

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

**CRIMINAL APPEAL NO. AAU 0099 OF 2016**  
**In the High Court at Lautoka HAC 047 of 2014**

**BETWEEN** : **RUSIATE TEMO ULUIBAU**

*Appellant*

**AND** : **THE STATE**

*Respondent*

**Coram** : **Mataitoga, JA**  
**Qetaki, JA**  
**Morgan, JA**

**Counsel** : **Appellant in person**  
**Mr R. Kumar for the Respondent**

**Date of Hearing** : **6 September, 2023**

**Date of Judgment** : **28 September, 2023**

**JUDGMENT**

**Mataitoga, JA**

[1] The appellant had been indicted in the High Court of Suva on two counts of Act with Intent to Cause Grievous Harm [section 255(a)], one count of Aggravated robbery [section 311(1)(a)] and Damage to property [section 369(1)] of the Crimes Act, 2009 committed with 04 others [three of whom are the appellants in AAU0092/2016, AAU 0100/2016 and AAU0067/2017] on 06 April 2014 at Nadi in the Western Division.

[2] The information read as follows.

**FIRST COUNT**

*Statement of Offence*

**ACT WITH INTENT TO CAUSE GRIEVOUS HARM:** *Contrary to Section 255 (a) of the Crimes Decree 44 of 2009.*

*Particulars of Offence*

**PENI YALIBULA, MIKAELE TURAGANIVALU, RUSIATE TEMO ULUIBAU, ULAIASI QALOMAI and TEVITA QAQANIVALU** on the 6th day of April 2014 at Nadi in the Western Division, with intent to cause grievous harm to **MANI RAM**, unlawfully wounded the said **MANI RAM** by kicking, hitting and striking him in the head with a liquor bottle.

**SECOND COUNT**

*Statement of Offence*

**ACT WITH INTENT TO CAUSE GRIEVOUS HARM:** *Contrary to Section 255 (a) of the Crimes Decree 44 of 2009.*

*Particulars of Offence*

**PENI YALIBULA, MIKAELE TURAGANIVALU, RUSIATE TEMO ULUIBAU, ULAIASI QALOMAI and TEVITA QAQANIVALU** on the 6th day of April 2014 at Nadi in the Western Division, with intent to cause grievous harm to **NAUSAD MOHAMMED**, unlawfully wounded the said **NAUSAD MOHAMMED** by kicking, hitting and striking him in the head with a liquor bottle.

**THIRD COUNT**

*Statement of Offence*

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

*Particulars of Offence*

**PENI YALIBULA, MIKAELE TURAGANIVALU, RUSIATE TEMO ULUIBAU, ULAIASI QALOMAI and TEVITA QAQANIVALU** on the 6th day of April 2014 at Nadi in the Western Division, robbed **MANI RAM** of assorted liquor valued at \$3,400.00, assorted cigarettes valued at \$1,300.00 and \$5,300.00 cash all to the total value of \$10,000.00 and immediately before the robbery, force was used on the said **MANI RAM**.

## **FOURTH COUNT**

### ***Statement of Offence***

**DAMAGING PROPERTY:** *Contrary to Section 369 (1) of the Crimes Decree 2009.*

### ***Particulars of Offence***

***PENI YALIBULA, MIKAELE TURAGANIVALU, RUSIATE TEMO ULUIBAU, ULAIASI QALOMAI and TEVITA QAQANIVALU on the 6th day of April 2014 at Nadi in the Western Division, wilfully and unknowingly damaged assorted liquor valued at \$3,200.00, assorted juice valued \$580.00, 1 x computer valued at \$650.00, dried Kava valued at \$220.00 and 1 x cash register valued at \$499.00 all to the total value of \$6,609.00 the property of MANI RAM.***

- [3] After trial, the assessors expressed a unanimous opinion of guilty against the appellant on all charges on 06 June 2016. The learned High Court judge in his judgment on 13 June 2016 had agreed with the assessors and convicted the appellant as charged. He had been sentenced on 11 July 2016 to 10 years of imprisonment for all offences (aggregate sentence) with a non-parole period of 07 years.
- [4] The appellant being dissatisfied with the conviction and sentence submitted a timely application for leave to appeal on 27 July 2016 (received by the CA registry on 08 August 2016). He had tendered written submission on 10 June 2020 with three grounds of appeal against conviction only and he stated at the leave to appeal hearing that he would rely only on those grounds. The state had filed its submissions on 17 August 2020.

## **Court of Appeal**

### **Judge Alone**

- [5] The following grounds were submitted at the hearing for the Application for Leave to Appeal before single judge.

*That the Learned Trial Judge erred in law when His Lordship*

- (i) *Did not direct the Assessors for the need for such a warning in clear terms on the dangers of convicting on recognition;*

- (i) *Did not direct the Assessors and himself to consider the appropriateness of the parade regarding the fact of having the Appellant as the only person with injuries in the identification parade; and*
- (ii) *Did not warn the Assessors on the weakness of the identification parade with regards to the fact that the Appellant would have been seen by the Complainant when he was taken for reconstruction during investigation and before the identification parade on the 7<sup>th</sup> April, 2014.*

[6] Although, separately framed all three grounds of appeal are interrelated and interconnected. The totality of the summing-up and the judgment show the futility of all of the grounds of appeal relating to different aspects of identification of the appellant. The Single Judge undertook a careful analysis of the relevant evidence for each of the grounds urged before him and determined that none of the grounds had any prospect of success.

### **The relevant Facts**

[7] The prosecution evidence of the case as summarised by the trial judge in the sentence order is as follows.

*'[3] The Complainant, Mr. Mani Ram, had been running a shop in Martintar, Nadi, for the past 40 years. To cater to customers who enjoy the night life in the Airport City of Nadi, he kept his shop open till late night in the company of his security guard, Mr. Naushad. Five accused came in a mini-van, got off near the shop and started drinking alcohol. Around 3 a.m., they came to the counter of the complainant's shop in the guise of customers and tried to forcibly enter the shop through the opening at the counter. Failing of which they broke off the rear door and entered the shop forcibly. They went on rampage in the shop completely disregarding personal and property rights of the shop keepers. They wounded the complainant and his security guard kicking, hitting and striking brutally with bottles, and destroyed the property. They robbed valuable goods and cash. 1<sup>st</sup> accused was apprehended red handed by members of the public while others fled with the loot. The entire 'horrific drama' lasted nearly for eight minutes was being secretly recorded by six surveillance cameras installed in the shop. The CCTV footages obtained from cameras helped the police to identify the culprits who were later apprehended. 1<sup>st</sup> accused made a confession to police. Other accused were positively identified by the prosecution witnesses. The CCTV footage displayed during trial showed a systematic and coordinated brutal attack on the victims and their property.'*

## Full Court

[8] The grounds submitted by the appellant both at the Leave to Appeal stage before the single judge and renewed in the full court may be consolidated into two grounds

- (i) *Application to adduce new evidence, namely, medical report, which he claims showed injuries sustained in police custody;*
- (ii) *Lack of trial judges' directions to the assessors on 3 aspects of his identification: danger of convicting solely on recognition evidence of Mani Ram; holding an identification parade when the appellant was the only person with injuries and therefore easily identified and that the appellant was seen by Mani Ram when he was taken to the shop for the crime scene for reconstruction.*

## Assessment of the Grounds

[9] As regards the notice to adduce new evidence to be adduced. On 23 February 2023, the appellant submitted a Notice of Motion to Adduce Fresh Evidence relating to medical reports he claims shows injuries that were inflicted by the police officers on him. This issue was not taken any further by him before the Court. The Notice was bound to fail because the evidence sought to be adduced is not fresh. The evidence was available at the time of the trial and it was considered by the court during the Voire Dire hearing following his claim that his caution interview statements were not obtain voluntarily.

## Claims regarding Identification evidence

[10] To provide the context of the appellant's complainant one has to look at the evidence led against him. The trial judge has set out the evidence of witness Mr. Mani Ram in the summing-up as follows.

*'57. He had seen the third accused earlier as a customer. Even though the accused was a frequent visitor he had not known his name and where he was actually from, but he knew his face. At the time he gave his first statement to police he was not in a stable condition. He could not recall how many statements were given to police. He later admitted giving a statement on 30<sup>th</sup> of October, 2014, after watching the CCTV footage. He said that the description- 'a thin tall Fijian man' referred to in the 1<sup>st</sup> statement was about the man who first approached for a cigarette role.*

*58. Speaking about the ID parade, Mr. Mani Ram said that people lined up were under 30 years of age, different in height and complexion. **He did***

*not see any injury on the 3<sup>rd</sup> accused [Rusiate Temo Uluibau]. Page 303 Court Record*

*116. 3<sup>rd</sup> accused was identified Mr. Mani Ram at the ID parade within 36 hours after the incident. Mr. Mani Ram said that 3<sup>rd</sup> accused's face was familiar to him as a frequent visitor to his shop. 3<sup>rd</sup> accused denied having shopped at his shop earlier. 3<sup>rd</sup> accused took two different versions as to the basis of his identification at the ID parade. He said that he was pointed out by police officers to Mr. Mani Ram before the ID parade was conducted. On the other hand, he said he was singled out at the parade as the only person having injuries. You watched the CCTV footage also. Page 316 Court Record*

- [11] The trial judge was mindful of the evidence of identification against the appellant as he stated in the judgment as follows.

*17. 'Witness Mani Ram identified 3<sup>rd</sup> accused as one of the robbers who entered his shop. He identified the 3<sup>rd</sup> accused at the identification parade within 36 hours of the incident. He said that 3<sup>rd</sup> accused's face was familiar to him as a frequent visitor to his shop.*

*18. The 3<sup>rd</sup> accused denied having shopped at Mani Ram's shop earlier. He took two different positions as to the basis of his identification at the identification parade. He said that he was pointed out to Mani Ram by police officers before the identification parade was conducted. On the other hand, he said that he was singled out at the identification parade as the only person having injuries.*

*19. On the 7<sup>th</sup> of April 2014, Mani Ram gave a statement to police. He had not mentioned in his first statement that he recognized the 3<sup>rd</sup> accused on the basis of familiarity as a frequent customer. Only description he had given to police was about a 'thin tall Fijian man'. He was not in a stable condition when he made his 1<sup>st</sup> statement at the hospital. He explained the 'thin tall Fijian man' as the person who first approached for a cigarette role. Video footage corroborated his evidence.*

*20. Even though the 3<sup>rd</sup> accused was a familiar customer, Mani Ram had not known his name and where he was actually from. He knew only his face. **In these circumstances, holding of an identification parade was logical.***

*21. **Mani Ram denied that 3<sup>rd</sup> accused was pointed out to him by police officers before the identification parade. He had been discharged from the hospital in the afternoon of the 7<sup>th</sup> whereas the 3<sup>rd</sup> accused had been arrested in the early morning of the 7<sup>th</sup>. 3<sup>rd</sup> accused said he was taken directly to Mani Ram's shop after his arrest. By that time Mani Ram was still in the hospital.***

'23. There is no reason to reject Mani Ram's evidence. I am satisfied that Mani Ram is an honest and reliable witness. This is not a fleeting glimpse case. Robbers had confronted the witnesses face to face for a considerable time. Their faces were not covered. Lighting condition had been good. Video footage confirmed that conditions were conducive for a proper identification. I am satisfied that Mani Ram positively identified the 3<sup>rd</sup> accused.

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### **Identification v Recognition Evidence – the legal principles**

[12] There is a difference between recognition and identification evidence. The difference was described by Buss JA in **Mills v The State of Western Australia** [2008] WASCA 219

*In general, identification evidence describes the evidence of a witness who identifies an accused as the offender in circumstances where the witness first saw the accused at or near the crime scene. In general, recognition evidence describes the evidence of a witness who recognises an accused as the offender in circumstances where the accused was previously known to the witness or had previously been seen by the witness other than at or near the crime scene. Where the witness's previous knowledge of the accused was tenuous, or the witness's previous sighting of the accused was fleeting, the witness's evidence that he or she recognised the accused at or near the crime scene may, in substance, resemble 'identification evidence'. The nature and character of the witness's previous connection with the accused is the crucial issue, rather than the characterisation of his or her evidence as 'recognition' evidence.*

[13] The High Court of Australia in **Domican v The Queen** [1992] HCA13; 173 CLR 189, the so-called **Domican** warning derived from the following observations made by Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ

*Whatever the defence and however the case is conducted, where evidence as to identification represents any significant part of the proof of guilt of an offence, the judge must warn the jury as to the dangers of convicting on such evidence where its reliability is disputed. The terms of the warning need not follow any particular formula. But it must be cogent and effective. It must be appropriate to the circumstances of the case. Consequently, the jury must be instructed 'as to the factors which may affect the consideration of [the identification] evidence in the circumstances of the particular case'. A warning in general terms is insufficient. The attention of the jury should be drawn to any*

*weaknesses in the identification evidence'. Reference to counsel's arguments is insufficient. The jury must have the benefit of a direction which has the authority of the judge's office behind it. It follows that the trial judge should isolate and identify for the benefit of the jury any matter of significance which may reasonably be regarded as undermining the reliability of the identification evidence. (Domican Warning)*

*A **Domican** warning is mandated for cases involving identification. It is not mandated for cases involving recognition. This is because, generally speaking, recognition evidence is more reliable than a stranger's evidence of identification. Nevertheless, ordinarily in cases involving recognition, a jury is reminded that mistakes in recognition, even of close relatives or friends, are sometimes made.*

[14] This court accepts that the above principles of law defining the parameters of identification evidence from recognition evidence, equally applies in Fiji. Applying the above case law principles to facts of this case, there was no need to give a special warning to the assessors on the 'dangers' of convicting on recognition as demanded by the appellant. However, in paragraphs 25 – 27 [pages 296 & 297 Court Record] of the summing-up the trial judge had specifically warned the assessors to take special care in approaching the issue of identification and in fact given a Turnbull direction in paragraph 28. The trial judge had himself been very careful of the evidence of identification of the appellant by the eye witness. This claim has no merit and is dismissed.

[15] The third limb of the identification evidence against the appellant, which he complains about in this appeal, relates fairness of Mani Ram's evidence which identifies him as one of the robbers at the identification parade, when he was injured which made him easily identifiable.

[16] The trial judge had addressed the assessors on the appellant's stand in the following manner.

*'103. Temo resided at Waiyavi in Lautoka, Stage 1 in 2014. On the 5<sup>th</sup> day of April, 2014, he was in Lautoka. On the 5<sup>th</sup> of April, he was watching movies during night time with a friend. He knew nothing about the robbery. He was asleep at home. In the early morning of the 7<sup>th</sup> of April, he was arrested and was taken to Nadi by police officers and taken to a shop in Martintar. From there, he was taken to the Nadi Police*



*Station. He was shown to the Indian men there. Mani Ram and the security were present at the shop. He denied having any knowledge about the Daily Shop and the robbery. Then police officers started beating him. He received visible injuries and his leg got swollen. He was taken to the hospital and, on the 8<sup>th</sup> of April, was taken to an ID parade where some iTaukei people of different height and complexion were lined up. One of the same Indian men who was at the shop came and pointed at him. He was the only person with injuries. He denied shopping at Mani Ram's shop any time before the incident.*

116. *3<sup>rd</sup> accused was identified by Mr. Mani Ram at the ID parade within 36 hours after the incident. Mr. Mani Ram said that 3<sup>rd</sup> accused's face was familiar to him as a frequent visitor to his shop. 3<sup>rd</sup> accused denied having shopped at his shop earlier. 3<sup>rd</sup> accused took two different versions as to the basis of his identification at the ID parade. He said that he was pointed out by police officers to Mr. Mani Ram before the ID parade was conducted. On the other hand, he said he was singled out at the parade as the only person having injuries. You watched the CCTV footage also.*

117. *3<sup>rd</sup> accused took up a defense of alibi. He said that after watching a movie with a friend, he was sleeping at his house in Lautoka at the time the robbery took place. He did not call his friend as an alibi witness. He had not given prior alibi notice to police to check his alibi. You decide what weight you give to his evidence on alibi. However, you must remember, he has no burden to prove his alibi. Even if you do not believe a single word of his evidence, burden of proof remains with the Prosecution to prove that he was in fact present at the crime scene at the crucial time.*

118. *Taking into consideration the caution I have given to you; you decide if Mr. Mani Ram is an honest witness and whether he positively identified the 3<sup>rd</sup> accused.*

[17] Therefore, it is clear that the trial judge had addressed the assessors of all aspects of the appellant's identification and coupled his cautionary note to them on having to take special care in the matter of identification as stated above. This ground of appeal has no merit.

[18] Before the court concludes it should be made abundantly clear that the Court of Appeal will not easily substitute its opinion with that of the trial judge in the High Court because the latter would be in far better position to assess the evidence led during the trial and evaluate the credibility of the witnesses called and cross-examined: Sahib v State [1992] FJCA 24.

[19] All grounds of appeal are dismissed as having no merit

**Qetaki, JA**

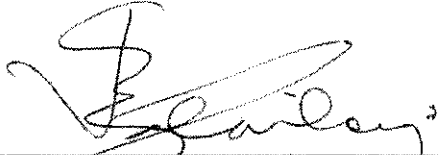
[20] I agree with the judgment, its reasoning and the Orders.

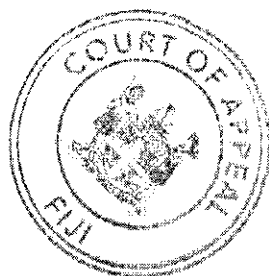
**Morgan, JA**


[21] I concur with the reasons and conclusion of Mataitoga J.

**Order**

1. *Appeal against conviction is refused.*
2. *Orders of the High Court is affirmed.*

  
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**The Hon. Mr. Justice Isikeli Mataitoga**  
JUSTICE OF APPEAL



  
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**The Hon. Mr. Justice Alipate Qetaki**  
JUSTICE OF APPEAL

  
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**The Hon. Mr. Justice Walton Morgan**  
JUSTICE OF APPEAL

**SOLICITORS:**

Appellant in person  
Office of the Director of Public Prosecutions, Suva, for the Respondent