

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**APPELLATE JURISDICTION**

**CRIMINAL APPEAL CASE NO.: HAA 50 OF 2014 AND HAA 56 OF 2014**

**BETWEEN:** SIRELI LILO

*Appellant*

**AND:** STATE

*Respondent*

**Counsels:** Ms. Vasemaca T. Narara for the Appellant  
Mr Semi Babitu for the Respondent

**Date of Judgment:** 17 April 2014

**JUDGMENT**

1. The Appellant was charged before the Lautoka Magistrate under following counts:

**FIRST COUNT**

**Statement of Offence**

**Robbery with violence:-** Contrary to Section 293 (1) of the Penal Code Cap.17.

**Particulars of the Offence**

Sireli Lilo with others on the 6<sup>th</sup> day of November 2008 at Lautoka in the Western Division, robbed **Monish Varma** of a Nokia mobile phone valued \$250.00, \$130.00 in cash, driver's license, FNPF card and Hospital card and before the time of such robbery did use personal violence on said **Monish Varma**.

**SECOND COUNT**  
**Statement of Offence**

**Unlawful use of Motor Vehicle:-** Contrary to Section 292 of the Penal Code Cap.17.

**Particulars of the Offence**

**Sireli Lilo with others** on the 6<sup>th</sup> day of November 2008 at Lautoka in the Western Division, unlawfully and without color of right but not so guilty of stealing took to his use motor vehicle registration number DS-414 the property of **Monish Varma**.

**THIRD COUNT**  
**Statement of Offence**

**Wrongful Confinement:-** Contrary to Section 253 & 256 of the Penal Code Cap.17.

**Particulars of the Offence**

**Sireli Lilo with others** on the 6<sup>th</sup> day of November 2008 at Lautoka in the Western Division, wrongly confined **Monish Varma** in motor vehicle registration number DS-414.

**FOURTH COUNT**  
**Statement of Offence**

**Robbery with violence:-** Contrary to Section 293 (1) (b) of the Penal Code Cap.17.

**Particulars of the Offence**

**Sireli Lilo with others** on the 6<sup>th</sup> day of November 2008 at Lautoka in the Western Division, robbed **Asad Ali** of cash \$2767.00 and before the time of such robbery did use personal violence on the said **Azad Ali**.

2. The Appellant pleaded not guilty and after trial he was convicted for the 1-3 counts and was sentenced for 5 years and 9 months imprisonment for the 1<sup>st</sup> count, 3 months imprisonment for the 2<sup>nd</sup> count and 6 months imprisonment for the 3<sup>rd</sup> count.
3. The facts of the case are that the Appellant hired the vehicle of the Complainant to deliver some groceries and on the way had directed the complainant to drive towards a lady. Then four persons have approached the vehicle and assaulted the complainant. The Appellant had prevented Complainant going out by holding on to the steering wheel. He was taken out and put to the back side. Complainant's hands were tied in the back and he was blind folded. Then Complainant had heard them loading something to the vehicle and going away. They have abandoned the vehicle when it met with an accident.

4. This appeal against the conviction was filed on 3<sup>rd</sup> November 2014 within time. The appeal against the sentence was filed on 4<sup>th</sup> December 2014 within time.
5. The grounds of appeal against the conviction are :
  - (i) That the learned Magistrate erred in law by not drawing her mind to the Turnbull guidelines and identifications.
  - (ii) That the learned trial Magistrate erred in law and in fact when she did not draw attention to the weakness of the identification parade by Police.
6. The Appellant had not filed any ground of appeal against the sentence.
7. Both parties have filed written submissions. I have carefully considered those.

#### Grounds against the conviction

8. The first ground of appeal against the conviction is that the learned Magistrate erred in law by not drawing her mind to the Turnbull guidelines.
9. In R v. Turnbull [1977] QB 224 it was held that:

*"First, whenever the case against an accused depends wholly or substantially on 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 or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make reference to the possibility that a mistaken witness can be convincing one and that number of such witnesses can all be mistaken. Provided this is done in clear terms, the judge need not use any particular form of words.*

*Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example passing traffic or a press of people? Had the witness seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent observation to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen them and his actual appearance?...Finally he should remind the jury of any specific weakness which had appeared in the identification evidence."*

This principle was approved by The Court of Appeal in Wainiqolo v State[2006] FJCA 70; AAU 0027.2006 (24 November 2006)

10. The issue of identification was considered by the learned Magistrate in the following paragraph.

*'...In regards to the identity of the accused is also beyond doubt. He is firmed and well comprehensive the way on which that he identified the accused. He explained the duration he spent with the accused to have the opportunity of seeing the accused by sitting next to accused until he was apprehended by the other accused persons. He properly explained to the court how he was able to identify the accused although accused was wearing sunglasses and was having a beard on that day.'*

11. The requirement is not to mention the Turnbull guidelines but to follow those and apply those to the case at hand. The above paragraph is clear indication that the learned Magistrate is well aware of the danger to convict on wrongful identification. She had considered the evidence on identification came to a finding that the identification is established beyond reasonable doubt. There is no merit in this ground and it fails.

#### **2<sup>nd</sup> Ground against the Conviction**

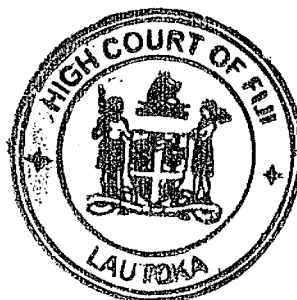
12. The second ground is that the learned Magistrate erred in law and in fact when she did not draw attention to the weakness of the identification parade by the police.
13. The need to conduct a proper Identification parade was discussed by the Court of Appeal in Johnson v State [2013] FJCA 45; AAU 90.2010 (30 May 2013)


[13] Having a parade where the Appellant was the only bald person would be a weakness in such a parade as it would be very easy to single out such a person among the others. In this case the evidence was that the Complainant had seen the Appellant among five others who were all wearing pom poms in good light for about ten minutes on the day that the offence was committed and had thereafter identified the Appellant at the Identification parade, which he had done in about 30 seconds. The complainant had seen the Appellant on the night of the incident wearing a pom pom among five others wearing pom poms and when he identified him at the identification parade he was not wearing a pom pom. The complainant therefore would have identified the Appellant from his facial features, which was apparent when in his evidence he had said that he could never forget his face. Under cross-examination the Appellant had suggested to the Complainant that on the previous day the Appellant was shown to the Complainant when he was inside a police vehicle and that the complainant had spoken to the driver of that vehicle regarding identifying the

implements used to commit the robbery. The complainant of course denied such suggestion.

[14] This evidence when analyzed would suggest that the complainant actually identified the Appellant as the person who threatened him on the day of robbery as he could remember his face very well though he had seen him for about ten minutes. It is also possible that the Appellant would have been seen by the complainant when he was in the police vehicle the day before the identification parade when the complainant was talking to the driver of that vehicle. It may be that as suggested under cross-examination to the complainant that he was shown to the complainant by the driver in the police vehicle. It could also be on the basis that the Appellant was the odd person out in the lineup of the identification parade as being the only bald person in a red t-shirt. These possibilities would throw a doubt as to the proper identification of the Appellant and would weaken the prosecution case which was based entirely on the identification of the Appellant by the complainant. It was a weakness in relation to the identification of the Appellant. Did the learned trial Judge warn the Assessors about this position? The summing up which has been set out above does not deal with this position at all. In such circumstances identification becomes unsafe and should have been a matter that should have been placed before the Assessors by the learned trial Judge.'

14. The Appellant in written submissions had stated that there was no mention of any person who came to the parade had sunglasses or having a beard. The Appellant had not cross examined the Complainant about any irregularity in conducting the Identification parade. When the Complainant had given clear evidence as to how the Identification Parade was conducted and the Appellant had not asked a single question about the parade. It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross examination it must follow that the evidence tendered on that issue ought to be accepted. This is subject to the qualification that the witness is a reliable witness.
15. The learned Magistrate had decided that the Complainant's evidence on issue of identification is beyond doubt. No issue was raised that the proper procedure was not followed at the Identification parade. Therefore, there is no merit in this ground and it fails.
16. For the reasons given above appeals against the conviction and sentence are dismissed.



  
Sudharshana De Silva  
JUDGE

**At Lautoka**  
**17 April, 2015**

**Solicitors: Office of the Legal Aid Commission for the Appellant**  
**Office of the Director of Public Prosecutions for the Respondent**