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

CRIMINAL APPEAL NO.AAU 080 of 2017
[In the Magistrates Court of Suva Case No. 1724 of 2016]

BETWEEN : **SAMUELA TUIBEQA VUNIWAWA**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Mr. I. Ramanu for the Appellant**
: **Ms. R. Kumar for the Respondent**

Date of Hearing : **17 June 2020**

Date of Ruling : **25 June 2020**

RULING

[1] The appellant had been arraigned in the Magistrates Court of Suva on a single count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009 committed with two others on 29 October 2016 at Suva regarding property belonging to Anit Ram.

[2] The information read as follows.

'Statement of Offence

AGGRAVATED ROBBERY: contrary to section 311(1) (a) of the Crimes Act 2009.

Particulars of Offence

> *SAMUELA TUIBEQA VUNIWAWA with two others on the 29thh day of September 2016 at Samabula, Suva in the Central Division robbed one ANIT RAM and stole 1 Lenovo Mobile Phone valued at $500.00 ,cash $80.00 ,all to the total value of $580.00 , the property of ANIT RAM and before the robbery used force on ANIT RAM.'*

[3] After trial, delivering his judgment on 05 May 2017 the learned Magistrate found the appellant guilty of the charge of aggravated robbery. He had been sentenced on the same day to 10 years of imprisonment with a non-parole period of 08 years.

[4] The appellant being dissatisfied with the conviction had in person signed a timely application for leave to appeal against conviction on 15 May 2017 and his solicitors had then filed an amended notice of appeal against conviction on 02 June 2017. Skeleton submissions had been filed on behalf of the appellant on 09 August 2019. The respondent's written submissions had been tendered on 02 June 2020.

[5] 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 and **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). This threshold is the same with timely leave to appeal applications against sentence as well.

[6] ***Grounds of appeal against conviction***

> *1) That the learned magistrate erred in law and in fact in allowing the dock identification of the application, however, failed to observe its credibility in that PW1 Anit ram did not give description of the alleged robbers when he gave his statement to the police of the 29th of September 2016, the same day the alleged of offence took place.*
>
> *2) That the learned Magistrate erred in law and in fact in allowing the evidence of PW7 WDC Lice on oath without any record from the disclosures to substantiate the finding of the wallet and the I.D from the Taxi.*

3) That the learned Magistrate erred in law and in fact in accepting the identification evidence admissible:

(i) without a proper identification parade conducted
(ii) without a proper photographic identification conducted in that only a single photo of the applicant was shown to the complainant (PW1), Anit Ram, with the applicant's name on it.

[7] The evidence of the case as summarised by the learned Magistrate is as follows.

'3. PW1 was Anit Ram a taxi driver by profession and said the accused and 2 others hired his taxi from base at Namadi height and went to Tikaram place. The accused was sitting in the front passenger seat. It was 4.45 pm and in Tikaram place they said they were looking for a home. The accused took a wallet and was trying to pay when the person behind also said he would also pay. Suddenly the witness saw one in front with a knife and he grabbed with him. He said he would kill the driver. One from behind came and pulled him from the taxi and another one tried to drive the car. The witness turned off the car and kicked the car key away. They took the phone (MFI-1) and $80.00 was missing after that. PW1 got injuries and after going to the hospital he came to the police station. The police found the wallet in front passenger seat and later found the mobile. The police showed him the ID of the accused (MFI-3) and his wallet (MFI-4). PW1 also identified the accused in the court.

4. In cross-examination the witness said the accused was sitting next to him and he noticed the face. There was no obstruction. In re-examination PW1 said the police officer gave the ID card and through that he identified the accused and could have identified in an ID parade too if given the opportunity. The wallet found in the car was not his.

9. PW6 was Adi Senibiya who was in possession of the phone. After refreshing the memory she first said on 29/09/2016 around 7pm whilst she was preparing the dinner a person gave the phone. After a break she said it was given by Tui ,the accused who was present in the court. In cross-examination by the accused she said she does not know Tui, but when asked by this court she said she knows him previously from the town.

10. PW7 was WDC Lice who was the investigating officer. She complied the docket and marked the phone, wallet and ID and the medical report as PE4, PE5 and PE6 respectively. In cross-examination the witness said she found the wallet and the Id from the car when it was brought to the station on the same date.

11. For the defence the accused gave evidence. He said for an earlier case in Nadi the police seized his wallet and Id and the police did not return them. When he was in aunty place the police came and arrested him. They said they found his wallet in the taxi. In cross-examination the accused denied giving the phone to PW6.

01st ground of appeal

[8] The appellant's complaint is that the learned trial judge had wrongly allowed dock identification and not addressed himself on the complainant's credibility as he had failed to give the description of the appellant to the police. The learned Magistrate has correctly identified the main disputed point in the case as the identity of the appellant in paragraph 16 of the judgment and then dealt with it as follows.

'17. The complainant identified the accused in the court and the accused objected for this dock identification. At that time I allowed it and these are the reasons for my decision.

18. It has been held that without(sic) a first time dock identification in the court is not safe. It is obvious the accused is the only person standing in the dock and asking the witness to identify that person is tantamount to a leading the witness.

*19. In **Lotawa v State** [2014] FJCA 186; AAU0091.2011 (5 December 2014) his Lordship Justice Madigan held: 'Dock identification is completely unreliable in the absence of a prior foundation of identity parade or photograph identification because it then becomes the ultimate leading question. The answer is obvious to any witness -- the person to be identified is sitting in the dock. The Privy Council has examined the merits and demerits of such identification in the case of Holland v. HM Advocate(The Times June 1, 2005) where it was held that such an identification was not per se incompatible with a fair trial but other factors must too be considered such as whether the accused was legally represented, what directions the Judge gave to the finders of fact on this identification and how strong the prosecution case was in all other respects……'*

20. In this case there was no ID parade as shown through the evidence. But the complainant identified the accused through the ID card that was shown by the police soon after the robbery. This ID was found in his car. Therefore I do not think an ID parade would have added anything more for this identification.'

[9] Thus, the learned Magistrate had allowed the dock identification of the appellant because there had already been photograph identification of the appellant by the

complainant. In **Wainiqolo v The State** [2006] FJCA 70; AAU0027.2006 (24 November 2006) which is very much relevant to the case in hand it was held

> *'[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.*
>
> *[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.*
>
> *[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.*

[10] 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. However, this is not a first time dock identification after the incident but the appellant had been identified by the photograph on his ID card (*i.e.* photograph identification) prior to the dock identification. Thus, the complainant was only identifying the appellant in the dock who had already been identified by him at the police station from the photograph on his own ID card.

[11] In **Vulaca v The State** AAU0038 of 2008: 29 August 2011 [2011] FJCA 39, 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**.**

[12] Therefore, I am of the view the learned Magistrate need not have directed himself on first time dock identification *i.e.* to give it little or no weight or warned himself of the undesirability in principle and dangers of a dock identification, as the complainant was identifying the appellant in the dock whom he had identified previously from the photograph on his ID card. Therefore, the tests formulated in **Naicker v State** CAV0019 of 2018: 1 November 2018 [2018] FJSC 24 and ***Korodrau*** on first time dock identifications need not be applied in this case. Even if those tests were to apply it is clear that apart from the photograph and dock identification there was the circumstantial evidence of admittedly the appellant's wallet and his ID card being found inside the taxi soon after the robbery that would justify the conviction.

[13] Moreover, the learned Magistrate had given his mind to the identification of the appellant in his judgment in sufficient measure and had considered Turnbull directions on identification as referred to in ***Korodrau*** and **Saukelea v State** [2018] FJCA 204; AAU0076.2015 (29 November 2018) to conclude that the prosecution had established the identity of the appellant as seen from the following paragraphs.

> *'21. Now I have to consider whether the complainant could have properly identified the accused on that day. This brings me to the guidelines laid down by Court of Appeal of England in **R v Turnbull** (1977) Q.B.224.*
>
> *22. Lord WidgeryCJ in **R v Turnbull**(supra) said :*
> *"……."*
>
> *23. Accordingly when considering identification evidence the court has to consider the following grounds:*
>
> *(i) has the witness known the accused before?*
>
> *(ii) For how long did the witness have the accused under observation and from what distance?*

(iii) Was it more than a fleeting glance?

(iv) In what light was the observation made?

(v) Was there any obstruction to his view?

24. Having considered above grounds, if I am satisfied about the identification then I can act on that. <u>According to the complainant, the accused was sitting next to him in the front passenger seat from Nadera to Tikaram place and he has time to see the face. There was no obstruction for his view and there was enough light to see the face (4.45 pm). This is not a fleeting glance .Hence I accept this identification as correct in this case and can rely (sic)by me</u>.

26. The complainant said he took the vehicle to the police station and there the police found the wallet and ID of the accused in the front passenger seat. In fact the IO said she found them on the same date in the vehicle. <u>The accused also admitted the wallet and the ID belonged to him</u>.'

02nd ground of appeal

[14] Without the benefit of the full appeal record, I cannot examine the tenability of the argument of the appellant under thus appeal ground. From the judgment I cannot find that the appellant had objected to the evidence of PW7 WDC Lice who had found the appellant's wallet and his ID card inside the complainant's car.

3rd ground of appeal

[15] An identification parade had admittedly not been held and it is not an indispensable requirement on all occasions. The necessity and evidentiary value of identification at a parade depends on the facts and circumstances of each case. As pointed out by the learned Magistrate, in the light of the fact that the complainant had already identified the appellant by the photograph in his ID card, identification at a parade one again would not have made a difference or added more weight and value to the reliability of identification (see ***<u>Wainiqolo</u>*)**.

[16] As for the appellant's complaint that only a single photograph had been shown to the complainant, it should be borne in mind that it was not the decision of the investigators to show him only one photograph of the appellant but it was due to the fact that there was only one photograph on the appellant's ID card and that was the one shown to the complainant.

[17] In this context, the learned Magistrate had dealt with the appellant's defense regarding the presence of his wallet and the ID card inside the complainant's taxi as follows.

> *'30.To neutralize this crucial evidence the accused said this wallet and the ID was seized by the police previously in another case in Nadi. He was trying to suggest the police had planted these to implicate him in this case. The police witnesses denied that they had the wallet with them before this incident. Further the complainant said he saw the wallet with the accused on that day when he took the money to pay. Accordingly I find this version of the accused is not credible'.*

[18] Therefore, there is no reasonable prospect of success in the appellant's grounds of appeal against conviction.

[19] Before parting with this ruling I am constrained to make the following observations on the sentence (though there is no appeal against sentence) in the interest of justice. It is clear from the sentencing order that the learned Magistrate had simply applied the sentencing tariff of 08-16 years of imprisonment set in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) and taken 10 years as the starting point. The tariff in ***Wise*** was set in a situation where the accused had been engaged in home invasion in the night with accompanying violence perpetrated on the inmates in committing the robbery.

[20] The factual scenario in this case does not fit into the kind of situation the Supreme Court dealt with in ***Wise*.** Neither is this a case of simple street mugging as identified in **Raqauqau v State** [2008] FJCA 34; AAU0100.2007 (4 August 2008) where the Court of Appeal set the tariff for the kind of cases of aggravated robbery labelled as 'street mugging' at 18 months to 05 years with a qualification that the upper limit of 5 years might not be appropriate if certain aggravating factors identified by court are present.

[21] Then came **State v Ragici** [2012] FJHC 1082; HAC 367 or 368 of 2011, 15 May 2012 where the accused persons pleaded guilty to a charges of aggravated robbery contrary to section 311(1) (a) of the Crimes Decree 2009 and the offence formed part of a joint attack against three taxi drivers in the course of their employment. Gounder J. examined the previous decisions and took a starting point of 06 years of imprisonment.

> *'[10] The maximum penalty for aggravated robbery is 20 years imprisonment.*
>
> *[11] In **State v Susu** [2010] FJHC 226, a young and a first time offender who pleaded guilty to robbing a taxi driver was sentenced to 3 years imprisonment.*
>
> *[12] In **State v Tamani** [2011] FJHC 725, this Court stated that the sentences for robbery of taxi drivers range from 4 to 10 years imprisonment depending on force used or threatened, after citing **Joji Seseu v State** [2003] HAM043S/03S and **Peniasi Lee v State** [1993] AAU 3/92 (apf HAC 16/91).*
>
> *[13] In **State v Kotobalavu** & Ors Cr Case No HAC43/1(Ltk), three young offenders were sentenced to 6 years imprisonment, after they pleaded guilty to aggravated robbery. Madigan J, after citing **Tagicaki & Another** HAA 019.2010 (Lautoka), **Vilikesa** HAA 64/04 and **Manoa** HAC 061.2010, said at p6:*
>
> > *"Violent robberies of transport providers (be they taxi, bus or van drivers) are not crimes that should result in non- custodial sentences, despite the youth or good prospects of the perpetrators...."*
>
> *[14] Similar pronouncement was made in **Vilikesa** (supra) by Gates J (as he then was):*
>
> > *"violent and armed robberies of taxi drivers are all too frequent. The taxi industry serves this country well. It provides a cheap vital link in short and medium haul transport .... The risk of personal harm they take every day by simply going about their business can only be ameliorated by harsh deterrent sentences that might instill in prospective muggers the knowledge that if they hurt or harm a taxi driver, they will receive a lengthy term of imprisonment."*

[22] **State v Bola** [2018] FJHC 274; HAC 73 of 2018, 12 April 2018 followed the same line of thinking as in ***Ragici*** and Gounder J. stated

> *'[9] The purpose of sentence that applies to you is both special and general deterrence if the taxi drivers are to be protected against wanton disregard of their safety. I have not lost sight of the fact that you have taken responsibility for your conduct by pleading guilty to the offence. I would have sentenced you to 6 years imprisonment but for your early guilty plea…'*

[23] I said in **Usa v State** [2020] FJCA 52; AAU81.2016 (15 May 2020):

> *'Therefore, it appears that the settled range of sentencing tariff for offences of aggravated robbery against providers of services of public nature including taxi, bus and van drivers is 04 years to 10 years of imprisonment subject to aggravating and mitigating circumstances and relevant sentencing laws and practices.'*

[24] The learned trial judge had correctly identified the seriousness of the offence committed by the appellant by quoting from **Koroivuata v The State** [2004] FJHC 139; HAA0064.2004 (20 August 2004) as follows

> *'Violent and armed robberies of taxi drivers are all too frequent. The taxi industry serves this country well. It provides a cheap vital link in short and medium haul transport. Taxi drivers are particularly exposed to the risk of robbery. They are defenseless victims. The risk of personal harm they take every day by simply going about their business can only be ameliorated by harsh deterrent sentences that might instill in prospective muggers the knowledge that if they hurt or harm a taxi driver they will receive a lengthy term of imprisonment.'*

[25] However, by taking a starting point of 09 years following the sentencing tariff guidelines for aggravated robberies involving home invasions set out in ***Wise*****,** the learned Magistrate has acted upon a wrong principle resulting in the sentence of 10 years of imprisonment imposed on the appellant. Instead the learned trial judge should have followed the sentencing guidelines set for cases involving providers of public transport such as taxi, bus or van drivers.

[26] Therefore, the sentencing error above highlighted offers a real prospect for the appellant to succeed in appeal against sentence if he pursues that course of action by way of an application for enlargement of time.

[27] The appellant, if he decided to do so, should be mindful of the guidelines to be followed for leave to appeal when a sentence is challenged in appeal (vide **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; **House v The King** [1936] HCA 40*;* (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal

No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011), conditions to be satisfied in seeking extension of time (vide **Rasaku v State** CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4**, Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17 and the test of 'real prospect of success'(vide **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019).

Order

1. Leave to appeal against conviction is refused.

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL