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

CRIMINAL APPEAL NO.AAU 011 of 2017
[In the High Court of Suva Case No. HAC 285 of 2015]

BETWEEN	:	**MENI RAITEKITEKI**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Mr. M. Fesaitu with Ms. L. Manulevu for the Appellant**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	:	**28 July 2020**
Date of Ruling	:	**29 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)(b) of the Crimes Decree, 2009, one count of rape contrary to section 207(1) and 2(a) of the Crimes Decree, 2009 and one count of false information to public servant contrary to section 201(a) of the Crimes Decree, 2009, committed on 18 August 2015 at Nepani, Nasinu in the Central Division.

[2] The information read as follows.

'FIRST COUNT

Statement of Offence

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

Particulars of Offence

MENI RAITEKITEKI *on the 18th day of August 2015 at Nepani, Nasinu in the Central Division, being armed with an offensive weapon, namely a dagger, stole cash in the sum of approximately $1700.00, assorted jewelries valued at $2000.00, 1 Alcatel mobile phone valued at $50.00, assorted liquor valued at $240.00, 1 Yess brand Note Pad valued at $165.00, 1 Floke model 112 multi meter valued at $1200.00, assorted biscuits valued at $10.00, all to the total value of $5365.00, the properties of PW, with the intention of permanently depriving PW of her properties and immediately before stealing, used force on PW.*

SECOND COUNT

Statement of Offence

RAPE: *contrary to section 207(1) and 2(a) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

MENI RAITEKITEKI *on the 18th day of August 2015 at Nepani, Nasinu in the Central Division had carnal knowledge of PW, by penetrating her vagina with his penis without her consent.*

THIRD COUNT

Statement of Offence

FALSE INFORMATION TO PUBLIC SERVANT: *contrary to section 201(a) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

MENI RAITEKITEKI *on the 18th day of August 2015 at Nepani, Nasinu in the Central Division gave Detective Constable 4255 Binay Kumar, a person employed in the public service, a false name, intending to cause or knowing it to be likely that Detective Constable 4255 Binay Kumar will arrest Meni Raitekiteki if the true state of facts were known to him.*

[3] The appellant had pleaded guilty to the third count. After trial, on 24 November 2016 the assessors unanimously found the appellant guilty of the other two counts as charged and delivering his judgment on 28 November 2016 the learned High Court judge agreed with the assessors and convicted the appellant of the 01st and 02nd charges. He had been sentenced on 07 December 2016 to aggregate sentence of imprisonment of 17 years with a non-parole period of 14 years.

[4] The appellant being dissatisfied with the conviction had in person signed a timely notice of appeal against conviction on 15 December 2016 (received by the CA registry on 24 January 2017) and tendered written submissions on 24 March 2017. The Legal Aid Commission had thereafter filed an amended notice for leave to appeal against conviction and sentence and written submissions on 02 June 2017. He had filed an application in Form 3 to abandon his sentence appeal on 02 April 2019. The respondent's written submissions were tendered at the leave to appeal hearing on 28 July 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 One:*
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> *The Learned Trial Judge erred in law and facts in allowing dock identification by the complainant when there is no prior identification parade made.*
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> *Ground Two:*
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> *The Learned trial Judge erred in law and facts by inadequately assessing and evaluating the complainant's evidence on identifying the Appellant, in doing so, his Lordship would have not relied upon her evidence on identification.*
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> *Ground Three:*

The Learned Trial Judge erred in law and facts by inadequately directing the assessors and himself on how to approach the circumstantial evidence.

Ground Four:

The Learned trial Judge erred in law and facts by inadequately assessing the evidence of Joeli Kete, in doing so, his Lordship would have not relied on his testimony that it is the Appellant whom he had saw.

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

> *'33. The complainant said she is 75 years old. She stays with her son at Nepani and when her son is at work she stays alone in the house. On 18/08/15, around quarter to one while she was watching Sky Pacific, someone came inside her house and covered her mouth with the hand. Then he pulled her up from the chair she was sitting on and punched her face. She had a black out as a result of the punch. Then he dragged her through the passage towards her room, took a belt from her son's room and tied her hands. He also tied her mouth with a T-shirt. She saw him 3-4 times when he was doing this. He also showed her a dagger and told her not to shout. When this was happening she thought she would die. Then this person closed all the curtains in the house and started taking things from her son's room. She saw him taking her son's T-shirts, bottles of liquor, a Multimeter, and a tablet. She saw this as she was sitting in front of the doorway and the person kept on looking at her. She said she saw him packing all items that were taken inside a Sky Pacific bag. Then he went inside her room and took her jewelleries and some money. These were put inside his pocket. Her big earrings which may be about $1000, two small studs which is about $50-$70, a chain and a pendant which were bought in 1968 for $60 and $40 respectively, a gold hand watch which is about $60, a small bank and $1600 were taken from her room.*
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> *34. After that the person went to the kitchen. He ate some biscuits that was there in the kitchen and checked all the pots and pans. Then he went to the son's room and brought two pillows. He told her to lie on the pillows. Then he pushed her onto the pillows and told her in Hindi to take off her panty. He then removed her panty, pulled her legs up and raped her. She said he inserted his penis into her vagina. She shouted because it was very painful. She said she did not consent for him to insert his penis into her vagina. After that he went to her son's bedroom, took all the items that were packed and went out from the back door.*

01st ground of appeal

[8] The appellant argues that the learned trial judge should not have allowed the dock identification of the appellant in the absence of prior identification parade and that the Turnbull directions given could not have cured the miscarriage of justice caused by the dock identification. He relies on **Naicker v State** CAV0019 of 2018: 1 November 2018 [2018] FJSC 24 where the trial judge did not give the jury what has come to be known as a *Turnbull* direction but the evidence of the two crucial witnesses was that they had not seen the appellant before the date of the incident but both had identified him in the dock at the trial. In that factual background, the Supreme Court remarked:

> *'25. The dangers of a dock identification (by which is meant offering a witness the opportunity to identify the suspect for the first time in court without any previous identification parade or other pre-trial identification procedure) have been pointed out many times. ..... Unless there is no dispute over identity, and the defence does not object to a dock identification, it should rarely, if ever, take place. If it takes place inadvertently, a strong direction is needed to the assessors to ensure that they do not take it into account.*
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> *'30. The judge did not give the assessors a direction along these lines, and the Court of Appeal did not consider whether he should have done. Of course, there should not have been a need for the judge to do so as the evidence of Naqaruqara and Draunimasi purporting to identify Naicker should never have been given, and once given the assessors should have been told to ignore it. But since the assessors were having to consider it, an appropriate Turnbull direction was essential.*
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> *'38. The critical question, therefore, is whether, ignoring the dock identifications of Naicker by Naqaruqara and Draunimasi which should not have been allowed, there was sufficient evidence – albeit of a circumstantial nature – on which the assessors could express the opinion that Naicker was guilty, and on which the judge could find Naicker guilty.'*

[9] The Supreme Court referred to **Lotawa v The State** [2014] FJCA 186 AAU0091.2011 (5 December 2014) where the identity of the appellant had never been an issue at the trial and there had been unequivocal evidence of the accused's identity, the observations of Madigan, J on dock identification should be regarded as obiter dictum.

[10] The Supreme Court also referred to **Vulaca v The State** AAU0038 of 2008: 29 August 2011 [2011] FJCA 39, where the Court of Appeal did not disapprove of dock

identification because (i) the witness had seen the suspect twice before, on both occasions under good lighting, and (ii) there had been eight defendants in the dock and though there had been a failure on the part of the judge in respect of the dock identification, nevertheless had gone on to hold that no prejudice had been caused despite lack of Turnbull direction.

[11] In **Wainiqolo v The State** [2006] FJCA 70; AAU0027.2006 (24 November 2006) the Court of Appeal had taken a different stand on a dock identification when the appellant had been known to the complainant previously.

> *'[17] The circumstances in the present case were different from a case where the first identification after the offence takes place in court. This was a case of recognition rather than identification of a stranger and different considerations arise.*
>
> *[18] The witness in this case told the court that she recognised the person committing the robbery as someone she already knew. Whether that recognition was reliable was a matter for the assessors taking into account the Turnbull guidelines against the circumstances in which the sighting occurred as suggested by the learned judge.*
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> *[19] An identification parade would have added nothing because it would not have tested the accuracy of her previous identification of the robber. She believed she had seen a person, a relative, she already knew. The accused is the person she thought she saw. If he had been placed on a parade, she would have been identifying him as that relative, not checking the accuracy of her original recognition of him. More than that, it would appear likely that an identification parade could be prejudicial in such a case because it could be seen as strengthening the initial identification when it is, in fact, no more than an identification of a person on the parade that she already knew and would be looking for.*
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> *[20] Equally the identification in the dock was no more than identifying the accused as the person she knows as a relative. It added nothing to the original recognition which, as we have said, was the identification the assessors needed to consider against the Turnbull warnings.*

[12] In **Korodrau v State** [2019] FJCA 193; AAU090.2014 (03 October 2019), the Court of Appeal dealt with a similar complaint in the case of a first time dock identification and refereed to ***Naicker***.

[13] However, this is not a first time dock identification after the incident but the appellant had been identified by the complainant prior to the dock identification. Thus, the

complainant was only recognising the appellant in the dock who had already been identified by her. The trial judge had given full Turnbull directions and warnings on the identification of the appellant by the complainant at the time of the commission of the offence in paragraph 37, 56-60 and 62 & 63 of the summing-up. I think the trial judge had been very fair by the appellant throughout the summing-up when it came to the issue of identification.

[14] In addition to the evidence of identification at the time of the commission of the offence, the complainant had recognised the appellant when the police brought him to her house in handcuffs on the same day where she had spontaneously started shivering and crying stating that she did not want to see him. Thus, the dock-identification or rather recognition was not a first time identification after the commission of the offence. Therefore, the appellant was not a totally unknown person to the complainant prior to the commission of the offence and she instantaneously recognised him once again upon seeing him after the commissions of the offences on the same day. She had said that she would have recognised him even if he was not in handcuffs. In addition she had also stated that she pointed out the appellant not because he was the only one in the dock but after looking everywhere in the courthouse, she actually recognised him.

[15] The learned trial judge had addressed the issue of identification in the judgment in sufficient detail in paragraph 5-7 where he had placed reliance on the complainant's ability and opportunity available for the identification of the appellant during the commission of the offences though he had not attached any weight to her prior identification for reasons given in paragraph 8.

[16] In the totality of above legal and factual circumstances, I do not think that the appellant has a reasonable prospect of success in appeal on this ground of appeal.

02nd ground of appeal

[17] 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.

[18] 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) and **Kumar v State** AAU185 of 2016 (22 July 2020)

> *'[9] 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).*

[19] Examining the learned trial judge's reasons for agreeing with the assessors on the 01st and 02nd counts, I find that in paragraph 4 of the judgment the trial had stated that he was directing himself in accordance with the summing-up and then in paragraphs 5-8 he had dealt with the complainant's evidence. The learned trial judge had amply directed the assessors on the two maters referred to by the appellant namely the evidence of the complainant that she blacked out after being punched and the fact that appellant was in handcuffs when taken to the complainant's house, in paragraphs 33, 39, 42, 50 and 59 of the summing-up.

[20] I see no reasonable prospect of success in this ground of appeal.

03rd ground of appeal

[21] The appellant argues that there is inadequate direction on the assessors as to how they should approach circumstantial evidence. The learned trial judge had addressed the assessors on circumstantial evidence as follows

> *'64. In the event you are not satisfied that the identity of the accused is established by the direct evidence of the complainant, you may consider whether the identity of the accused is proved beyond reasonable doubt through circumstantial evidence. However, in relation to circumstantial evidence, you should first consider whether the evidence relating to the circumstances is credible and reliable and if so, you should then consider,*

when taken together whether those circumstances will lead to the only inescapable conclusion that it was the accused who committed the crimes.'

'68. When it comes to circumstantial evidence, it is important that you examine it with care as with all evidence and consider whether the evidence upon which the prosecution relies to proof its case is reliable and whether it does prove the guilt of the accused, or whether on the other hand it reveals any other circumstances which cast doubt upon or destroy the prosecution case.'

[22] The appellant's complaint is that the above paragraphs do not capture the observations on circumstantial evidence in ***Naicker*** that *'.... But when taken together leave no doubt about the defendant's guilt because there is no reasonable explanation for them other than the defendant's guilt'*. As pointed out by Justice Keith himself in ***Naicker*** there is no prescribed form of direction on circumstantial evidence as long as the judge gets the essence of it. There is no incantation to recite on circumstantial evidence.

[23] I see no issue with the above direction on how circumstantial evidence should be considered by the assessors. The trial judge had gone onto consider the pieces of circumstantial evidence in the summing-up in paragraphs 40-50 and 65-67 and in paragraph 9-12 of the judgment. In fact the trial judge had considered the circumstantial evidence to have corroborated the evidence of the complainant and it appears that those pieces of circumstantial evidence alone may be sufficient to sustain the verdict against the appellant thus passing the two-tier test formulated in ***Naicker*** and later developed in ***Korodrau*** as follows:

'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.

[24] Though no reference had been made in the summing-up and the judgment it appears that the evidence of the 02nd and 03rd prosecution witnesses may have presented recent complaint evidence of rape and aggravated robbery showing the consistency of the complainant's version.

[25] There is no reasonable prospect of success in this ground of appeal.

04th ground of appeal

[26] The appellant cast doubt on the evidence of the fourth witness for the prosecution Joeli Kete as to whether he had seen the appellant in close proximity to the complainant's house or coming from its direction soon after cries were heard from that direction.

[27] The trial judge had brought to the attention of assessors the evidence of Joeli Kete in paragraphs 43-46, 49 and 66 and himself examined his evidence in paragraph 9 and 10 of the judgment. The judge had discussed all aspects of his evidence with the assessors and then directed himself accordingly.

[28] There is no reasonable prospect of success in this ground of appeal too.

Order

1. Leave to appeal against conviction is refused.

COURT OF APPEAL FIJI

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL