasted time spent on preparation and unnecessarily protracted hearings."*

[17] In my view, those sentiments are equally applicable to an appeal to the Court of Appeal from the High Court in its original jurisdiction. Therefore, in an appeal to the Court of Appeal from the High Court in its original or appellate jurisdiction, the notice of appeal or the notice of application for leave to appeal should precisely specify the grounds, be they on mixed questions of fact and law or questions of law only, not in general terms but in sufficiently particularized terms so as to enable the Court of Appeal and the Respondent to understand what is at issue without having to undertake an arduous voyage of discovery. I think the drafters of grounds of appeal should be mindful of this mandatory requirement all the time.

[18] Therefore, the single judge was fully justified in rejecting the appellant's first ground of appeal for want of sufficient particulars to determine whether there was an arguable issue for determination of the Court of Appeal.

[19] Nevertheless, in all fairness to the appellant and in the interests of justice I shall now deal with the appellant's complaint brought before this court in the written submissions dated 04 February 2020 and highlighted by his counsel at the hearing under the first ground of appeal rejected by the single judge.

[20] The appellant's submissions contain criticisms of several aspects of the case relating to his conviction. Firstly, he argues that the learned High Court Judge was wrong to have concluded in paragraph 6 of his judgment dated 24 April 2015 that he had accepted the complainant's identification evidence as of high quality. The basis for this assertion is that the appellant had on the first occasion encountered the complainant after the robbery when he offered to take him to the hospital and on the second occasion the complainant on his own had pointed at him in the dock during the trial. The insinuation is that the learned trial judge was not correct to have treated those two instances of identification relating to the appellant as being of 'high quality'. The appellant also argues that there should have been an identification parade and the dock identification itself was wrong and should not have been permitted.

[21] There are mainly two problems with these arguments. Firstly, the learned High Court Judge was not dealing with the identification of the appellant by the complainant in paragraph 6 of his judgment. He was considering the quality of identification of the co-appellants who were the 2nd and 3rd accused respectively at the trial. Therefore, the appellant's submission is misconceived. The relevant portion of paragraph 6 reproduced below makes it abundantly clear.

> *'On accused no. 2 and 3, I agree with the unanimous verdict of the three assessors. They had accepted the prosecution's version of events, and had found them guilty as charged. I accept that the complainant (PW1) properly identified them, at the crime scene, at the material time. I accept that PW1's identification evidence was of a high quality, and I accept them.'*

[22] The other difficulty faced by the appellant is the lack of substance in his submission on the dock identification which becomes clear from the unchallenged evidence of the complainant that he had known the appellant for 16 years and the appellant had called the complainant the 'brother' when he approached him at the scene of the robbery where he had attempted to play the Good Samaritan. Therefore, there was obviously no purpose of holding an identification parade in respect of the appellant. Neither was there anything obnoxious to the complainant pointing at the appellant in the dock at the trial in that context. Therefore, no miscarriage of justice had occurred as a result of the complainant's dock identification of the appellant. Three decisions could be usefully considered with regard to the appellant's complaint on the dock identification.

[23] In **Korodrau v State** AAU090 of 2014:3 October 2019 [2019] FJCA 193 (where the appellant had been with the complainant for about 02 hours and she had ample opportunity of recording his identification features in her mind and the appellant had confessed to the crime) having considered several previous authorities and following the Supreme Court decision in **Naicker v State** CAV0019 of 2018: 1 November 2018 [2018] FJSC 24, the Court of Appeal stated on how a complaint based on dock identification should be dealt with in the following terms and in the end applied the proviso to section 23(1) of the Court of Appeal Act and dismissed the appeal.

> *'[36] Thus, the Supreme Court appears to formulate a two tier test. Firstly, ignoring the dock identification of the appellant whether there was sufficient evidence on which the assessors could express the opinion that he was guilty, and on which the judge could find him guilty. Secondly, whether the judge would have convicted the appellant, had there been no dock identification of him. In my view, the first threshold relates to the quantity/sufficiency of the evidence available sans the dock identification and the second threshold is whether the quality/credibility of the available evidence without the dock identification is capable of proving the accused's identity beyond reasonable doubt. Of course, if the prosecution case fails to overcome the first hurdle the appellate court need not look at the second hurdle. However, if the answers to both questions are in the affirmative, it could be concluded that no substantial miscarriage of justice has occurred as a result of the dock identification evidence and want of warning and the proviso to section 23(1) of the Court of Appeal Act would apply and appeal would be dismissed.* (emphasis added)

[24] The appellant has relied on **Nalave v State** CAV0001 of 2019: 1 November 2019 [2019] FJSC 27 where identification was squarely in issue, a security guard who had been on duty at the club and not seen either of the appellants previously had identified in a dock identification both appellants at trial as having been present at the club on the night in question. The Supreme Court *inter alia* said as given below and allowed the appeal in respect of one of the appellants (whose confession was not sufficient to establish the charge) and dismissed the other appellant's appeal (whose confession implicated her in the murder) by applying the proviso to section 23(1) of the Court of Appeal Act.

> *'[37] Whilst it is correct that a trial judge has a discretion to allow a dock identification, I endorse the suggestion by the editors of Archbold 2018 that "in practice the exercise of such a discretion should not even be considered unless the failure to hold an identification procedure was as a result of the defendant's*

> *default."*[4] *There was, as far as the evidence established, no identification parade and there was no suggestion that either petitioner had refused to attend one. Even had there been an identification parade at which the security guard had been asked if he could recognise anyone, it would have been a worthless exercise if it had taken place after the security guard had seen the accused persons in the custody of the police as suspects. In so far as it lay within the power of the trial judge to permit the dock identification – we do not know whether it merely emerged to his surprise – he ought not to have permitted it.'* (emphasis added)

[25] Therefore, it is clear that in the face of a challenge to a dock identification in appeal the court would look to the other evidence barring the dock identification quantitatively and qualitatively to determine whether a conviction should be upheld or not.

[26] It is clear from the evidence of the complainant in this case that there had not been an identification parade held. However, as far as the appellant is concerned there was no need to hold an identification parade, for he was known to the complainant for at least 16 years. Therefore, the factual situation *vis-à-vis* the dock identification parade in this case is materially different from those of ***Naicker***, ***Korodrau*** and ***Nalave.*** The identity of the appellant was not in issue at all at the trial. Neither was it challenged at the trial. Nor was the dock identification objected to at the trial. The issue was not whether he was present at the scene of the crime but whether he took part in the robbery. That question was answered in the affirmative by the evidence in the form of his caution interview.

[27] Moreover, the recognition of the appellant by the complainant in the dock was not the only or the strongest evidence regarding his identity. In fact, the prosecution or the learned trial judge did not rely on the dock identification in the matter of conviction of the appellant. His caution interview including the confessionary statements therein established his identity in the robbery beyond reasonable doubt. The appellant has not challenged the admissibility of the caution interview in this appeal either. Nor has he complained of any shortcoming by the learned trial judge on his directions to the assessors and to himself as to how the caution interview should be treated as evidence against the appellant.

[28] Therefore, in a factual scenario similar to this case, the decisions in ***Naicker***, ***Korodrau*** and ***Nalave*** have no useful application. They have to be distinguished from the facts of

this case. Even the proviso to section 23(1) of the Court of Appeal Act would not come into play in this appeal. Therefore, I reject the sole ground of appeal urged on behalf of the appellant.

[28] Accordingly, the appellant's appeal against conviction is dismissed as it does not satisfy any of the grounds set out in section 23(1) of the Court of Appeal Act.

Nawana, JA

[29] I agree with the reasons and conclusions of Prematilaka, JA.

The Orders of the Court are:

1. Application to abandon the appeal against sentence is allowed.
2. Appeal against sentence is dismissed.
2. Appeal against conviction is dismissed.
3. Conviction and sentence of the appellant are affirmed.

Hon. Justice S. Gamalath
JUSTICE OF APPEAL

Hon. Justice C. Prematilaka
JUSTICE OF APPEAL

Hon. Justice P. Nawana
JUSTICE OF APPEAL