

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

CRIMINAL APPEAL NO. AAU 059 OF 2024
[Lautoka High Court: HAC 195 of 2016]

BETWEEN : **JOELI NUKUNAWA**

Appellant

AND : **THE STATE**

Respondent

Coram : Qetaki, RJA

Counsel : Appellant In-Person
Mr. S. Seruvatu for the Respondent

Date of Hearing : 28 August, 2025

Date of Ruling : 22 October, 2025

RULING

(A). Background

- [1] The Appellant with four others were charged with two counts of aggravated robbery contrary to section 311 (1) (b) of the Crimes Act 2009.
- [2] The Appellant maintained his plea of not guilty and the matter proceeded to Voir Dire trial (from 4th to 24th April 2024) and trial (from 1st to 22nd May 2024) at the Lautoka High Court before Justice Aluthge.
- [3] On 24th May 2024, the Court delivered its judgment and convicted the Appellant on both counts of aggravated robbery and was sentenced to 6 years imprisonment with a non-parole period of 5 years.

[4] The Appellant applied to appeal his conviction on 15 August 2024. The appeal is untimely and out of time by about 83 days.

(B). Grounds of Appeal (Against Conviction)

[5] **Ground 1:** *The learned trial judge had erred in law and in fact in following PW5 SGT Sailasa to give evidence on behalf of the CCTV footage to identify the appellant which is unfair to the appellant taking into account identification procedures required by law.*

[6] **Ground 2:** *The learned trial judge had erred in law and fact in agreeing with the unclear visual face image (PE1) of the person whom SGT Sailasa said to be the appellant when it was not even clear enough to identify the appellant.*

[7] **Ground 3:** *The learned trial judge erred in law and fact at para 176 of the judgment for his comparison and admission that the image of the screen is of the appellant.*

(C). The Law

[8] The Court of Appeal Act requires that a person who wish to appeal his conviction or sentence must obtain the leave of the Court of appeal.

[9] Under section 35(1)(b) of the Court of Appeal Act, a single judge of the court may extend the time within which notice of appeal or of an application to appeal may be given.

[10] Leave to appeal against conviction requires the Appellant to demonstrate that the grounds of appeal have “reasonable prospect of success”: **Caucau v State** [2018] FJCA 171; **Navuki v State** [2018] FJCA 172.

[11] For an enlargement of time application, the threshold is higher than ordinary leave application and the Appellant must demonstrate that the grounds of appeal have “real prospect of success” **Nasila v State** [2019] FJCA 84. This means that the appeal must not only be arguable but likely to succeed (**R v Miller[2002] QCA 56**). The elevated standard ensures that only meritorious appeals proceed, given the exceptional nature of time extensions.

(D). Appellant's Case

- [12] **Ground 1:** PW5 Sailasa should not have been allowed to testify on the CCTV footage evidence as he was an arresting officer. He did not take part in the arrest of the Appellant, but of the other co-Accused. The law prohibits an investigation officer to also give evidence related to identity of the accused person.
- [13] **Ground 2:** The formal Turnbull Identification guideline was not followed. The CCTV footage tendered by the prosecution was unclear to adequately identify the person claimed to be the appellant. In the footage the person's face was covered with a cap which covered not only the top part but half of his face was hidden behind the cap and the fact that SGT Sailasa can identify the appellant in the unclear footage in the night time. Identification was unreliable.
- [14] **Ground 3:** The trial was unfair to the Appellant. The trial judge view of CCTV then compared the image on the screen with the appellant which is unfair. Not reminded himself of the Turnbull guideline. Quality of identification was low, not high. The law requires that the prosecution to prove their case beyond reasonable doubt.

(E). Respondent's Case

- [15] **Ground 1:** The Appellant was correct that an identification officer should not be involved in the investigation (Archibald). However, SGT Sailasa was not testifying as an identification officer conducting a formal procedure like an identification parade. He was testifying as a witness of fact who, during the course of his investigative duties, reviewed the CCTV footage evidence and identified the suspect.
- [16] The judgment extensively cover SGT Sailasa (PW4) s evidence. He was involved in the arrest of Isaac James and Are Amae and was found to be a credible witness. His role was to explain to the Court how the investigation progressed and how the Appellant became a suspect. There is no indication in the judgment that the learned trial judge treated this evidence as a breach of procedure; rather, it was accepted as part of the narrative of the investigation.

- [17] The ground has no reasonable prospect of success. The procedure followed was not unfair or unlawful. Sailasa gave factual evidence about an investigative step, which is a standard practice and the trial judge was entitled to hear this evidence.
- [18] **Ground 2:** The learned judge had the distinct advantage of viewing the CCTV footage (PE1) firsthand. An appellate court has only a static, paper record. The learned trial judge was in the best position to assess its clarity, quality and the features that could be discerned. His finding of fact on this issue is therefore entitled to significant deference.
- [19] The Appellant referred to **Maikeli Scott Manu Wave v State** to argue that the trial judge should have been more cautious. The judgment demonstrates that the learned trial judge was acutely aware of the need for caution. He relied heavily on the Appellant's own admissions which suggests he treated the CCTV evidence with appropriate care, using it for corroboration rather than as a standalone pillar of the case. The learned trial judge's reasoning in paragraph 176 (addressed in Ground 3) shows he engaged in a careful process. The ground is a direct challenge to a finding of fact made by the trial judge who saw the evidence. There is no such error shown here. This ground has no reasonable prospect for success.
- [20] **Ground 3:** This is the core of the Appellant's complaint, and it is without merit. It is entirely proper and necessary for a trial judge to compare the Appellant in the courtroom with the person depicted in a CCTV image. This is a fundamental part of the fact-finding process. The learned judge does not have to "remind himself" of *Turnbull* to perform this basic task, it is inherent in the exercise.
- [21] The Appellant has failed to identify any error in law or fact in how this was done. As such, this ground has no real prospect of success.

(F). Enlargement of Time Application

- [22] The Appellant has not submitted any reason for the delay in filing his appeal. The delay is 83 days. However the Respondent has submitted that while delays up to 3 months may be excused as a matter of practice (**Seresere v State** [2008] FJCA 71), longer delays require stronger justification. In this case, although the Appellant has not given any reason for failure to file appeal on time, the Appellant still requires an

extension of time, and that requires that the grounds proposed be scrutinized to assess whether there is a ground of merit.

(G). Discussion/Analysis

[23] The 3 grounds against conviction are connected and relate to the identification of the Appellant by the learned Judge and PW5 with the aid of CCTV evidence. The Appellant challenges the quality of the image on the CCTV footage and the propriety of the learned Judge viewing the CCTV footage, and approving of it in establishing / determining the identity and acts of the Appellant.

[24] The test for leave to appeal against conviction and sentence is *reasonable prospect of success*”: see **Caucou v State** AAU0029 of 2016:4th October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016:4th October 2018 [2018] FJCA 172 and supported by a line of authorities in order to establish arguable grounds: **State v Vakarau** AAU0052 of 2017:4th October 2018, **Sadrugu v State** Criminal AppealNo.AAU0057 of 2015:06 June 2019 [2019] FJCA 87, **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019) from non-arguable grounds: **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 and **Naisua v State** [2013] FJCA 14; CAV 10 of 2013 (20 November 2013).

Ground 1 – Identification following PW5 Sailasa’s evidence-Assistance of CCTV Footage

[25] The proposition in Archibald’s Criminal Pleading cited by the Appellant is correct that an identification officer should not be involved in the investigation. However, evidence suggests that SGT Sailasa (PW5), in his evidence, was testifying as a witness of fact, who in the course of his investigative duties, reviewed the CCTV footage evidence and identified the Appellant. PW5’s evidence is discussed by the learned trial Judge in paragraphs 32, 33, 34 and 35 of the judgment. He was also involved in the arrest of Are Amae and was found to be a credible witness. This ground is not arguable.

Ground 2 - Unclear Facial Image (PEI)-PW5's Identification of Appellant

[26] As stated above, the learned trial Judge found PW5, SGT Sailasa to be a credible witness. The witness had met the Appellant many times “*when he used to come and hang around in Lautoka and at the police station*” PW5 had last met the Appellant back in 2015, and described the ethnicity, skin colour and age of the Appellant-see paragraph 32 of judgment. PW5 denied in cross-examination that the image of the face was so poor quality that he could not even tell correctly whose face was it-paragraph 35 of judgment. See also paragraphs 163 to 176 on *Identification of 4th Accused-Joeli Nukunawa*. The learned Judge was in a better position, then an appellate Judge to decide on the facts based on the evidence given by PW5, and his own impression of the footage. This ground is not arguable.

Ground 3 - Comparison of CCTV Image of Appellant – Paragraph 176 of Judgment

[27] In relation to this ground, the observations made with respect to grounds 1 and 2 above are also relevant to this ground. Further, in paragraphs 175 and 176 of the judgment, the learned judge in discussing the evidence and issues arising from the identification of the 4th Accused-Joeli Nukunawa, stated:

“175. Although the Accused in this case were not tried by a Judge sitting with a jury or assessors, the same principles should apply. It was contended that the image of the face of the person alleged to be that of Nukunawa was of so poor quality that Sgt. Sailasa would not have been able to tell correctly whose face was that, Sgt. Sailasa denied that. Although the top part of the face was covered with a cap, I accept that a person acquainted with Nukunawa will not find it difficult to recognize him especially given his typical manner of walking. The person Sgt. Sailasa pointed out in the video has all the characteristic of Nukunawa.

176. Nukunawa has been coming to this Court for a long time for his remand extensions and for bail matters. I have had the benefit of observing him for a long time. I have had the benefit of viewing the video footage and at the same time compare the image on the screen with the 4th Accused in Court. Given his typical manner of walking and other physical

characteristics such as his height, built, skin colour which I observed in the video, I am sure the person pointed out by Sgt. Sailasa is the 4th Accused.”

[28] It was necessary and proper that the learned Judge compare the Appellant in the Courtroom with the person pointed out by Sgt. Sailasa in the CCTV footage. This ground has no prospect of success.

Order of Court

1. *Application for leave to appeal conviction is disallowed*




Hon. Justice Alipate Qetaki
RESIDENT JUSTICE OF APPEAL

Solicitors

Appellant In-Person
Office of the Director of Public Prosecutions for the Respondent