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

CRIMINAL APPEAL NO.AAU 037 of 2019
[In the High Court at Suva Case No. HAC 430 of 2016S]

BETWEEN : **ASESELA NAUREURE**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, JA**

Counsel : **Appellant in person**
: **Mr. Y. Prasad for the Respondent**

Date of Hearing : **31 March 2021**

Date of Ruling : **01 April 2021**

RULING

[1] The appellant (01st accused in the High Court) had been indicted with another (02nd accused in the High Court and the appellant in AAU 0035 of 2019) in the High Court of Suva on one count of aggravated robbery contrary to section 311(1)(a) of the Crimes Act, 2009, one count of abduction contrary to section 282 (a) Crimes Act of 2009 and one count of damaging property contrary to section 369 (1) Crimes Act of 2009 committed on 24 November 2016, at Kasavu, Nausori in the Central Division. The information read as follows:

'COUNT 1'

Statement of Offence

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

Particulars of Offence

ASESELA NAUREURE AND MOAPE ROKORAICEBE*, on the 24th day of November 2016, at Kasavu, Nausori in the Central Division, robbed ANIL KUMAR of his taxi registration Number LT 7127 valued at $25,000, cash $160.00 and a black Forme mobile phone valued at $50.00 all to the total value of $25,210 and immediately before the robbery used violence on the said ANIL KUMAR.*

'COUNT 2'

Statement of Offence

ABDUCTION: *Contrary to section 282 (a) Crimes Act of 2009.*

Particulars of Offence

ASESELA NAUREURE AND MOAPE ROKORAICEBE*, on the 24th day of November 2016, at Kasavu, Nausori in the Central Division, abducted ANIL KUMAR in order that he may be subjected to grievous harm.*

'COUNT 3'

Statement of Offence

DAMAGING PROPERTY: *Contrary to section 369 (1) Crimes Act of 2009.*

Particulars of Offence

ASESELA NAUREURE AND MOAPE ROKORAICEBE*, on the 24th day of November 2016, at Wairuku, Rakiraki in the Western Division, wilfully and unlawfully damaged the black Fielder Taxi registration number LT 7127 valued at $25,000.00 the property of ANIL KUMAR.*

[2] On 13 March 2019, following the summing-up, the assessors had expressed a unanimous opinion of guilty against the appellant in respect of all counts. The learned High Court judge in his judgment delivered on the same day had agreed with the assessors and convicted the appellant of all counts. He had been sentenced on 14 March 2019 to 13 years, 05 years and 18 months of imprisonment for the three charges respectively, all to run concurrently with a non-parole period of 12 years.

[3] The appellant being dissatisfied with the conviction and sentence had in person lodged a timely application for leave to appeal against conviction and sentence on 10 April 2019. He had preferred additional/amended grounds of appeal from time to

time. Finally he relied on amended grounds of appeal and submission that had been received by the CA registry on 31 July 2020 and additional grounds of appeal and written submission received by the CA registry on 19 August 2020. The respondent's written submissions had been tendered on 11 November 2020.

[4] 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), **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.

[5] 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.*

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

31 July 2020 grounds of appeal on conviction

Ground 1

That the Learned Trial Judge erred in law and fact in relying on and/or considering and/or taking into consideration inadmissible and/or prejudicial evidence in finding the appellant guilty.

Ground 2

That the Learned Trial Judge erred in law and fact in not sufficiently adequately directing himself on the statement of the victim/witness which in contradicting and inconsistent and does not satisfy the cogency test especially in view of the identification and reliance on the above has cause a serious miscarriage of justice.

Ground 3

That the Learned Trial Judge erred in not considering the evidence of the Doctor raising the issue of probability of the victim and this credibility which the Judge has not addressed his mind to in his summing up and judgment and aggregating the same in sentence.

Ground 4

That the Learned Trial Judge erred in law and fact in assessing/evaluating/directing himself and assessors on reliability of witness in his evidence in term of "ACCURACY" conspicuously clear and correctness of the identification of the appellant undermining the credibility as inconsistent and raising potential weakness during his observation onto the appellant as the complainant's age factor, position of victim in recognising or identifying correctly and accurately and the trauma he had been in, raising weakened inaccurate, unsafe identification.

Ground 5

That the Learned Trial Judge erred in not directing the assessors on the dangers of convicting the appellant considering the absence of one accused from dock causing the appellant an injustice and not warned the assessors that failure to hold a parade in station constituted a substantial weakness in case of prosecution as dock i-d, for reliance or sustaining the conviction is unfair prejudicial and unsatisfactory.

Ground 6

That the Learned Trial Judge erred in his own summing-up as it was unfair, imbalance, confusing, one-sided, irrelevant, ineligible and inequality in outlining all the facts and circumstance of the case.

Ground 7

That the Learned Trial Judge erred in not sufficiently directing himself as the incredibility, probability on inconsistency in victim statement and evidence as the witness will normally pick out the person in dock whom he sees believing that committed the crime which will also mislead the assessors in confirming the identification without the victim knowing the appellant or providing any such identification of description to the Police station at first or even knowing him before the offense, has caused unfairness and miscarriage of justice.

Ground 8

That the Learned Trial Judge erred in with identification evidence in general the Judge did not warn the assessors of the distinct and positive danger of a dock identification over period of 2 years without any previous identification parade or clear description of appellant in victim statement.

Ground 9

That the Learned Trial Judge erred in not directing the assessors that the witness might have been influenced to which could be a key fundamental weakness as the appellant stood alone in dock.

Ground 10

That the learned trial failed in misdirecting himself in not taking into consideration that there was no confession, no material evidence, no forensic evidence, no weapon or other suspicious article which could implicate link, trace or connect the appellant to the alleged offense.

Ground 11

That the Learned Trial Judge erred in linking the direction of the offense to assessors on appellant guilt and culpability was serious miscarriage of justice.

Ground 12

That the Learned Trial Judge erred in not sufficiently directing himself and assessors on the victims identification and evidence in court linking to the appellant to the alleged offense is contradicting with his statement and evidence in court which is consistent, unsatisfactory and ineligible in convicting the appellant.

19 August 2020 additional grounds on conviction

Ground 1

That the Learned Trial Judge erred in law by not directing the assessors adequately and properly on the weakness of the recognition evidence before the assessors could act upon it. Failure to do so denied the Appellant a fair trial.

Ground 2

That the Learned Trial Judge erred in law by misdirecting the assessors in the summing-up where the appellant's name was already put to them to find him guilty even before retiring to form their own opinions. This misdirection to the assessors can be a solid basis in the conviction being quashed.

Ground 3

That the Learned Trial Judge erred in law and in fact in allowing a first time dock identification at the proceedings of trial without a proper prior identification parade to test the witness causing a grave miscarriage of justice, before the lay assessors.

Ground 4

That the Learned Trial Judge erred in law and in fact in not accepting the evidence given by the appellant without any cogent reasoning and that when DW2 Joeli Nukunawa had confirmed the where about of the appellant was at that period of time? See, summing-up page 8 paragraph 30.

Ground 5

That the Learned Trial Judge erred in law and in fact to convict the appellant without a proper police identification parade to corroborate failure to follow and complied with this procedure, the police breaches the judges rule and that caused a substantial flaw to the rights of the accused in the Fiji Constitution section 15 (12), section 16 (1) (a), section 26 (1) and section 26 (2).

31 July 2020 grounds of appeal on sentence.

Ground 13

That the appellant appeal against sentence being manifestly harsh and excessive and wrong in principle in all circumstance of the case.

Ground 14

That the Learned Trial Judge acted on a wrong principle, allow extraneous or irrelevant matters to guide or affect him, mistook the facts and failed to take into account relevant consideration before passing the sentence.

Ground 15

That the Learned Trial Judge erred in law and fact in passing the sentence of imprisonment was disproportionately severe punishment section 11 (1) of the 2013 Constitution of Fiji.

19 August 2020 additional grounds on sentence.

Ground 1

That the appellant appeal against sentence being manifestly harsh and excessive and wrong in principle in all the circumstances of the case.

Ground 2

That the learned Sentencing Judge err in its duty to consider the parole principle by imposing an order to enable the appellant to be released on parole at the completion of his non-parole period. Failure to do so has caused a mockery out of the administration of criminal justice.

Ground 3

That the sentence is harsh and oppressive in all the circumstances of this matter.

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

> 2. *'The brief facts of the case were as follows. On 24 November 2016, the complainant, Mr. Anil Kumar (PW1) was aged 59 years old. He was married with three children in their twenties. He earns his living by driving a taxi, registration number LT 7127. He also owned the taxi. While working early morning on 24 November 2016 (Thursday), he picked up Mr. Asesela Naureure (Accused No. 1) at Gordon Street Suva at about 6.30 am. Accused No. 1 asked him to go to Fiji National University (FNU) Tamavua to pick up Mr. Moape Rokoraicebe (Accused No. 2). Mr. Kumar complied, and drove to FNU Tamavua.*
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> 3. *At FNU Tamavua, Mr. Kumar picked up Moape Rokoraicebe (Accused No. 2). Both accuseds sat in the backseat and requested to be taken to Kasavu Nausori. Mr. Kumar took the two to Kasavu Nausori. At Kasavu, Moape asked Mr. Kumar to take them to Tailevu. Mr. Kumar passed two villages and was asked to stop at a breadfruit tree thereafter. Moape then pulled Mr. Kumar out of the taxi and took the car key. Asesela then tried to attack Mr. Kumar with a screw driver. Mr. Kumar defended himself, and Asesela repeatedly punched him in the mouth, whereby he lost some teeth. Later, the two accuseds abducted Mr. Kumar to Korovou Town.*
>
> 4. *At Korovou Town, Asesela then took over from Moape, in driving the taxi. Moape drove the same from Tailevu. Asesela drove to Rakiraki. They had an accident at Wairuku Rakiraki, where the taxi was severely damaged. The two accused fled the crime scene. Mr. Kumar, who was knocked unconscious, was later taken to Rakiraki Hospital. The matter was reported to police. An investigation was carried out. The two accused were*

later charged for aggravated robbery, abduction and damaging property. They had been tried and convicted of the above offences in the High Court.

01st, 02nd, 04th, 12th grounds of appeal (31 July 2020)** and **01st additional ground of appeal (19 August 2020)

[8] The gist of the above grounds of appeal is the complainant's evidence on visual identification and the trial judge's directions to the assessors on identification of the appellant. The appellant mainly relies on ***Turnbull*** [1977] Crim. Appeal R.132.

[9] In **Korodrau v State** [2019] FJCA 193; AAU090.2014 (3 October 2019) the Court of Appeal looked at Turnbull directions and first time identification in detail and stated as follows on Turnbull directions *vis-à-vis* the first time identification in the dock:

> *'[28] **Turnbull** [1977] QB 224 laid down important guidelines in the face of widespread concern over the problems posed by cases of mistaken identification, for judges in trials that involve disputed identification evidence. Where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification(s). The judge should tell the jury that:*
>
> *1. caution is required to avoid the risk of injustice;*
> *2. a witness who is honest may be wrong even if they are convinced they are right;*
> *3. a witness who is convincing may still be wrong;*
> *4. more than one witness may be wrong;*
> *5. a witness who recognises the defendant, even when the witness knows the defendant very well, may be wrong.*
>
> *The judge should direct the jury to examine the circumstances in which the identification by each witness can be made. Some of these circumstances may include:*
>
> *a. the length of time the accused was observed by the witness;*
> *b. the distance the witness was from the accused;*
> *c. the state of the light;*
> *d. the length of time elapsed between the original observation and the subsequent identification to the police.*
>
> *[29] It is clear that the directions in paragraph 28 and 29 of the summing up are substantially in terms of Turnbull guidelines though such directions need not be given unless the prosecution case depends wholly or substantially on visual identification.....'.*

[10] In **Saukelea v State** [2018] FJCA 204; AAU0076.2015 (29 November 2018) the Court of Appeal had earlier stated:

> *'[43] In **Mills & Others v The Queen** (1995 CLR 884 and TLR 1/3/95) the Privy Council emphatically rejected the mechanical approach to the Judge's task of summing up stating that*
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> > *'R v Turnbull was not a Statute and did not require an incantation of a formula - the Judge did not need to cast his directions in a set form of words'.*
> >
> > *'All that was required of him was that he should comply with the sense and spirit of the guidance in Turnbull'.*
>
> *'[46] Then, in giving the Turnbull direction the judge should direct the jury to examine the circumstances in which the identification by each witness can be made. Some of these circumstances may include the length of time the accused was observed by the witness, the distance the witness was from the accused, the state of the light (visibility), obstructions blocking the witness's view, whether the accused had been known or seen before, any other reason for the witness to remember who he saw, the length of time elapsed between the original observation and the subsequent identification to the police or identifying the accused at an identification parade, errors or discrepancies between the first description of the accused seen given by the witness to the police and the actual appearance of the accused.*

[11] Upon a perusal of the summing-up it becomes clear that the case against the appellant was entirely based on the evidence of the complainant, Anil Kumar (PW1). The trial judge had addressed the assessors on the complainant's evidence in detail at paragraphs 24-27 and in even more detail on the identification evidence against the appellant at paragraphs 35-41 of the summing-up. Examining in the light of the above decisions no criticism can be made of the learned trial judge's directions to the assessors though he had not used the label 'Turnbull directions'. It appears that PW1 had clear opportunities including face to face encounters (for e.g. when the appellant tried to take PW1's eye balls out with a screw driver, and when PW1 was lying on the flow of the taxi back seat facing up where the appellant was seated and stomped PW1 on his chest and stomach several times) to see, observe and retain in his memory the physical characteristics of the appellant for 01 to 01 ½ hours from Gorden Street to Rakiraki before he lost consciousness.

[12] Therefore, these grounds of appeal have no reasonable prospect of success.

3rd ground of appeal (31 July 2020)

[13] The appellant claims that the medical evidence had not been consistent with PW1's evidence of injuries he had suffered. According to the summing-up, PW1 had lost teeth bleeding heavily from the mouth and suffered a stab injury at the hands of the appellant. Dr. Jona Seru (PW7) had given evidence and PW1's medical report had been tendered as PE1. However, the details of injuries revealed by PE1 are not available in the summing-up. The appellant has not submitted what the so called inconsistences are. Yet, PW3 had seen the complainant unconscious in his taxi with blood in his mouth.

[14] I have no material even to suspect that there are any merits in this ground of appeal and it could be even vexatious.

05th, 07th, 08th, 09th ground of appeal (31 July 2020) and 03rd and 05th additional ground of appeal (19 August 2020)

[15] The appellant's contention is based on dock identification and the failure to hold an identification parade and the trial judge's failure to warn the assessors of the danger of PW1 picking the only person in the dock as the perpetrator who happened to be the appellant.

[16] The summing-up does not show that the counsel for the appellant had objected to the dock identification or at least sought redirections on dock identification as contemplated by the appellant [vide **Tuwai v State** [2016] FJSC35 (26 August 2016) and **Alfaaz v State** [2018] FJCA19; AAU0030 of 2014 (08 March 2018) and **Alfaaz v State** [2018] FJSC 17; CAV 0009 of 2018 (30 August 2018)]. Resultantly, there had not been any reference or warning on dock identification either in the summing-up. The deliberate failure to seek redirections would disentitle the appellant even to raise these grounds of appeal with any credibility.

[17] Be that as it may, it looks as if the case had been fought on the identification of the appellant by PW1 in the course of the whole transaction culminating in the commission of the crimes. There had not been an identification parade or any explanation why such a police parade had not been held perhaps due to lack of any challenge to PW1's identification evidence during the commission of the crimes. Not

holding a police identification parade *per se* would not vitiate a conviction. Nor does it amount a breach of the Constitution as argued by the appellant. It would have been certainly desirable for the police to have conducted an identification parade and even helpful to the prosecution case as PW1 seems to have been very reliable in his evidence in the identification of the appellant. The trial judge had treated PW1's identification as high quality worthy of being accepted despite the absence of an identification parade (see paragraph 41 of the summing-up).

[18] Nevertheless, the identification of the appellant by the complainant at the trial appears to have been a first time dock identification after the event that had happened about 02 years and 03 months ago.

[19] 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.

[20] 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.

[21] 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."*

[22] 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.'*

[23] Having allowed the first time dock identification after about 02 years and 03 months since the incident, the trial judge had substantially directed the assessors on Turnbull guidelines *inter alia* at paragraph 40 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 court should look at this omission in appeal.

[24] 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).

[25] 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.

[26] Therefore, applying those tests to the appellant's complaint on the first time dock identification, it appears that other than the dock identification there was the evidence of the appellant being arrested while trying to flee into a sugar cane field within a few hours of the incident within the general area of the crime scene. Further, the appellant had given a false name to the police upon arrest *i.e.* Jone Savou which was exposed *via* PW5 who had known him from childhood. This is evidence of subsequent conduct

influenced by the fact in issue. In addition unlike in ***Naicker*** , the trial judge had given a clear Turnbull direction in this case. Therefore, in the light of strong initial identification evidence of PW1 coupled with the aforesaid circumstantial evidence I do not think that the absence of an identification parade or a warning on the dock identification had resulted in a miscarriage of justice. Even assuming that a miscarriage of justice had occurred it would not amount to a substantial miscarriage of justice and the Court of Appeal would be inclined to apply the proviso to section 23(1) of the Court of Appeal Act.

[27] Therefore, at this stage there appears to be no reasonable prospect of success in appeal on these grounds of appeal.

06th ground of appeal (31 July 2020)

[28] The appellant submits that the summing-up was unfair, imbalanced, confusing, one-sided, and ineligible in outlining all the facts and circumstances of the case.

[29] In elaborating this ground of appeal the appellant had repeated his complaint of lack of warning to the assessors on dock identification. I have already dealt with this aspect before.

[30] For the reasons given above, I do not see this ground of appeal also having a reasonable prospect of success in appeal.

10th and 11th grounds of appeal (31 July 2020)

[31] The appellant's contention is that the trial judge had not considered whether there was evidence such as the items stated in the ground of appeal to connect the appellant with the crimes.

[32] A trial judge is not expected to address the assessors or himself on what is not available as evidence but only with the available evidence. He had done that in the summing-up and the judgment. If PW1's evidence was accepted, as indeed was the case, that alone was sufficient to establish the nexus between the crimes and the offender namely the appellant.

[33] Therefore, I do not see these grounds of appeal having a reasonable prospect of success in appeal.

02nd additional ground of appeal (19 August 2020)

[34] The appellant's complaint relates to the trial judge having mentioned his name at paragraph 41 of the summing-up.

[35] This concern has to be understood in the context of the manner in which the summing-up had been arranged by the trial judge. It is under the heading 'analysis of the evidence'. The trial judge had already refereed to the available evidence in the summing-up. When the main evidence against the appellant was the identification evidence of PW1, there was no prejudice in mentioning his name. In any event, at the end of paragraph 41 the trial judge had specifically asked the assessors to find him not guilty if they were not to accept PW1's evidence. This warning had been repeated by the trial judge at the end of paragraph 40 also.

[36] Therefore, there is no reasonable prospect of success in this ground of appeal.

04th additional ground of appeal (19 August 2020)

[37] The submission under this ground of appeal is not relevant to the ground of appeal as formulated on the trial judge not accepting the appellant's evidence.

[38] The trial judge had addressed the assessors on the appellant's evidence including that of DW1 at paragraph 30 and directed them to find him not guilty of all charges if they were to accept his version of events. Even otherwise, the judge had directed the assessors to look at the prosecution evidence and decide accordingly and left the decision entirely to the assessors. This direction had been repeated at the end at paragraph 52 as well.

[39] However, the assessors had rejected the appellant's version, accepted the prosecution evidence and found the appellant guilty. I undertook some analysis of past several decisions of the Supreme Court and the Court of Appeal regarding the trial judge's role in trial proceedings with assessors in **Manan v State** [2020] FJCA 157; AAU0110.2017 (3 September 2020) and **Waininima v State** [2020] FJCA 159;AAU0142 of 2017 (10 September 2020) followed by a few other rulings. My

conclusions were subsequently summarized in **State v Mow** [2020] FJCA 199; AAU0024.2018 (12 October 2020) and several other rulings. They are as follows.

> "*What could be ascertained as common ground is that when the trial judge agrees with the majority of assessors, the law does not require the judge to spell out his reasons for agreeing with the assessors in a judgment but it is advisable for the trial judge to always follow the sound and best practice of briefly setting out evidence and preferably reasons for his agreement with the assessors in a concise written judgment as it would be of great assistance to the appellate courts to understand that the trial judge had given his mind to the fact that the verdict of court is supported by evidence so that a judge's agreement with the assessors' opinion is not viewed as a mere rubber stamp of the latter ([vide **Mohammed v State** [2014] FJSC 2; CAV02.2013 (27 February 2014), **Kaiyum v State** [2014] FJCA 35; AAU0071.2012 (14 March 2014), **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015) and **Kumar v State** [2018] FJCA 136; AAU103.2016 (30 August 2018)]."*
>
> *"…… 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) even when he disagrees with the majority of assessors as long as he had directed himself on the lines of his summing-up to the assessors, for it could reasonable be assumed that in the summing-up there is almost always some degree of assessment and evaluation of evidence by the trial judge or some assistance in that regard to the assessors by the trial judge."*
>
> *"This stance is consistent with the position of the trial judge at a trial with assessors i.e. in Fiji, the assessors are not the sole judge of facts. The judge is the sole judge of fact in respect of guilt, and the assessors are there only to offer their opinions, based on their views of the facts and it is the judge who ultimately decides whether the accused is guilty or not (vide **Rokonabete v State** [2006] FJCA 85; AAU0048.2005S (22 March 2006), **Noa Maya v. The State** [2015] FJSC 30; CAV 009 of 2015 (23 October 2015] and **Rokopeta v State** [2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26 August 2016)."*

[40] The trial judge had directed himself according to the summing-up and agreed with the assessors by accepting the prosecution evidence. He need not have given cogent reasons for rejecting the appellant's evidence.

[41] The appellant had also made submissions that it was wrong for the trial judge to have said at paragraph 28 of the summing-up *'When a prima facie case was found against*

each accused at the end of the prosecution case, wherein they were called upon to make their defence, Accused 01 ……' .

[42] This court has said before that such a pronouncement is unwarranted and should be avoided but it would not vitiate a conviction.

[43] Therefore, there is no reasonable prospect of success in this ground of appeal.

13th, 14th, 15th grounds of appeal (31 July 2020) & 01st and 03rd additional grounds of appeal (19 August 2020) against sentence.

[44] These grounds of appeal represent the main argument on the sentence.

[45] The learned High Court judge had applied the sentencing tariff set in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) *i.e.* 08 to 16 years of imprisonment. He had picked 12 years as the starting point and enhanced the sentence on account of two aggravating features by 02 years and deducted 01 year for remand the period arriving at the sentence of 13 years with a non-parole period of 10 years.

[46] 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. The factual background in ***Wise*** was as follows:

> '*[5] Mr. Shiu Ram was aged 62. He lived in Nasinu and ran a small retail grocery shop. He closed his shop at 10pm on 16th April 2010. He had a painful ear ache and went to bed. He could not sleep because of the pain. He was in the adjoining living quarters with his wife and a 12 year old granddaughter.*
>
> *[6] At around 2.30am he heard the sound of smashing windows. He went to investigate and saw the door of his house was open. Three persons had entered. The intruders were masked. Initially Mr. Ram was punched and fell down. One intruder went up to his wife holding a knife, demanding her jewellery. There was a skirmish in which Mr. Ram was injured by the knife. Another of the intruders had an iron bar.*
>
> *[7] The intruders got away with jewellery worth $550 and $150 cash. Mr. Ram went to hospital for his injuries. He had bruises on his chest and upper back, and a deep ragged laceration on the left eye area around the eyebrow, and another laceration on the right forehead. The left eye area was stitched.'*

[47] The facts highlighted by the trial judge show that what had happened was in the category of an *'Attack against taxi drivers'* where the sentencing tariff is between 04 to 10 years. It is less serious than *'home invasion in the night'* as espoused in ***Wise*** (08 to 16 years). Nevertheless, given the overall background, objectively the offence of aggravated robbery the appellant had been convicted of assumes a high degree of seriousness.

Attacks against taxi drivers

[48] 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."

[49] **State v Bola** [2018] FJHC 274; HAC 73 of 2018, 12 April 2018 followed the same line of thinking as in ***Raqici*** 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…'*

[50] 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.'*

[51] The Court of Appeal in **Qalivere v State** [2020] FJCA 1; AAU71.2017 (27 February 2020) said:

> *'[19]……. When the learned Magistrate chose the wrong sentencing range, then errors are bound to get into every other aspect of the sentencing, including the selection of the starting point; ……..'*

[52] Therefore, picking 12 years as the starting point by the trial judge based on ***Wise*** may demonstrate a sentencing error. However, the objective seriousness of this particular aggravated robbery could have justified a higher starting point of the sentencing tariff between 04 years to 10 years for *'Attack against taxi drivers'*. If the starting point was taken at the lower end the aggravating features would have justified a very substantial increase of the sentence.

[53] The ever increasing occurrence of similar attacks against taxi drivers in the form of aggravated robberies demand deterrent custodial sentences. The appellant's propensity to commit similar robberies [see **State v Naureure** - Sentence [2020] FJHC 1030; HAC331.2018 (30 November 2020) for an aggravated robbery committed on 20 August 2018] had continued unabated. Thus, deterrence should 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 other prospective offenders. However, the sentence of 13 is still outside the sentencing tariff for *'Attack against taxi drivers'.*

[54] Sentencing is not a mathematical exercise. It is an exercise of judgment involving the difficult and inexact task of weighing both aggravating and mitigating circumstances concerning the offending, and arriving at a sentence that fits the crime. Recognising the so-called starting point is itself no more than an inexact guide. Inevitably different judges and magistrates will assess the circumstances somewhat differently in arriving at a sentence. On the other hand, it is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered **(vide Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006). In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range [**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015)].

[55] Therefore, in all the circumstances of this case, I think that the appellant's appeal against sentence should be allowed to go before the full court for it to decide the ultimate sentence in terms of section 23(3) of the Court of Appeal Act.

[56] Accordingly, leave to appeal against sentence is allowed on 13th ground of appeal (31 July 2020), 01st and 03rd additional grounds (19 August 2020) of the above grounds of appeal. 14th and 15th grounds of appeal (31 July 2020) are allowed only to the extent of the trial judge having applied the wrong tariff and the sentence being possibly disproportionately severe.

03rd additional grounds of appeal (19 August 2020) against sentence

[57] The appellant argues that the trial judge should have made an order that he be released upon conclusion of the non-parole period.

[58] There is no legal basis for this ground of appeal at all. In terms of section 18 of the Sentencing and Penalties Act the trial judge was empowered only to fix a non-parole period and nothing more.

[59] 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'.*

[60] This ground of appeal is vexatious and dismissed in terms of section 35(2) of the Court of Appeal Act.

Orders

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

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL