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

CRIMINAL APPEAL NO.AAU 174 of 2019
[In the High Court at Suva Case No. HAC 299 of 2017S]

BETWEEN	:	**LORIMA KOROITAMANA**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Appellant in person**
	:	**Ms. E. Rice for the Respondent**
Date of Hearing	:	**16 February 2021**
Date of Ruling	:	**17 February 2021**

RULING

[1] The appellant with two others had been indicted in the High Court of Suva on two counts of aggravated robbery contrary to section 311(1) (a) of the Crimes Act, 2009 committed on 25 September 2017 at Sports City, Suva in the Central Division.

[2] The information read as follows.

"Count 1

Statement of Offence

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

Particulars of Offence

ILAITIA SARAI, LORIMA KOROITAMANA with others on the 25th September, 2017 at Sports City, Suva in the Central Division, in the company of each other, robbed ROSELINE MUDALIAR of USD$50.00, GBP$600.00, AUD$195.00, NZ$455.00, FJD$2,921.50 and 3x blank cheques valued at FJD$4,221.50, the property of REAL FOREX EXCHANGE OFFICE.

Count 2

Statement of Offence

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

Particulars of Offence

ILAITIA SARAI, LORIMA KOROITAMANA with others on the 25th September, 2017 at Sports City, Suva in the Central Division, in the company of each other, robbed ROSELINE MUDALIAR of a handbag and FJD$500.00 cash, the property of ROSELINE MUDALIAR.

[3] After the summing-up, the assessors had expressed a unanimous guilty opinion against the appellant on both charges on 13 May 2019. The learned High Court judge in his judgment on 13 May 2019 had agreed with the assessors and convicted the appellant as charged. He had been sentenced on 14 May 2019 to 12 years of imprisonment each (to run concurrently) for the two offences with a non-parole period of 11 years.

[4] The appellant being dissatisfied with the conviction and sentence had purportedly submitted an appeal in person to the Court of Appeal registry through Suva Correction Centre on 21 May 2019. However, a copy of the original appeal is not available in the record. The appellant had affirmed to filing the timely appeal in his affidavit dated 20 August 2020 and mentioned this fact in his letter to the CA registry on 28 April 2020. Considering the matters mentioned in his affidavit which I tend to believe, I am inclined to treat his appeal as timely. His amended grounds of appeal and additional grounds of appeal against conviction and sentence had been received on 09 December 2019 and 29 June 2020 respectively. He had preferred written submission on 14 September 2020 but not made any submissions on the sentence. The state had filed its submissions on 12 October 2020 on the conviction appeal.

[5] In terms of section 21(1)(b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence 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.

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

> '***Ground 1-*** *Defective particulars of the offence.*
>
> ***Ground 2, 3, 4, 6, 7 and 8 -*** *Dock Identification*
>
> ***Ground 5-*** *Paragraph 17 of the summing-up*

[7] The prosecution evidence of the case as summarised by the learned High Court judge in the sentencing order is as follows. The appellant was accused No.3 at the trial and he remained silent.

> *2. The brief facts were as follows. The female complainant was Ms. Roseline Mudaliar (PW1). She was on 25 September 2017 employed as a teller for Real Forex Exchange Office at Sports City, Suva in the Central Division. At 8.30 am, she opened the main door of the Real Forex Exchange Office at Sports City. She had just started work. She then went into her office, which was separated from the customer area by a counter and glass partition. Suddenly Accused No. 2 and 3 came through the main office door. Another two were on guard outside the office.*
>
> *3. Accused No. 3 climbed over the counter and glass partition, and went into PW1's office. He opened the office door, and let Accused No. 2 into the same. The two then threatened PW1 not to raise the alarm, or they will kill her. They demanded money. They punched PW1 on the head and back. They then forced PW1 to open the office's safe. The two then stole the items mentioned in count no. 1 from the office safe. They also stole PW1's properties as itemized in count no. 2. The two then fled the crime scene, with the others outside the office.*

4. The matter was reported to police. An investigation was carried out. The two accuseds were arrested. They were interviewed by police. Both were later charged with aggravated robberies. They had been tried and convicted of count no 1 and 2 in the High Court.

01st ground of appeal

[8] The appellant's complaint is that the charges preferred against him were not in conformity with Form 8 in the Criminal Procedure Act, 2009 (Forms) Rules in that they had not mentioned the words 'use of force' in the charges. However, he had not averred that he was misled in his defense or was prejudiced as a result of the omission of those words in the charges. The appellant had been defended by counsel at the trial but they had not complained against any deficiency in the charges.

[9] I addressed exactly a similar ground of appeal in **Niubasaga v State** [2021] FJCA 3; AAU111.2018 (6 January 2021) where I *inter alia* examined **Kirikiti v State** [2015] FJSC 13; CAV17.2014 (20 August 2015) relied on by the appellant. In **Kirikiti** the particulars of the offence had only stated that *"Alifasi Kirikiti on the 9th day of July 2010 at Suva in the Central Division with others* ***stole*** *cash $345.00 from one Ashwant Nagaiya s/o Nagaiya" (no reference to 'robbery')".* However, the charges against the appellant had clearly informed him that he with others had **robbed** the complainant several items in the company with each other. Thus, the appellant had been informed unequivocally that he was being charged for robbery in an aggravated form.

[10] **Vakatalai v State** [2017] FJHC 228; HAA035.2016 (17 March 2017) held as follows

> *'[7]........... Although the particulars did not expressly state that the appellant used force, the element of force was subsumed in the definition of robbery, thus, making the charge reasonably informative for the appellant to know what was being alleged by the prosecution. In my judgment, the charge was not defective.*
>
> *[8] But if I am wrong in my conclusion that the charge was not defective, I am not convinced that the appellant was prejudiced by the charge not stating that the appellant used force to steal the complainant's mobile (see,* ***Kirikiti v State*** *[2015] FJCA 150; AAU005.2011 (3 December 2015).The appellant's case was that he was mistakenly identified by the complainant as the person who had robbed him. The issue was whether the appellant was the robber. That is how the appellant presented his case at the trial. Whether force was*

used or not to steal the complainant's mobile phone was not an issue at the trial.'

[11] His Lordship Justice Keith's remarks in **<u>Koroivuki v State</u>** [2017] FJSC 28; CAV7.2017 (26 October 2017) regarding how a proper charge under section 311(1)(a) of the Crimes Act, 2009 should read is exactly relevant on the appellant's complaint.

> *'The Particulars of Offence should have read*
>
> ***Isoa Koroivuki*** *and* ***Tila Williams*** *on the 7th day of August, 2011, in Suva in the Central Division, in the company of each other,* ***robbed*** *Yuan Hua Ye of [the items stolen], the property of Yuan Hua Ye.'*

[12] The Court of Appeal followed ***<u>Koroivuki</u>*** in **<u>Saukelea v State</u>** [2018] FJCA 204; AAU0076.2015 (29 November 2018) and refused to interfere with the conviction on a similar ground of appeal.

[13] Therefore, there is no reasonable prospect of success of this ground of appeal based on 'defective charges'.

02nd, 03rd, 04th, 06th, 07th and 08th grounds of appeal

[14] The appellant challenges the first time dock identification and argues that the trial judge should not have allowed the same at the trial and also that the trial judge had failed to give any directions to the assessors as to the danger and unreliability of the first time dock identification. He further complains that the police had shown his photograph to the complainant based on the confession of the co-accused within hours of the incident.

[15] The trial judge had stated at paragraph 31 of the summing-up that the case against the appellant stood or fell on whether or not the assessors accepted the complainant's identification of him at the crime scene at the material time. Having described the incident the complainant had said that the i-taukei man whom she had described as a person wearing a hoodie covering his face, was in the courtroom and pointed out the appellant in the dock as the person she saw on the day of the incident. According to her, she had observed his face for 1 ½ minutes at a distance of just 02 feet away from where she was.

[16] It appears from the summing-up that there had not been a police identification parade to identify the appellant and the complainant had specifically said that she had not attended such a parade. Though, the appellant had made submissions regarding photo identification, it does not appear from the summing-up that there had been a photographic identification either. Therefore, the identification of the appellant by the complainant at the trial has to be regarded as a first time dock identification.

[17] In **Edwards v. Queen** [2006] UKPC 23 (25 April 2006) the Privy Council has referred to first time dock identification as a 'serious irregularity' which should be permitted in exceptional circumstances. Further, the court said that it is in general an undesirable practice and other means should be adopted of establishing that the accused in the dock is the man who was arrested for the offence charged and that when the evidence had been admitted it was incumbent upon the judge to direct the jury to give it little or no weight.

[18] In contrast 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 8 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.

[19] The Privy Council in **Maxo Tido v The Queen** (2010) 2 Cr. App. R23. PC, [2011] UKPC 16 stated:

> "*17. Dock identifications are not, of themselves and automatically, inadmissible. In Aurelio Pop v The Queen [2003] UKPC 40 the Board held that, even in the absence of a prior identification parade, a dock identification was admissible evidence, although, when admitted, it gave rise to significant requirements as to the directions that should be given to the jury to deal with the possible frailties of such evidence –*
>
> *'that it is important to make clear that a dock identification is not inadmissible evidence per se and that the admission of such evidence is not to be regarded as permissible in only the most exceptional circumstances. A trial judge will always need to consider, however, whether the admission of such testimony, particularly where it is the first occasion on which the accused is purportedly identified, should be permitted on the basis that its admission might imperil the fair trial of the accused.*"

[20] In **Lawrence v The Queen** [2014] UKPC 2 (11 February 2014) the Privy Council said:

> *'In several cases this Board has held that judges should warn the jury of the undesirability in principle and dangers of a dock identification: Aurelio Pop v The Queen [2003] UKPC 40; Holland v H M Advocate [2005] UKPC D1, 2005 SC (PC) 1; Pipersburgh and Another v The Queen [2008] UKPC 11; Tido v The Queen [2012] 1 WLR 115; and Neilly v The Queen [2012] UKPC 12.'*

[21] Having allowed the first time dock identification after about 01 year and 07 months of the incident, the trial judge had substantially directed the assessors on Turnbull guidelines at paragraph 33 of the summing-up regarding the identification of the appellant by the complainant at the crime scene. The issue then is whether the judge had given appropriate directions on how the assessors should approach the first time dock identification. It appears that the learned trial Judge had not warned the assessors of the dock identification. In other words he had not told them about the undesirability and dangers of dock identification or to give it little or no weight or that they should not take that into account. Therefore, the next question is how the appellate should look at it in appeal.

[22] The tests for the appellate court to apply in a situation like this were formulated in **Naicker v State** CAV0019 of 2018: 1 November 2018 [2018] FJSC 24, **Saukelea v State** [2018] FJCA 204; AAU0076.2015 (29 November 2018) and **Korodrau v State** [2019] FJCA 193; AAU090.2014 (3 October 2019).

[23] In ***Korodrau*** it was held as follows,

> *'[35] However, the Supreme Court in **Naicker** went on to state in paragraph 38 that the critical question is whether ignoring the dock identifications of the appellant, there was sufficient evidence, though of a circumstantial nature, on which the assessors could express the opinion that he was guilty, and on which the judge could find him guilty and answered the question in the affirmative. Going further, the Supreme Court formulated a test to be applied when dock identification evidence had been led and no warning had been given by the trial Judge. The test to be applied is found in the following paragraph.*
>
> > *'45. I return to the irregularities in the trial as a result of the **dock identifications** and the absence of a Turnbull direction. To use the language of the proviso to section 23(1) of the Court of Appeal Act*

*1949, has a "substantial miscarriage of justice" occurred?........The question, in my opinion, is whether the judge **would** have convicted Naicker of murder if there had been no **dock identification** of him at all by the two witnesses who chased a man with blood on his hands. That is a different question to the one posed in para 38 above, which was whether the judge **could** have convicted Naicker without the **dock identifications.** The question now is whether he **would** have done so. I have concluded that, for the same reasons as I think that the judge could have convicted Naicker without the **dock identifications,** the judge would have convicted him of murder in their absence. It follows that I would apply the proviso, holding that no substantial miscarriage of justice has occurred despite the irregularities in the trial.' (Emphasis added)*

[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.

[24] Therefore, applying those tests to the appellant's complaint on the first time dock identification, it looks as if that without the dock identification there was no or insufficient evidence of identification of the appellant at the crime scene. Therefore, unlike in ***Naicker*** and ***Korodrau***, there being no other or insufficient evidence to establish the appellant's identity *vis-à-vis* the crime and no warning on the first time dock identification by the complainant, the Court of Appeal has to decide whether in this case there is a basis to apply the proviso to section 23(1) of the Court of Appeal Act.

[25] Therefore, at this stage (without the trial proceedings) there appears to be a reasonable prospect of success in appeal on these grounds of appeal.

05th ground of appeal.

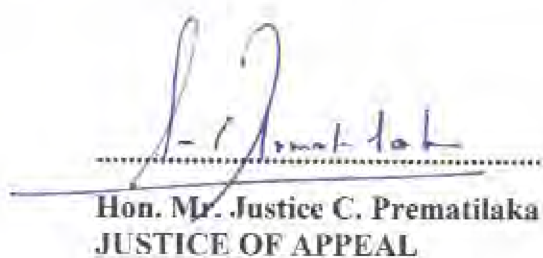
[26] The appellant complains against the trial judge having stated at paragraph 17 of the summing-up that *'Most evidence in this case are admissible against all accused.'*

[27] Not only the impugned statement but considering the entire paragraph 17 in general I do not see any merits in this ground of appeal.

[27] Although, the appellant had included some grounds of appeal against sentence in his amended grounds of appeal and additional grounds of appeal, he had not even mentioned those grounds of appeal in his written submissions which he relied on at the hearing or made any submissions on the sentence in the written submissions. The state too had not responded to the appellant's sentence appeal in its written submissions which it relied on at the hearing. Therefore, the appellant is deemed to have not pursued his sentence appeal at the leave to appeal hearing. Since this court has not considered his sentence appeal, I would not dismiss it but leave to appeal would be refused on the basis of non-prosecution.

Order

1. Leave to appeal against conviction is allowed.
2. Leave to appeal against sentence is refused.



Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL