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

CRIMINAL APPEAL NO.AAU 168 of 2019
[In the High Court at Suva Case No. HAC 114 of 2018]

BETWEEN	:	**KEVERIELI DUIGIGIDIGO WAQA (GABERIELI WAQA)**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, ARJA**
Counsel	:	**Appellant in person**
	:	**Ms. E. A. Rice for the Respondent**
Date of Hearing	:	**27 August 2021**
Date of Ruling	:	**03 September 2021**

RULING

[1] The appellant (02nd accused in the High Court) had been indicted with another (01st accused in the High Court and the appellant in AAU 0096 of 2019) in the High Court at Suva on a single count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009 committed on 11 March 2018 at Kinoya in the Central Division.

[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

> ***MATAIYASI NAVUGONA*** *and* ***KEVERIELI DUIGIGIDIGO WAQA*** *on the 11th day of March, 2018 at Kinoya in the Central Division, in the company of each other robbed, Reapi Kawanikailekutu of $249 in case cash, the property of Reapi Kawanikailekutu.*

[3] Following the summing-up, the assessors had expressed a unanimous opinion of guilty against the appellant (25 March 2019). The learned High Court judge in his judgment dated 29 March 2019 had agreed with the assessors and convicted the appellant. He had been sentenced on 28 May 2019 to 04 years of imprisonment with a non-parole period of 03 years.

[4] The appellant being dissatisfied with the conviction had in person lodged a timely appeal against conviction (29 April 2019). He had preferred additional grounds of appeal and written submissions on 29 September 2020. The respondent's written submissions had been tendered on 26 February 2021. The appellant was heard *via* Skype at the leave to appeal hearing.

[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), **Chaudhry 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.

[6] Grounds of appeal urged by the appellant against conviction are as follows:

> ***Conviction***
>
> ***Ground 1***
>
> *THAT the Learned Trial Judge erred in law when he failed to direct the assessors and for caution them about the dangers of relying on photographic identification.*
>
> ***Ground 2***
>
> *THAT the Learned Trial Judge erred in law when he failed to inquire to the state counsel as to the reasons as to why the interviewing officers of the appellant is not coming to give evidence since he was the material witness for both state and defence. Failure by the state to call material witness has caused prejudiced to the appellant.*
>
> ***Ground 3***
>
> *THAT the Learned Trial Judge erred in law when he failed to put adequately to the assessors the defence case in regard to the Alibi Defence.*
>
> ***Ground 4***
>
> *THAT the Learned Trial Judge erred in law at paragraph 64 of his summing up when he directed the assessors in relation to defence to create a reasonable doubt in prosecution case.*

[7] The evidence of the case had been summarised by the learned trial judge as follows in the sentencing order:

> *'5. The facts of the case were that the complainant was running a car wash at Kinoya. On the 11th of March, 2018, the complainant was at the said 'car wash' with her co-worker and her one year old daughter. In the morning, both of you approached the room of the 'car wash' and pulled open the grill door. You forcefully entered the room and took the days' cash collection from the cashier, three mobile phones and fled the scene in a taxi when the complainant was yelling for help in fear.'*

01st ground of appeal

[8] The defense had challenged identification at the trial and in particular photographic identification on 23 April 2018. The prosecution had relied on eye-witness account of

the complainant and photographic identification to establish the identity of the appellant.

[9] The trial judge had directed the assessors on photographic identification at paragraphs 33 – 36, 45, 47 and 61 of the summing-up. The appellant submits that the complainant had already identified him by his name Gabby Waqa and informed the police on 11 March 2018. Thus, when photographic identification was conducted he was already in remand and charged with the offending. There was no police identification parade conducted. The appellant submits that the trial judge should have cautioned the assessors about the photographic identification.

[10] The trial judge had addressed the assessors on this aspect at paragraph 36, 47 and 61 of the summing-up:

> *'36. According to Fiji Police Force Standing Orders, photographs should not be shown to a witness if the circumstances allow of persona identification, e.g. when there is already a suspect who is readily available to be asked to stand on an identification parade. PC Inoke explained why he had to deviate from the proper procedure as set down by Police Force Standing Orders. He said that the photograph identification was used only for them to be satisfied as to Reapi's claim that she had already known the suspects. It is for you to decide what weight to be attached to the photograph identification evidence and if it has helped at all to bolster the identification evidence adduced by Reapi.'*
>
> *47. The Constable Inoke said that on the 23rd of April 2018 he was instructed by the investigating officer DC Tuimereke to conduct the photograph identification process. He was given 10 photographs of likely suspects to be shown to the victim Reapi for her to identify the suspects. On the 23rd April, 2018 he went to Kinoya Car Wash because the witness Reapi was unable to come to court after giving birth. He went in his private car with DC Tuimereke and displayed the photographs on the car for the victim to identify the suspects. He said that Reapi picked two photographs and clearly identified the two boys who had robbed the Kinoya Car Wash. He tendered in evidence the photographs which Reapi had identified as PE.1 and PE.2. He said that the purpose of the photograph identification parade was to get the identification confirmed from the victim who had already known the suspects beforehand.'*

61. *The Prosecution also led evidence of photograph identification done nearly one month after the alleged incident. The Prosecution relies on photograph identification to bolster the identification evidence of the complainant who had said that she knew the suspects already. The Defence alleges that the photograph identification parade was improperly conducted. The police officer who conducted the photograph identification parade admits that it was not conducted properly. However he says that it was conducted only to get a confirmation from an eye witness who already knew the suspects. It is up to you to decide what weight you should give to the identification evidence of Reapi. If after a consideration of all the evidence the quality of the identification remains good the danger of mistaken identification is lessened. Taking into consideration the directions I have given to you, you decide if the complainant is an honest witness and whether she positively identified the accused.'*

[11] The trial judge had considered this matter in the judgment too:

8. *The Prosecution also led evidence of photograph identification done nearly one month after the alleged incident. The Prosecution relies on photograph identification to bolster the identification evidence of the complainant who had said that she had known the suspects already.*

9. *The Defence alleges that the photograph identification parade was not conducted properly. PC Thomasi who conducted the photograph identification parade admits that it was not conducted strictly in accordance with the Fiji Police Standing Orders. However the photograph identification process in this case was conducted only to get a confirmation from an eye witness who had said that she already knew the suspects.*

12. *'The complainant said that she knew the 2nd accused very well before the incident as a person who used to hang around in the area. She had given 2nd accused's nick name Gabby to police soon after the incident. Both 2nd accused's mother and sister confirmed that the 2nd accused is referred to as Gabby. The complainant had even seen the 2nd accused being engaged in a fight with an Indian girl at the car wash on an earlier occasion. That is when she had come to know of his nickname.*

15. *'I am satisfied that the complainant is an honest and reliable witness and she had positively identified both the accused. After a careful consideration of all the evidence, I am satisfied that the quality of the identification remains good and the danger of mistaken identification is eliminated.*

[12] Thus, the trial judge had adequately put the assessors on guard regarding photographic identification. In any event, it was only supplementary to the complainant's recognition of the appellant who was already known to her and she had informed the police that he was one of the offenders prior to the photographic identification. Therefore, any irregularity associated with the photographic identification cannot cause any miscarriage of justice to the appellant.

[13] Therefore, this ground of appeal has no reasonable prospect of success.

02nd ground of appeal

[14] The appellant complains that the trial judge had not inquired from the prosecution as to why the interviewing officer was not coming to give evidence. He argues that he was a material witness for both the prosecution and defense to question him whether he checked the *alibi* and if not why.

[15] It does not appear that the prosecution had relied on the appellant's cautioned interview to establish his identity. Therefore, there was no need to summon the interviewing officer. If the appellant wished to call him as a witness regarding his *alibi* his counsel could have done so. Calling witnesses to prove its case is a prosecutorial discretion and the trial judge had no role to play in that exercise.

[16] Therefore, this ground of appeal has no merits at all.

03rd ground of appeal

[17] The appellant contends that the trial judge had failed to put his *alibi* defense adequately to the assessors. There is nothing to indicate that the appellant had given *alibi* notice as required by law.

[18] However, the trial judge had devoted paragraphs 37, 38, 52-56 and 63 to discuss the appellant's *alibi* defense in great detail. He has considered it in the judgment but disbelieved.

'11. The 2nd accused completely denies that he took part in this robbery. The Defence took up the defence of alibi to discredit the version of the Prosecution.

13. The two alibi witnesses are close relatives of the 2nd accused. They appeared to be interested witnesses as far as the Defence case is concerned. They admitted that they will do anything to protect the 2nd accused. <u>The statements of alibi witnesses had been recorded even after the trial had begun.</u> After a passage of time, there is no special reason for them to remember the date on which the robbery took place and say that the accused was home on that particular date. The alibi witnesses are not reliable. They failed to create any doubt in the identification evidence the Prosecution.'

[19] Therefore, this ground of appeal has no merits.

<u>04th ground of appeal</u>

[20] The appellant's complaint is aimed at paragraph 64 of the summing-up where the trial judge *inter alia* had stated that the assessors should consider whether the appellant's version was sufficient to establish a reasonable doubt in the prosecution case.

64. It is up to you to decide whether you could accept the version of the Defence and that version is sufficient to establish a reasonable doubt in the prosecution case. If you accept the version of the Defence, you must not find the accused guilty. Even if you reject the version of the Defence still the Prosecution should prove its case beyond reasonable doubt.

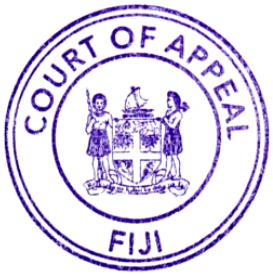
[21] The trial judge had said what he said at paragraph 64 in the context of discussing the appellant's *alibi* defense and he had not attempted to shift the burden of proof at all which had been dealt quite adequately at paragraphs 7, 8 and 65 of the summing-up:

'65. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies with the Prosecution throughout the trial, and never shifts to the accused, at any stage of the trial. The accused are not required to prove their innocence, or prove anything at all.'

[22] Therefore, this ground of appeal has no merits.

Order

1. Leave to appeal against conviction is refused.



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Hon. Mr. Justice C. Prematilaka
ACTING RESIDENT JUSTICE OF APPEAL