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

CRIMINAL APPEAL NO. AAU0037 OF 2019
[Suva Criminal Action No. HAC 430 of 2016]

BETWEEN **ASESELA NAUREURE**

Appellant

THE STATE

Respondent

Coram	**Prematilaka, RJA**
	Qetaki, JA
	Andrews, JA
Counsel	**Appellant in person**
	Ms S Shameem for the Respondent
Date of Hearing	**3 November, 2023**
Date of Judgment	**29 November, 2023**

JUDGMENT

Prematilaka, RJA

[1] I am in agreement with the outcome proposed by Qetaki, JA.

Qetaki, JA

[2] The appellant (first accused in the High Court) had been indicted with another (second accused in the High Court and appellant in AAU0035 of 2019) on one count of aggravated robbery contrary to section 311(1) of the Crimes Act 2009; one count of abduction contrary to section 282(a) of the Crime Act 2009 and one count of damaging property contrary to section 369(1) of the Crimes Act 2009 committed on 24 November 2016, at Kasavu ausori in the Central Division.

[3] Following the summing up on 13 March 2019, the assessors expressed a unanimous opinion of guilty against the appellant on all counts. The learned trial judge on the same day had agreed with the assessors and convicted the appellant on all counts. He was sentenced on 14 March 2019 to 13 years, 05 years and 18 months imprisonment for the three charges respectively, all to run concurrently with a non-parole period of 12 years.

[4] 10th April 2019 the appellant appealed against both his conviction and sentence, founded on the following: (a) 12 conviction grounds filed on 31st July 2020; (b) 5 conviction grounds filed on 19 August 2020; (c) 3 sentence grounds filed on 31 July 2020; (d) 3 sentence ground filed on 19 August 2020. These grounds are set out in full under paragraph [6] of the learned trial judge's Ruling at pages 49-52 of the Record of the High Court of Fiji.

[5] For the reasons stated in a Ruling dated 01 April 2021, the learned single judge refused the appellant's application for leave to appeal against conviction, and allowed leave to appeal against sentence. On 5 October 2023, the appellant filed an application for renewal grounds for leave to appeal against conviction, which the full Court had accepted at the commencement of the hearing.

[6] **Renewal Ground of Conviction**

Ground 1

"That *the appellant's contention is based on* ***"Dock Identification Parade"****....and the trial judge had erred in law, when he failed to warn the assessors of the danger of PW1 picking the only person in the dock as the perpetrator who happen to be the appellant...."*

[7] On the sentence appeal: *"The appellant will rely on grounds of sentences that was allowed by the single judge on the exact date of Ruling (1 April 2021)."* The said grounds as allowed by a single judge all focus on the sentence being harsh and excessive as represented in Ground 1 below:

Sentence Ground:

Ground 1

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

The Law

[8] Any appeal against conviction and sentence to this Court may be made with leave of Court pursuant to section 21(1)(b) and (c) of the Court of Appeal Act. The test for leave to appeal against conviction and sentence is *"reasonable prospect of success"*. as established through case law: **Caucau v State** [2018] FJCA 171: AAU0029.2016 (4 October 2018): **Navuki v State** [2018] FJCA 172: AAU0038.2016 (4 October 2018): **State v Vakarau** [2018] FJCA 173: AAU0052.2017 (4 October 2018); **Sadrugu v State** [2019] FJCA 87: AAU0057.2015 (6 June 2019) and others.

[9] When a sentence is challenged the test is not whether it is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principle outlined

in the case **Kim Nam Bae v State** AAU0015 of 2011 [1999]FJCA 21:(26/02/1999), namely, that the sentencing judge:

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.

[10] Section 23 (3) of the Court of Appeal Act provides:

"On appeal against sentence the Court of Appeal shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial and pass such other sentence warranted by law by the verdict (whether more or less severe) in substitution thereof as they think ought to have been passed, or may dismiss the appeal or make such other order as they think just."

The Facts

[11] The sentencing order of the learned trial judge is summerised herein based on the evidence adduced at the trial:

"2. The brief facts of the case were as follows. On 24 November 2006, the complainant Anil Kumar (PW1was 59 years old. He was married with three children in their twenties. He earns his living by driving a taxi, registration number LT7127.He also owned the taxi. While working on early morning on 24 November 2006 (Thursday), he picked up Asesela Naureure (Accused No.1) at Gordon Street, Suva at about 6:30am.Accused No.1 asked him to go to Fiji National University (FNU) Tamavua to pick up Moape Rokoricebe (Accused No.2). Mr Kumar complied and drove to FNU Tamavua.

3. At FNU Tamavua Mr Kumar picked up Moape Rokoricebe (Accused No.2).Both accused sat in the back seat 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, where he lost some teeth. Later the two abducted Mr Kumar to Korovou Town.

4. *At Korovou Town Asesela 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 have been tried and convicted for the above offence in the High Court."*

[12] **Appellant's Submissions on Conviction Ground:** The appellant's written submissions dated 27 September 2023, filed 5 October 2023, are summarised below:

(a) The trial judge had made an error of law when he failed to warn the assessors or make any reference of the positive danger of "*dock identification*" with the absence of police identification parade.

(b) Having allowed (for the first time) the dock identification after 2 years and, 3 months since the incident, the issue for the appellant is: Whether the judge had given appropriate direction on how the assessors should approach the first time dock identification.

(c) In his Ruling dated 1 April 2021, Prematilaka JA at page 12, paragraph [23] stated: "*…… 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 danger of dock identification.*"

(d) Dock identification is not itself admissible, there being no identification parade held by the investigating team.

(f) The Court transcript at page 9 of 202, when counsel was asked by trial judge- "Anything else? Counsel for appellant raised an issue, the objection to dock ID there being no ID parade done by the police or an explanation why such parade was not conducted.

(g) The evidence in the identification of the appellant is unreliable, it amounts to a breach of Constitution.

(h) The appellant cited the following cases in support of his submissions: **Edwards v The Queen** [2006] UKPC 23 (25 April 2006); **Lawrence v The Queen** [2014] UKPC 82 (11 February 2014; **Maxo Tido v The Queen** (2010) 2 Cr.App.R23, PC [2011] UKPC 16.

[13] **Appellant's Submissions on Sentence Ground:** The appellant submissions on sentence grounds as can be ascertained from the grounds of appeal are:

(a) That the appellant's sentence is harsh and excessive.

(b) That the wrong principle was applied in sentencing the appellant.

(c) The learned trial judge acted on a wrong principle, allowed extraneous or irrelevant matters to guide or affect him, mistook the facts and failed to take into account relevant considerations before passing sentence.

(d) The appellant's sentence was disproportionately severe punishment contrary to ection 11(1) of the Constitution.

(e) The sentence was manifestly harsh and oppressive.

Discussions

[14] **Identification including dock identification.**

The appellant had challenged the dock identification conducted in this case with PW1 pointing to the appellant, e pecially as there wa no Police identification parade held, and with no proper explanation on why it was not held as is normally required of the police in similar cases. The learned trial judge also failed 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. That challenge has to be weighed against the fact that, after the summing up , counsel for the appellant did not object to dock identification or at least sought redirections on it .

[15] Further, the case against the appellant is based on identification evidence of the appellant by PW1 in the course of the commission of the offence. ot holding a police identification parade on its own, under the circumstances of this case, would not vitiate a conviction. Despite the absence of an identification parade, the learned trial judge had accepted PW1's evidence in identification of the appellant. Paragraph [41] of the summing up is relevant:

"*In this case, Mr Anil Kumar's identification of Asesela appear to take more than one hour, from when he was picked up at Gordon Street Suva, the trip to FNU Tamavua, then to Kasavu Nausori, then to the breadfruit tree at Tailevu, the fight thereat, the trip to Korovou Town, and then the trip towards Rakiraki. Mr Kumar said, he observed Asesela's face during that time. This was not a case of a fleeting glance. It was a case of personal observation for more than one hour. Mr Kumar said, Asesela was with him from 6:30am on 24 November 2016 to 9am when they reached Korovou Town. So, it would appear they were together for more than two hours. This, it would appear, was enough time to remember a person's face. The distance between the two was one to two footsteps away, as when they were in the taxi and when he was allegedly attacked by Asesela. It was broad morning daylight. A special reason for remembering Asesela's face, was because of what he did to him that day. PW1 said, he had repeated nightmares, and could not forget Asesela's face. Although a proper police identification parade was not carried out in this case, it could be argued that Mr Kumar's identification of Asesela at the material time was of a high quality and ought to be accepted. If you accept Mr Anil Kumar's identification evidence against Asesela at the material time, you must find him guilty as charged on all counts. If otherwise, you must find him not guilty as charged on all counts. It is entirely a matter for you.*" (Underlining added)

[16] What then was the role of dock identification at the trial in this case? As pointed out by the learned single judge 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 2 years and 3 months prior. Such first time dock identification was referred to as a '*serious irregularity*' by the Privy Council in **Edwards v Queen** [2006] UKPC 23 (25

April 2006), which should be permitted in exceptional circumstances, although the court also stated that it is in general an undesirable practice and other means should be adopted of establishing what the accused in the dock is the man who was arrested for the offence charged and that when evidence had been admitted it was incumbent upon the judge to direct the jury to give it little or no weight.

[17] A contrasting position was adopted by this Court in **Vulaca v State** AAU0038 of 2008: 29 August 2011 [2011] FJCA 39, in not disapproving 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 the lack of Turnbull direction.

[18] Dock identifications are not, of themselves and automatically, inadmissible: **Maxo Tido v The Queen** (2010) 2 Cr. App.R23, PC, [2011] UKPC 16. In **Aurelio v The Queen** [2003] UKPC 40, the Board of the Privy Council 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 when 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."* (Underlining added)

[19] It is noteworthy that the learned trial judge, having allowed the first time dock identification (after 2 years 3 months of the incident occurring) did direct the assessors

on Turnbull guidelines *inter alia* at paragraph [40] of the summing up regarding the identification of the appellant at the crime scene. as follows:

> *"When considering the complainant's identification evidence against the accused, I must direct you, as follows as a matter of law. First, whenever 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, I am warning you of the special need for caution before convicting the accused in reliance on the correctness of the identification, because an honest and convincing witness may be mistaken. Second, you must closely examine the circumstances in which the identification was made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way? Had the witness ever seen the accused before? How often? Has he any special reason for remembering the accused's face? Was a police identification parade held? Third, are there any specific weaknesses in the identification evidence? If the quality of the identification evidence is good, you may rely on it. If the quality is bad, you must reject it."* (Underlining added)

[20] The learned trial judge had not directly warned the jury of the undesirability in principle and dangers of dock identification: **Lawrence v The Queen** [2014] UKPC 2 (11 February 2014) or to give it little or no weight or that they should not take that into account. uch omission would weaken the evidential value of first time dock identification. What is the test to apply?

[21] The Supreme Court had formulated test for the appellate court to apply in the situation in **aicker v State** CAV0019 of 2018: 1 November 2018 [2018] FJSC 24 which were applied in **Korodrau v State** [2019] FJCA 193; AAU090.2014 (3 October 2019) . where this Court 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 identification*** *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 identification*** *, 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. 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.

[22] The complaint by the appellant on first time dock identification can be dismissed .In applying the above tests to this case, it appears that other than the dock identification, there are other evidence, for example:

(i) 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.

(ii) 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.

(iii) Unlike in **Naicker,** the trial judge had given a clear Turnbull direction in this case.

[23] I agree with the learned trial judge that, in light of strong initial identification evidence of PW1 coupled with the above circumstantial evidence, the absence of an identification parade or a warning on the dock identification had not resulted in a miscarriage of justice. Further, 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.

[24] **Whether the appellant' sentence was harsh and excessive?**

The appellant was sentenced to 13 years with a non-parole period of 12 years. He was granted leave to appeal against his sentence on the basis that the learned trial judge had fallen into sentencing error by picking 12 years as the starting point as per the tariff set out in **Wise v State** [2015] FJSC 7; CAV0004.2015 (24 April 2015) .A sentencing error occurred. This case is distinguishable from **Wise,** where the accused had been engaged in home invasion in the night with accompanying violence perpetrated on the inmates in committing the robbery. Whereas this is a case of aggravated robbery against a public service vehicle driver.

[25] The correct sentencing tariff for the offence of aggravated robbery against taxi drivers was settled in **Usa v State** [2020] FJCA 52: AAU81.2016 (15 May2020) at 4 years to 10 years imprisonment, subject to aggravating and mitigating factors. **In Usa v State,** it was held:

"[17] ..it appears that the settled range of sentencing tariff of 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."

[26] 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 imprisonment. If the starting point was taken at the lower end the aggravating features would have justified a very substantial increase of the sentence. The ever increasing occurrence of similar attacks against taxi drivers in the form of aggravated robberies demand deterrent custodial sentences. In the appellant's case, deterrence should be the main consideration in deciding the length of sentence imposed to safeguard the public and the providers of public services from the propensities to engage in similar crimes and other perspective offenders. The sentence of 13 years is outside the sentencing tariff for "*Attack against taxi drivers*".

[27] 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: **Koroicakau v State** [2006] FJSC 5; CAV 0006U.2005S (4 May 2006).In determining whether the sentencing direction 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). The appeal against sentence is allowed.

Conclusion

[28] Given, the above, the sentencing tariff of 4 years to 10 years for attacks against taxi drivers, and the fact an error in sentencing occurred, the appellant's appeal against his sentence of 13 years imprisonment with a non-parole period of 12 years imprisonment

(passed by the learned trial judge) is quashed: Based on the guideline judgment in Matairavula **v State** [2023] FJCA 192: AAU 054.2018 (28 September 2023). I sentence the appellant (under section 23(3) of Court of Appeal Act), to 12 years imprisonment with a non-parole period of 10 years.

Andrews, JA

[29] I have read and agree with the judgment of his Honour Qetaki, JA.

Orders of the Court:

1) *Appeal against conviction is dismissed.*
2) *Conviction affirmed.*
3) *Appeal against sentence is allowed.*
4) *Appellant's sentence of 13 years imprisonment with a non-parole period of 12 years is quashed.*
5) *Appellant's sentenced substituted to 12 years imprisonment with a non-parole period of 10 years with effect from 14 March 2019.*

Hon Mr Justice Chandana Prematilaka
RESIDENT JUSTICE OF APPEAL

Hon Mr Justice Alipate Qetaki
JUSTICE OF APPEAL

Hon Madam Justice Pamela Andrews
JUSTICE OF APPEAL