

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

**CRIMINAL APPEAL NO.AAU 034 of 2019**  
**[High Court of Suva Case No. HAC 429 of 2018]**

BETWEEN:

**ESALA RABALOLO**  
Appellant

AND:

**STATE**  
Respondent

Coram: Prematilaka, JA

Counsel: Appellant in person  
Ms. P. Madanavosa for the Respondent

Date of Hearing: 02 March 2021

Date of Ruling: 03 March 2021

**RULING**

[1] The appellant had been charged with others in the High Court of Suva with a single count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009 committed on 09 November 2018 at Nasinu in the Central Division. The information read as follows.

***'Statement of Offence***

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

***Particulars of Offence***

***ESALA RABALOLO in the company of others, on the 9<sup>th</sup> of November, 2018 at Nasinu in the Central Division, stole \$150 cash, a BLU brand mobile phone and a wallet with assorted cards, the property of Benjamin Robert and immediately before committing the theft used force on Benjamin Robert.***

[2] The trial judge had succinctly described the prosecution and defense cases in the judgment as follows.

5. *There is no dispute in this case that the complainant Mr. Robert was robbed by three people on the 9<sup>th</sup> of November, 2018 at Nasinu. The only dispute is with regard to the identity of the accused. The accused completely denies that he took part in this robbery. Defence takes up the position that the complainant was mistaken when he identified the accused in difficult conditions as one of the robbers.*

6. *The Prosecution called the complainant as an eye witness. He said that the lighting condition was good and bright so that he could see clearly and nicely the face of the offender who punched him thrice; the assailant was recognised by the complainant soon after the incident when he was brought to the Valelevu Police Station. The complainant also identified the accused at a photo identification process held two days after the alleged incident.*

7. *Evidence of the complainant is acceptable and believable. His evidence that there was enough light at the crime scene was supported by the eye witness, Saukuru. There is no material contradiction between complainant's evidence and his previous statement to police. The complainant had refused to drive further down his taxi to the house which the robbers had pointed to because that place was dark and dangerous. The place he had stopped the taxi had enough light. Although he said that after the robbery he ran to a place where there was clear visibility, I am satisfied that the place where the incident happened had enough light for the complainant to observe the face of the accused.*

8. *According to eye witness accounts, the circumstances under which the identification was done are that; there was a street light on top and also the light coming from the nearby house where the taxi was parked, and also the light of the taxi was on. The assailant who punched the complainant was not wearing a cap and nothing was obstructing complainant's view. The observation of the offender was done in close proximity for one minute while the complainant was being punched thrice. The complainant said that he particularly remembered assailant's face because it was the first time he was punched by somebody in his face. Although he closed his eyes each time he received punches, he observed offender's face in close proximity when the offender was counting money in the wallet. The complainant had chauffeur driven the offender from Carnavon Street to Vesida, paying a close attention to the back seaters through the rear mirror. It was not a fleeting glimpse although the whole episode was over fairly quickly.*

9. *The Prosecution relies on photograph identification to bolster the identification evidence of the complainant. The photograph identification was done at the police station two days after the alleged incident where the complainant positively identified the photograph of the accused. The prosecution had laid a proper foundation for dock identification. After a consideration of all the evidence, I am satisfied that the quality of the*

*identification remains good and the danger of mistaken identification is eliminated.*

10. *The accused denies that he took part in the robbery. The Defence case is that the identification done in difficult conditions is incorrect and cannot be relied upon. The Defence argues that the apprehension of the accused by Marica and her neighbours was based on suspicious behaviour of the accused which coincides with accused's fear of being arrested by police and their personal prejudices and stereotypes vis-a-vis robbers. Defence further says that nothing was found in accused's possession soon after the alleged incident.*

- [3] After the summing-up on 14 March 2019 the assessors had unanimously opined that the appellant was guilty. The High Court judge had agreed with the assessors in the judgment delivered on 18 March 2019 and convicted the appellant as charged and sentenced him on 29 March 2019 to 08 years of imprisonment with a non-parole period of 05 years.
- [4] The appellant had timely appealed against conviction and sentence on 29 April 2019. He had tendered amended grounds of appeal and written submission on 19 August 2020 and he confirmed on 23 October 2020 that he would rely on those grounds of appeal and submissions. The state had tendered written submissions on 07 December 2020 but dealt with only one ground of appeal against conviction. Though the state counsel apologised for the lapse, sought permission and did make some oral submissions on other grounds of appeal at the hearing of the leave to appeal application on 02 March 2021, it is totally unsatisfactory and disappointing that all grounds of appeal had not been dealt with in the written submissions at least by way of a supplemental written submission since December 2020. This court expects the counsel appearing for the state to do better and maintain higher standards in the future. The appellant basically relied on his written submission and made some clarifications orally for this court at the hearing.
- [5] In terms of section 21(1)(b) and (c) of the Court of Appeal Act, the appellants could appeal against conviction and sentence only with leave of court. The test for leave to appeal is '**reasonable prospect of success**' (see **Caucu 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] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (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). The test for leave to appeal is not

whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of Kim Nam Bae's case. **For a ground of appeal timely preferred against sentence to be considered arguable there must be a reasonable prospect of its success in appeal.** The aforesaid guidelines are as follows.

- (i) *Acted upon a wrong principle;*
- (ii) *Allowed extraneous or irrelevant matters to guide or affect him;*
- (iii) *Mistook the facts;*
- (iv) *Failed to take into account some relevant consideration.*

[7] The grounds of appeal submitted to this court by the appellant are as follows. The appellant has correctly identified whether he was inside the taxi at the time of the robbery as the main issue in the case and in deed in appeal. In other words it is the identity of the appellant that is central to his appeal.

**Conviction**  
**'Ground 1**

*THAT the Learned Judge erred in law and in fact when he consider the contradictory evidence of the complainant to form a basis of the appellant's conviction, whereby the evidence of the complainant, Mr Benjamin Robert was self-contradictory as in regards to the actual act of the offence.*

**Ground 2**

*THAT the Learned Judge erred in law and in fact when admitted uncorroborated identification evidence of the complainant to form a basis of his conviction.*

**Ground 3**

*THAT the Learned Judge erred in law and in fact when he considered the evidence of PW 3 namely Marica Sovaki, as the person who made the civilian arrest as a fact that supported corroborated the evidence of PW2 [Sainimili Saukuru] whereby both witness did not see or witness the actual act thereby making their evidence "heresay" and not a fact of the event.*

**Ground 4**

*THAT the Learned Judge erred in law and in fact when he failed to properly and clearly sum up to the assessors and also bear in mind the defense case failure to consider the same has caused substantial miscarriage of justice.*

**Ground 5**

*THAT the Learned Judge erred in law and in fact when he failed to sum up to the assessors and also bear in mind the point of identification evidence that*

*how the identification came to be made and was there any original discrepancy on the statement provided to the Police and the actual appearance of the accused or the appellant's failure to consider the same has caused a grave miscarriage of justice.*

**Sentence**

**Ground 1**

*That the Sentence imposed is harsh and excessive regards to the correctness of the identification and the length of the sentence amounts to a grave miscarriage of justice.*

**Ground 2**

*That the Learned Judge erred in law and in fact when he imposed a non-parole period on the Appellant's sentence.*

- [8] It is clear from the summing-up that the primary evidence of identification of the appellant came from the complainant Benjamin Robert (PW1) who was the driving three persons in his taxi in that night. In addition, the prosecution had produced the results of a photographic identification parade conducted by Inspector Chand (PW4) where both the complainant and PW3 Marica Sovaki who had arrested the appellant when he was trying to jump over her backyard fence, had identified the appellant. The rest of the incriminating evidence implicating the appellant in the robbery came from Sainimili Saukuru (PW2) who had seen a person wearing a white t-shirt near the taxi and coming towards her backyard only to change course and going towards PW3's backyard as she stared shouting '*butako... butako*' (i.e. 'stealing' or 'robbing').
- [9] As opposed to that evidence, the appellant had testified at the trial that he was on a short cut with a girl by the name of Vilisi whom he had met for the first time and who had inquired for a short cut to get to Cunningham and with whom he had engaged in sexual intercourse too while on the way to Vesida roundabout, when he heard the shouts '*butako... butako*'. Having realised that something had gone wrong and the police would soon be there he had asked the girl to take a different route and he had gone towards a fence and while trying to jump over it he was pulled down by someone and people started assaulting him and handed him over to the police.
- [10] He had alleged that when he was taken to the police station he had seen the complainant. The police had pointed out the appellant to the complainant as one of the robbers. Because of that, he had refused to take part in a personal identification parade. The defence had challenged the photographic identification parade on the same basis and on the premise that as the appellant was already in police custody a photographic identification parade should not have been held.

### ***01<sup>st</sup> ground of appeal***

- [11] The appellant complains that the complainant had said in evidence that all three who had got into his taxi were wearing caps but when he was being punched the attacker was not wearing a cap.
- [12] The summary of facts reveals that according to the complainant although the three persons were wearing caps when they got into the vehicle, the person who grabbed his neck from behind, then came to the front, opened the door and started punching him on his face, was not wearing a cap at that time but wearing a round neck white t-shirt. The attacker was thus attacking him for about a minute while looking into the complainant's face.
- [13] The appellant also challenges the complainant's identification evidence on the basis that the appellant had received a black eye and therefore that would have affected his ability to make a proper identification. However, there is nothing to indicate that the complainant's evidence had been challenged on this basis at the trial at all.
- [14] Therefore, the 01<sup>st</sup> ground of appeal has no reasonable prospect of success in appeal.

### ***02<sup>nd</sup> ground of appeal***

- [15] The appellant argues that the complainant's identification had not been corroborated by another person identifying him to eliminate any mistaken identity.
- [16] **R v Tyler and others** (1993) 96 CrAppR 332; [1993] CrimLR 60, **R v Curry & Keeble** [1983] CrimLR 737; **R v Oakwell** [1978] 1 All ER 1223 at 1227, 66 Cr App Rep 174 at 178, CA (Eng) cited by the appellant are not particularly relevant to the point raised.
- [17] However, there has been circumstantial evidence in the form of PW2 and PW3 and photographic identifications to corroborate the direct identification evidence of the complainant in the commission of the offence by the appellant.
- [18] Therefore, the 02<sup>nd</sup> ground of appeal has no reasonable prospect of success in appeal.

### ***03<sup>rd</sup> ground of appeal***

- [19] The appellant argues that the trial judge had erred in considering PW3's evidence as having supported or corroborated the evidence of PW2 because both had not seen the commission of the offence and therefore their evidence is hearsay.
- [20] The appellant may be referring to paragraph 12 of the judgment. The appellant does not dispute that he was arrested while trying to jump over the fence. PW3's evidence is that it was the fence at her backyard. Immediately before that the appellant was seen by PW2 at or about the crime scene with the complainant and then going towards PW3's backyard on hearing the shouts '*butako... butako*'. Thus, PW3's evidence does provide corroboration to PW2's evidence of the appellant's presence at the scene immediately after the commission of the offence.

[21] Therefore, the 03<sup>rd</sup> ground of appeal has no reasonable prospect of success in appeal.

***04<sup>th</sup> ground of appeal***

[22] The contention here is that the trial judge had erred in not summing-up the defence case to the assessors. I find this allegation to be without any merits.

[23] The trial judge at paragraphs 63 – 66 and 70-74 of the summing-up had directed the assessors in great detail of the defence case. In addition the judge had addressed himself of his evidence at paragraphs 13-16 of the judgment before rejecting the appellants' defence.

[24] Therefore, the 04<sup>th</sup> ground of appeal has no reasonable prospect of success in appeal.

***05<sup>th</sup> ground of appeal***

[25] The appellant argues that the trial judge had failed to address the assessors on the question whether there had been any discrepancy between the complainant's police statement, his evidence at the trial regarding his identification features and his actual physical appearance.

[26] The trial judge had stated at paragraph 7 of the judgment that there was no material discrepancy between the complainant's evidence and his previous statement and therefore, obviously there had not been such important discrepancy to be brought to the attention of assessors regarding identification features. As for the description of the appellant given by the complainant in his police statement and his real appearance, the trial judge at paragraph 70 had addressed the assessors on this aspect as follows.

*'[70] The Defence alleges that the photograph identification parade was improperly conducted and the identification was based on police assistant. If you are satisfied that the photograph identification parade was conducted properly and fairly, you can compare the description of identification given by the complainant and the photograph shown to you with the accused sitting in the dock for you to be satisfied as to the identity of the robber. If after a consideration of all the evidence the quality of the identification remains good the danger of mistaken identification is lessened.'*

[27] The appellant's further submission that the complainant had failed to give a proper description of the marks on his face and informed the police about his missing front teeth appear to be without any basis as there is nothing to indicate that these matters had been elicited in evidence.

[28] The appellant also complains that the trial judge had failed to direct the assessors to consider the question '*Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?*' as prescribed in ***R v Turnbull & others*** [1977] QB 224 [(1976) 63 CrAppR 132; [1976] 3 WLR 445; [1976] 3 AllER 549; [1976] CrimLR 565] at page 228. As pointed out earlier this had been addressed by the trial judge at paragraph 70 of the summing-up.

- [29] In fact the trial judge having identified correctly that the prosecution case depended on the correctness of identification of the accused as the offender, had given ample directions at paragraphs 28-32, 67, 68 and 71 of the summing-up on all matters that should be considered on the quality of identification in addition to the evidence of each witness on the same issue. He had warned the assessors the need for caution before convicting the appellant on the correctness of identification stating that a wrong identification would cause a miscarriage of justice. He had given a full **Turnbull** direction too.
- [30] The appellant's counsel had argued based on Fiji Police Force Standing Orders at the trial that photographic identification should not have been conducted when the appellant was already in custody. The relevant paragraphs are 7 and 8 of the 'Identification By Photographs' available at Fiji Police Force Manual (FPM) which is appendix 'A' (FRO19/90) to Fiji Police Force Standing Orders (FSO) made by the Commissioner of Police by virtue of section 7(1) of the Police Act Cap 85.
- [31] Paragraph 7 of FPM of states:
- 'Identification Parades by photograph will be carried out only when the identity of the offender is unknown and there is no other way of establishing his identity; or if it is suspected that there is no chance of arresting him in the near future. A photographic identity parade of a person already in custody shall not be held.'*
- [32] Paragraph 8 of FPM sets out in detail the procedure or the manner in which an identification parade by photograph should be conducted.
- [33] The appellant's main complaint is that when the police held the photographic identity parade, he had been already arrested and in custody of the police at the police station. Thus, according to him the identification made at the said parade by the complainant and PW3 should not be relied upon. He also argues that the police had not conducted the photographic identity parade as prescribed in paragraph 8.
- [34] The evidence of PW4 shows that the police had adhered to the procedural aspects of the photographic identity parade. However, it is clear that the appellant had been arrested on the day of the incident and the photographic identity parade had been conducted two days later. The appellant had admittedly refused to participate at a personal identification parade. Therefore, considering that FSOs are not indispensable rules of law but procedural guidelines to ensure fairness, the police cannot be faulted for carrying out the photographic identity parade when the appellant rejected the personal identification parade. However, as to whether the appellant had been shown to the complainant by the police at the police station prior to the said parade was a disputed issue between the parties.
- [35] In the circumstances, the trial judge had specifically addressed the assessors on the photographic identification parade at paragraphs 33-37 and directed them not to rely on that evidence at all if they believed the appellant's contention that the police had pointed him out to the complainant prior to the photographic identification.



- [36] In addition the trial judge had addressed the assessors on the photographic identification parade *vis-à-vis* the complainant's and PW3's evidence at paragraphs 48, 50, 56, 58, 59, 60 and 69 of the summing-up.
- [37] The trial judge had also brought to the notice of the assessors the defence position *vis-à-vis* photographic identification parade at paragraphs 66 and 70 of the summing-up.
- [38] The trial judge had addressed himself on photographic identification parade at paragraph 9 of the judgment too.
- [39] Therefore, the 05<sup>th</sup> ground of appeal has no reasonable prospect of success in appeal.

***01<sup>st</sup> ground of appeal (sentence)***

- [40] The appellant argues that the length of the sentence amounts to a miscarriage of justice.

**Attacks against taxi drivers**

- [41] In **State v Ragici** [2012] FJHC 1082; HAC 367 or 368 of 2011, 15 May 2012 where the accused 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 as follows 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."*

- [42] **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...'*

- [43] It was held in **Usa v State** [2020] FJCA 52; AAU81.2016 (15 May 2020):

*'[17] 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.'*

- [44] The trial judge had taken 06 years as the starting point and added 03 years for aggravating factors and given a discount of 12 months making the ultimate sentence of 08 years which is within the sentencing tariff for aggravated robbery against providers of services of public nature including taxi, bus and van drivers. The trial judge had remarked in the sentencing order

*'[10] The courts have a duty to denounce and deter this kind of anti-social behaviour using violence on innocent people who are providing vital services to the community during night time. These kinds of offences will undoubtedly cause panic in taxi drives and will eventually affect the general public who are the service recipients. The primary purpose of the punishment for offences involving the use of violence is deterrence, both special and general.'*

- [45] The ever increasing occurrence of similar attacks against taxi drivers in the form of aggravated robberies demand deterrent custodial sentences. The appellant's criminal history of a number of previous convictions warrants deterrence to be treated as a main consideration in deciding the length of the sentence imposed to safeguard the public and the providers of public services from his propensities to engage in similar crimes and deter the other prospective offenders.

- [46] Therefore, there is no sentencing error and the 01<sup>st</sup> ground of appeal against sentence has no reasonable prospect of success in appeal.

***02<sup>nd</sup> ground of appeal***

- [47] The appellant argues against the non-parole period of 05 years imposed by the trial judge on the basis that there is no Parole Board in operation.

[48] The Supreme Court in **Tora v State** CAV11 of 2015: 22 October 2015 [2015] FJSC 23 had quoted from **Raogo v The State** CAV 003 of 2010: 19 August 2010 on the legislative intention behind a court having to fix a non-parole period as follows.

*"The mischief that the legislature perceived was that in serious cases and in cases involving serial and repeat offenders the use of the remission power resulted in these offenders leaving prison at too early a date to the detriment of the public who too soon would be the victims of new offences."*

[49] In **Natini v State** AAU102 of 2010: 3 December 2015 [2015] FJCA 154 the Court of Appeal said on the operation of the non-parole period as follows:

*"While leaving the discretion to decide on the non-parole period when sentencing to the sentencing Judge it would be necessary to state that **the sentencing Judge would be in the best position in the particular case to decide on the non-parole period depending on the circumstances of the case.**"*

*'... was intended to be the minimum period which the offender would have to serve, so that the offender would not be released earlier than the court thought appropriate, whether on parole or by the operation of any practice relating to remission'.*

[50] In **Korodrau v State** [2019] FJCA 193; AAU090.2014 (3 October 2019) the Court of Appeal stated

*'[114] The Court of Appeal guidelines in **Tora** and **Raogo** affirmed in **Bogidrau** by the Supreme Court required the trial Judge to be mindful that (i) the non-parole term should not be so close to the head sentence as to deny or discourage the possibility of rehabilitation (ii) Nor should the gap between the non-parole term and the head sentence be such as to be ineffective as a deterrent (iii) the sentencing Court minded to fix a minimum term of imprisonment should not fix it at or less than two thirds of the primary sentence of the Court.'*

[51] Section 18(4) of the Sentencing and Penalties Act states that any non-parole period so fixed must be at least 06 months less than the term of the sentence. Thus, the non-parole period of 05 years (when the head sentence was 08) fixed by the trial judge is in compliance with section 18(4). Therefore, the gap of 03 years between the final sentence and the non-parole period cannot be said to violate any statutory provisions and it is not obnoxious to the judicial pronouncements on the need to impose a non-parole period.

[52] It is pertinent to note that in terms of the new sentencing regime introduced by the Corrections Service (Amendment) Act 2019, when a court sentences an offender to be imprisoned for life or for a term of 2 years or more the court must fix a period during which the offender is not eligible to be released on parole and irrespective of the remissions that a prisoner earns by virtue of the provisions in the Corrections Service Act 2006, such prisoner must serve the full term of the non-parole period. In addition, for the purposes of the initial classification, the date of release for the prisoner shall be

determined on the basis of a remission of one-third of the sentence not taking into account the non-parole period. In other words, when there is a non-parole period in operation in a sentence, the earliest date of release of a pensioner would be the date of completion of the non-parole period despite the fact that he/she may be entitled to be released early upon remission of the sentence.

[53] There is no sentencing error or reasonable prospect of success of the 02<sup>nd</sup> ground of appeal against sentence.

### **Orders**

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

Hon. Mr. Justice C. Prematilaka  
**JUSTICE OF APPEAL.**