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

CRIMINAL APPEAL NO. AAU 011 of 2017
[In the High Court at Suva Case No. HAC 285 of 2015]

BETWEEN	:	**MENI RAITEKITEKI**
		Appellant
AND	:	**STATE**
		Respondent

Coram	:	**Prematilaka, RJA** **Bandara, JA** **Rajasinghe, JA**
Counsel	:	**Appellant in person** **Ms. P. Madanavosa for the Respondent**
Date of Hearing	:	**02 February 2023**
Date of Judgment	:	**24 February 2023**

JUDGMENT

Prematilaka, RJA

[1] I have had the benefit of perusing the draft judgment of Bandara, JA and agree that the appeal should be dismissed.

Bandara, JA

[2] The Appellant who was charged with one count of aggravated robbery contrary to section 311(1)(b) of the Crimes Decree, 2009, one count of rape contrary to section 207(1) and 2(a) of the Crimes Decree, 2009 and one count of false information to public servant contrary to section 201(a) of the Crimes Decree, 2009, committed on 18 August 2015 at Nepani, stood trial before the High Court at Suva.

Facts and antecedent proceedings

[3] The information read:

> *'**FIRST COUNT***
>
> ***Statement of Offence***
>
> ***AGGRAVATED ROBBERY:*** *contrary to section 311(1) (b) of the Crimes Decree No. 44 of 2009.*
>
> ***Particulars of Offence***
>
> ***MENI RAITEKITEKI*** *on the 18th day of August 2015 at Nepani, Nasinu in the Central Division, being armed with an offensive weapon, namely a dagger, stole cash in the sum of approximately $1700.00, assorted jewelries valued at $2000.00, 1 Alcatel mobile phone valued at $50.00, assorted liquor valued at $240.00, 1 Yess brand Note Pad valued at $165.00, 1 Floke model 112 multi meter valued at $1200.00, assorted biscuits valued at $10.00, all to the total value of $5365.00, the properties of PW, with the intention of permanently depriving PW of her properties and immediately before stealing, used force on PW.*
>
> ***SECOND COUNT***
>
> ***Statement of Offence***
>
> ***RAPE:*** *contrary to section 207(1) and 2(a) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

MENI RAITEKITEKI *on the 18th day of August 2015 at Nepani, Nasinu in the Central Division had carnal knowledge of PW, by penetrating her vagina with his penis without her consent.*

THIRD COUNT

Statement of Offence

FALSE INFORMATION TO PUBLIC SERVANT: *contrary to section 201(a) of the Crimes Decree No. 44 of 2009.*

Particulars of Offence

MENI RAITEKITEKI *on the 18th day of August 2015 at Nepani, Nasinu in the Central Division gave Detective Constable 4255 Binay Kumar, a person employed in the public service, a false name, intending to cause or knowing it to be likely that Detective Constable 4255 Binay Kumar will arrest Meni Raitekiteki if the true state of facts were known to him.'*

[4] The Appellant had pleaded guilty to the 3rd count.

[5] At the conclusion of the trial, on the 24th November 2016 the assessors returned a unanimous opinion that the Appellant was guilty as charged in respect of the other two counts.

[6] The Learned High Court Judge concurred with the assessors' opinion and convicted the Appellant on counts 1 and 2, and sentenced him to an aggregate sentence of imprisonment of 17 years with a non-parole period of 14 years.

[7] The following summary of the testimony of the complainant is reflected in paragraphs 33, 34 and 35 of the Learned High Court Judge's Summing Up:

"33. The complainant said she is 75 years old. She stays with her son at Nepani and when her son is at work she stays alone in the house. On 18/08/15, around quarter to one while she was watching Sky Pacific, someone came inside her house and covered her mouth with the hand. Then he pulled her

up from the chair she was sitting on and punched her face. She had a black out as a result of the punch. Then he dragged her through the passage towards her room, took a belt from her son's room and tied her hands. He also tied her mouth with a T-shirt. She saw him 3-4 times when he was doing this. He also showed her a dagger and told her not to shout. When this was happening she thought she would die. Then this person closed all the curtains in the house and started taking things from her son's room. She saw him taking her son's T-shirts, bottles of liquor, a Multimeter, and a tablet. She saw this as she was sitting in front of the doorway and the person kept on looking at her. She said she saw him packing all items that were taken inside a Sky Pacific bag. Then he went inside her room and took her jewelleries and some money. These were put inside his pocket. Her big earrings which may be about $1000, two small studs which is about $50-$70, a chain and a pendant which were bought in 1968 for $60 and $40 respectively, a gold band watch which is about $60, a small bank and $1600 were taken from her room.

34. After that the person went to the kitchen. He ate some biscuits that was there in the kitchen and checked all the pots and pans. Then he went to the son's room and brought two pillows. He told her to lie on the pillows. Then he pushed her onto the pillows and told her in Hindi to take off her panty. He then removed her panty, pulled her legs up and raped her. She said he inserted his penis into her vagina. She shouted because it was very painful. She said she did not consent for him to insert his penis into her vagina. After that he went to her son's bedroom, took all the items that were packed and went out from the back door.

35. Thereafter she managed to get up with the aid of the wall. She washed herself and ran outside the house. She told one 'Asifa' that she was robbed and raped. That night, police came to her place and showed her a stud and asked whether it was hers and she said yes."

The version of the defence

[8] A summary of the evidence given by the Appellant on oath is reflected in paragraphs 52 and 53 of the Learned High Court Judge's Summing Up which is as follows:

"52. The accused said in his evidence that on 18/08/15, he was weeding at home with his younger brother. Around midday he changed into casual clothes and went to the bus stop to go to the town. This was the bus stop in Narere. He was wearing blue long pants, desert boots and a white T-shirt. He was also carrying a bag which belonged to his brother. He said the police

arrested him at the bus stop. He said he was handcuffed to another police officer when he was taken to the complainant's house.

53. He said he was searched by the police at the police station and found some money and an earring stopper inside the bag he was holding. He said the money belongs to him and he does not know who owns the stopper as the bag he was holding belonged to his brother. He said he is not known by the name "Yanu", and he does not know Joeli Kete. During cross examination, he denied the allegations against him."

Appellate Procedure

[9] The Appellant in person had filed a timely leave to appeal application before the Single Judge of Appeal advancing four grounds of appeal against conviction.

[10] Single Judge of the Court of Appeal refused leave to appeal on all four grounds.

[11] On the 27th January 2023, the Appellant in person filed an amended notice of leave to appeal before the Full Court, containing four grounds of appeal against the conviction, and one ground against the sentence.

[12] The said grounds of appeal against the conviction bears similarity in content to the ones that were advanced before the Single Judge of Appeal.

[13] In the course of the hearing before the Full Court, the Appellant entirely depended on the said five grounds of the appeal as set out in his *"Amended Notice for Leave to Appeal"* application which are as follows:

*"**Amendment grounds of appeal against conviction:***

Ground A:
The Learned Trial Judge had erred in law and fact when he failed to scrutinize with care or weigh the reliability of the dock identification by the complainant with no proper foundation of identification laid or made.

Ground B:
The Learned Trial Judge had erred in law and facts when he failed to assess with objectivity the circumstantial evidence and how to be approached.
Ground C:
The Learned Trial Judge had erred in law and fact misdirecting the assessors on the complainants' prior sighting of the accused person before the commission of the charge offence.
Ground D:
The Learned Trial Judge had erred in law and facts overlooking a material and significant discrepancies in Joeli Kete's testimony as such affects his credibility causing a miscarriage of justice.
Ground E:
The Learned Trial Judge had erred in his sentencing as acting upon a wrong principle when regarding a wrong aggravating factor resulting in double counting."

Consideration of ground of appeal against the conviction

*'**Ground A:***

The Learned Trial Judge had erred in law and fact when he failed to scrutinize with care or weigh the reliability of the dock identification by the complainant with no proper foundation of identification laid or made.'

[14] The incident had occurred during daytime and the complainant had stated in evidence that *"it was daytime and the house was as bright as the court room."*

[15] As regards the identification of the Appellant the Learned High Court Judge in paragraphs 36 and 37 of the Summing Up specifically highlighted the fact that the complainant had seen the Appellant prior to the incident and that this had not been a first time identification.

> *"36. She said the person who did this to her was not that dark, he had small hair and she can recognize him as she had seen him 3-4 times. She said in 2014 before Diwali day she saw him trying to enter from the kitchen window. She also saw him running out of the house one day when her son's office laptop was stolen.*

37. When she saw him on 18/08/15 it was day time and was sunny. Inside her house, it was as bright as the court room at that time. She saw the person's face at a short distance when he punched her, she saw him for about 15 minutes each, when he was taking the items from her son's room and her room within a distance of about 2 metres. She saw him at a short distance when he raised her legs to rape her and saw him for about 5 minutes during the time she was being raped. She said she noticed that he had big eyes and that he was an iTaukei. She said he was wearing a black T-shirt and black pants and he was not very tall but taller than her. She said she clearly saw him that day and he is the same person that had come to her house before. She recognized the accused in court as the person she was referring to, after looking around the court house."

[16] The behaviour of the complainant when the Appellant was taken to her house, as testified by investigating police officer is also important in establishing identity of the Appellant. The Learned High Court Judge states in paragraphs 49 and 63 that:

"49. .....He said the accused was taken to the complainant's house and as they entered, the complainant pointed at the accused and she started crying covering her eyes saying that she does not want to see the accused. She was also shivering. He said an identification parade was not conducted thereafter as they didn't want to put her on more stress. He identified the accused in court.

63. The investigating officer in this case said in his evidence that the police decided not to conduct an identification parade because the complainant identified the accused when the accused was taken to her house on the same day the incident took place and the complainant started shivering and crying covering her eyes saying that she does not want to see the accused."

[17] In paragraphs 59, 60, 61, 62, 63 and 64, the Learned High Court Judge had extensively dealt with the issues of identification and had highlighted the risks involved in dock identification. Specifically in paragraph 60, the Learned High Court Judge states that:

"60. .....You should remember that there is a possibility that the complainant can be mistaken about the identity even if you accept her evidence regarding these two previous incidents. On the other hand, even if she did identify the accused on the two occasions, still there is a possibility that she is simply assuming that it was the accused that came to her house on 18/08/15."

[18] In paragraph 58 the Learned High Court Judge dealt with rules set out in **R v. Turnbull**, in relation to identification:

> *"A related criticism is that the judge did not give the jury what has come to be known as a Turnbull direction – so named after the judgment of the English Court of Appeal in R v Turnbull [1977] QB 224. Where the case depends wholly or substantially on the correctness of someone's identification of the defendant, Turnbull requires the judge (i) warn the assessors of the special need for caution before convicting on the basis of that evidence, (ii) to tell the assessors what the reason for that need is, (iii) to inform the assessors that a mistaken witness can be a convincing witness and that a number of witnesses can be mistaken, (iv) to direct the assessors to examine closely the circumstances in which each identification was made, (v) to remind the assessors of any specific weakness in the identification evidence, (vi) to remind the assessors (in a case where such a reminder is appropriate) that even in the case of the purported recognition by a witness of a close friend or relative, mistakes can occur, (vii) to specify for the assessors the evidence capable of supporting the identification evidence, and (viii) to identify the evidence which might appear to support the identification but does not in fact do so."*

[19] In paragraphs 62 it is specifically stated that:

> *"Identifying an accused for the first time in court after the alleged incident when the accused is inside the accused box is known as 'dock identification'. Dock identification is unreliable in the absence of a prior identification in the investigation stage during an identification parade or photograph identification. It is because the witness may identify the accused merely because he is in the 'dock'…"*

[20] In paragraphs 7, 12 and 14 it is stated that:

> *"7. I accept the evidence given by the complainant to the effect that she saw the accused at a very close range in good lighting condition and that she had observed the accused for more than 35 minutes on that day during the incident. The evidence revealed that the police took the accused to the complainant's house on the same day after he was arrested and the complainant started crying pointing at the accused and then she covered her eyes and was shivering.*

12. ...I find that the evidence given by the complainant on identification of the accused was corroborated by the evidence of other prosecution witnesses, especially the evidence of the 4th witness for the prosecution.

14. In my view, when taken together, the aforementioned evidence is capable of proving beyond reasonable doubt that the person the complainant was referring to in her evidence as the perpetrator is no one else but the accused and that there is no mistake with regard to the identity of the accused."

[21] In **Naicker v State** [2018] FJSC 24; CAV0019 of 2018 (1 November 2018), where the trial judge failed to sum up the assessors on the Turnbull directions, when the evidence of the two crucial witnesses was that they had not seen the Appellant before the date of the incident, but identified him in the dock at the trial the Supreme Court remarked that:

> *"The dangers of dock identification (by which is meant offering a witness the opportunity to identify the suspect for the first time in Court without any previous identification parade or other pre-trial identification procedure) have been pointed out many times. The defendant is sitting in the duck, and there will be a tendency for the witness to point to him, not because the witness recognises him but because the witness knowns from where the defendant is in Court who the defendant is, and can, given who the prosecutor wants him to point out. Unless there is no dispute over identify and defence does not object to a dock identification it should rarely, if ever take place. If it takes place inadvertently a strong direction is needed to the assessors to ensure that they do not take it into account."*

[22] In **Naicker v State** (supra) the Supreme Court also referred to **Valuca v The State** [2011] FJCA 39; AAU0038 of 2008 (29 August 2011), observing:

> *"27. A rare example of a dock identification being allowed was in Vulaca v The State [2011] FJCA 39. The Court of Appeal did not disapprove of it in that case 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. But it is very different where the witness had only seen the suspect once before (albeit for much longer than a fleeting glimpse) and there was only one person in the dock. That was this case – provided that you ignore the identification parade at which Draunimasi purported not to recognise Naicker, as you must."*

[23] In **Wainiqolo v The State** [2006] FJCA 70; AAU0027.2006 (24 November 2006) in relation to the dock identification, in a situation where the Appellant had known to the complainant previously, the Court of Appeal observed that:

> *'[17] The circumstances in the present case were different from a case where the first identification after the offence takes place in court. This was a case of recognition rather than identification of a stranger and different considerations arise.*
>
> *[18] The witness in this case told the court that she recognised the person committing the robbery as someone she already knew. Whether that recognition was reliable was a matter for the assessors taking into account the Turnbull guidelines against the circumstances in which the sighting occurred as suggested by the learned judge.*
>
> *[19] An identification parade would have added nothing because it would not have tested the accuracy of her previous identification of the robber. She believed she had seen a person, a relative, she already knew. The accused is the person she thought she saw. If he had been placed on a parade, she would have been identifying him as that relative, not checking the accuracy of her original recognition of him. More than that, it would appear likely that an identification parade could be prejudicial in such a case because it could be seen as strengthening the initial identification when it is, in fact, no more than an identification of a person on the parade that she already knew and would be looking for.*
>
> *[20] Equally the identification in the dock was no more than identifying the accused as the person she knows as a relative. It added nothing to the original recognition which, as we have said, was the identification the assessors needed to consider against the Turnbull warnings.'*

[24] At paragraph 63, page 86 of the Court Records the Learned Trial Judge stated that:

> *"the investigating officer in this case said in his evidence that the police decided not to conduct an identification parade because the complainant identified the accused when the accused was taken to her house on the same day the incident took place and the complainant started shivering and crying covering her eyes saying that she does not want to see the accused.*

Following answers of the complainant in the cross-examination corresponds to the references made in paragraph 24 above:

> *"Q: Because you got panicked you did not look at him in his eyes?*
> *A: I did had a good look and recognized him that he is the one.*
> *Q: But you agree that you were scared and did not directly look at him at his eyes:*
> *A: I did look at him and then got scared."*

[25] In the present case, it is not a first time dock identification after the incident occurred. The Appellant had been identified by the complainant prior to the dock identification. It was akin to a situation where the complainant was only recognizing the Appellant in the dock.

[26] This ground of appeal is without merit.

*'**Ground B:***

The Learned Trial Judge had erred in law and facts when he failed to assess with objectivity the circumstantial evidence and how to be approached.'

[27] In paragraph 68 of the summing up Learned High Court Judge had stated that:

> *"When it comes to circumstantial evidence, it is important that you examine it with care as with all evidence and consider whether the evidence upon which the prosecution relies to proof its case is reliable and whether it does prove the guilt of the accused, or whether on the other hand it reveals any other circumstances which cast doubt upon or destroy the prosecution case."*

[28] Furthermore, in paragraph 64 of the Summing Up dealing with how the assessors should approach circumstantial evidence the Learned High Court Judge stated:

> *"In the event you are not satisfied that the identity of the accused is established by the direct evidence of the complainant, you may consider whether the identity of the accused is proved beyond reasonable doubt through circumstantial evidence. However, in relation to circumstantial evidence, you should first consider whether*

the evidence relating to the circumstances is credible and reliable and if so, you should then consider, when taken together whether those circumstances will lead to the only inescapable conclusion that it was the accused who committed the crimes."

[29] In **Naicker v State** (supra) it was held that:

> *"There is no prescribed form of direction when the prosecution's case against the defendant is based on circumstantial evidence alone. So long as the judge gets the essence of it, that is sufficient. The essence of it is that the prosecution is relying on different pieces of evidence, none of which on their point directly to the defendant's guilt, but when taken together leave no doubt about the defendant's guilt because there is no reasonable explanation for them other than the defendant's guilt. Although I may have used slightly different language from that which the judge used in this case, it sufficiently captured the essence of what the assessors had to be sure of before they were able to express the opinion that Naicker was guilty."*

[30] In the instant case the Learned High Court Judge had rightly directed the assessors and himself as to how they should approach circumstantial evidence.

*"**Ground C:***

The Learned Trial Judge had erred in law and fact misdirecting the assessors on the complainants' prior sighting of the accused person before the commission of the charge offence."

[31] The issues relating to this ground of appeal have been addressed in the analysis of ground of appeal A.

*"**Ground D:***

The Learned Trial Judge had erred in law and facts overlooking a material and significant discrepancies in Joeli Kete's testimony as such affects his credibility causing a miscarriage of justice."

[32] By way of advancing the Appeal ground D the Appellant cast doubt of the testimony of the prosecution witness Joeli Kete when he said that he had seen the Appellant in close proximity to the complainant's house or coming from its direction soon after cries were heard from that direction.

[33] The Learned High Court Judge had directed the assessors in all aspects relating to the testimony of Joeli Kete in paragraphs 43-46, 49 and 66 and directed himself on the issue in paragraphs 9 and 10 of the Judgment.

[34] Specifically in paragraph 43 of the Summing Up the Learned High Court Judge stated:

> *"Fourth witness for the prosecution was one Joeli Kete. He said he was staying at Kilikali settlement in 2015. He had lived there for 36 years. On 18/08/15 after 1.00pm he was planting dalo beside the Laqere River near the house in which the robbery took place at Nepani. There was one house separating the said house from his farm. His brother's house was beside the farm. He said he heard someone screaming from the house which the robbery took place and then he saw the accused coming down from that house. The accused was about 10 steps away. There was nothing blocking his view. He said the accused was wearing a black T-shirt and black shorts. He said he saw the accused coming down to the river, reached the other side of the river, went across the playground of Muanikoso School and then disappeared. He said he observed this for around 7 minutes. He said he knew the accused very well and he saw the accused clearly. He said the accused is short, with short hair and was carrying something wrapped in a plastic in his hand. He said he called out to the accused but the accused just looked at him and went across the river. He called out to the accused because he knew the accused very well, and had known him for about 5 years. He used to call the accused "Yanu". He said he knows all the boys in the area. He identified the accused in court."*

[35] This ground of appeal has no merit.

*"**Ground E:***

The Learned Trial Judge had erred in his sentencing as acting upon a wrong principle when regarding a wrong aggravating factor resulting in double counting."

[36] This ground of appeal absolutely lacks clarity. Though this has been cited as a ground of appeal no submissions whatsoever had been made by the Appellant as to show how the Learned Trial Judge had acted on a wrong principle or how he had considered wrong aggravated factor resulting in double counting.

[37] In paragraph 14 of the Sentence Ruling the Learned High Court Judge had set out the aggravating factors that he took into account in the following manner:

> *"14. I consider the following as the aggravating factors relevant to the first count and the second count;*
>
> *a) The vulnerability of the elderly victim who was 74 years old;*
> *b) The nature and the magnitude of the force used (punching her causing her nasal bridge to be broken, dragging her on the floor and tying her hands with a belt);*
> *c) You raped the victim while her hands were tied together;*
> *d) Your forceful penile penetration caused the 74-year-old victim immense pain and she sustained a serious vaginal injury."*

[38] In paragraph 15 of the Sentence Ruling the Learned High Court Judge stated:

> *".....Though you are young offender you are not a first offender.....I do not find any mitigating factors in this case."*

[39] I cannot find any inaccuracy in the impugned sentence though the possibility was there for the High Court Judge to fall into an error, when he added 08 years for aggravation, where the starting point of 10 years may have subsumed some of the considered aggravation. What is significant is an adequate ultimate aggregate sentence, commensurate with the offence committed, than seeking a pure mathematical result, showing as to how the sentence was formulated.

[40] It stands to reason to consider, a 20 year old person who commits rape on a 74 year old female, as an absolute threat to the society. Such person needs to be isolated from the society until adequately reformed, consequent to an effective rehabilitation process.

Towards that end, an aggregate sentence of 17 years of imprisonment with a non-parole period of 14 years would suffice to meet the ends of justice.

[41] This grounds of appeal lacks merit.

Rajasinghe, JA

[42] I have read the judgment of Bandara, JA in draft and agree with his reasons and proposed orders.

Orders of the Court:

1. Leave to appeal refused.
2. Appeal dismissed.

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

COURT OF APPEAL FIJI

.....
Hon. Mr. Justice W. Bandara
JUSTICE OF APPEAL

.....
Hon. Mr. Justice R.D.R.T. Rajasinghe
JUSTICE OF APPEAL

Solicitors:

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