IN THE HIGH COURT OF FIJI

AT LAUTOKA

IN THE WESTERN DIVISION

APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO. HAA 074 OF 2016

OSEA ROKOSAVU

-v-

STATE

Counsel:	Appellant in Person
	Mr J. Niudamu for the Respondent
Date of Hearing:	25th April, 2017
Date of Judgment:	17th May 2017

JUDGMENT

INTRODUCTION

1. This is a timely appeal filed by the Appellant against the conviction and sentence of the learned Magistrate at Lautoka.

2. The Appellant was charged with one count of Robbery contrary to Section 310 (1) (b) (i) of the Crimes Decree No. 44 of 2009 at the Lautoka Magistrates Court.

3. The Appellant pleaded not guilty to the above charge on the 31st of May 2016. At the ensuing trial, the Appellant was convicted and, on the 14th of October 2016, he was sentenced to 7 years 6 months and 2 weeks' imprisonment term with a non-parole period of 5 years.

4. On 8th November 2016, the Appellant filed his letter or petition within time appealing his conviction and sentence. He further added seven grounds of appeal on 27th February, 2017.

GROUNDS OF APPEAL

5. In summary, the grounds of appeal filed by the Appellant's are as follows:

Against Conviction:

(i) That the learned Magistrate erred in law by not giving the right of election to the Appellant.

(ii) That the learned Magistrate erred in law in trying this matter as the Court was not given an extended jurisdiction by the High Court pursuant to Section 4 (2) of the Criminal Procedure Act.

(iii) That the learned Magistrate erred in law in failing to advice the defence counsel or the Appellant the right to have the matter decided by the assessors as it's an indictable offence triable summarily.

(iv) That the learned Magistrate erred in law by hearing this matter as there was no extended jurisdiction given by the High Court for the Magistrates Court to hear this matter.

(v) That the learned Magistrate erred in law and in fact when he failed to consider that the Police did not conduct an identification parade to confirm the identity of the robber.

(vi) That the learned Magistrate failed to consider the Turnbull guideline while considering his judgment and therefore this is a miscarriage of justice.

(vii) That the learned Magistrate erred in law by failing to direct his mind at the outset of the judgment on the burden and standard of proof.

(viii) The learned Magistrate erred in law in failing to rectify the deficiency in the charge and the evidence adduced during trial.

(ix) That the learned trial Magistrate erred in law in failing to consider the lack of any direct evidence to support the charge of robbery.

(x) That the learned Magistrate erred in law by failing to direct his mind by the lack of any corroborative evidence to support the complainant's evidence.

(xi) That the learned Magistrate erred in law in failing to direct his mind and consider that the use of force never occurred during the commission of the crime but away from the crime scene.

Against Sentence:

(xii) That the sentence of 7 years imprisonment is very harsh and excessive in all the circumstances of the case.

(xiii) That the learned sentencing Magistrate erred in law in failing to give cogent reasons behind his decision to adopt a sentencing tariff reserved for Robbery with Violence and not Robbery simplicity.

(xiv) That the learned sentencing Magistrate erred in law in allowing extraneous and irrelevant matters to guide in his sentencing and failed to take into account some relevant considerations.

6. To support these grounds, the Appellant filed a handwritten submission. At the hearing, Counsel for Appellant made an oral submission in addition to his written submissions. Appellant relied on his written submission. I have considered all material placed before me.

FACTUAL MATRIX

7. Complainant was at Lautoka bus stand around 4 p.m. trying to board a bus to go home. Whilst he was getting on the bus, he felt his back pocket being invaded by somebody. When he turned back he saw a Fijian man with a beard. Then the Fijian man started to run. However, complainant managed to grab the Fijian man and questioned him in respect of the wallet. The Fijian man denied any knowledge of the wallet and then attempted to punch the complainant. He managed to evade the punch but as a result they both fell on the floor. The complainant then held on to a leg of the Fijian man as he was trying to run. The Fijian man, as he was trying to free himself, stepped on complainant's middle finger causing an injury. Fijian man managed to free himself from the complainant and ran off. Complainant gave a chase yelling for help. The Fijian man was apprehended by two Fijian men near the Hira Lal Laundry at Veve Street. The Police arrived by this time and took the culprit to the Police Station.

ANALYSIS

Grounds (i) and (iii) – Right of Election

8. The Appellant in this case was charged with Robbery contrary to Section 310 (1) (b) (i) of the Crimes Decree No. 44 of 2009. There is no dispute that the offence with which the Appellant was charged is an 'indictable offence triable

summarily'. There is a statutory option laid down by law which allows an accused to choose the Court of his choice to stand trial when the charge encompasses an 'indictable offences triable summarily'.

9. The relevant part of Section 4 reads as follows:-

> *4 (1) Subject to the other provisions of this Decree—*
>
> *(1) (b) any indictable offence triable summarily under the Crimes Decree 2009 shall be tried by the High Court or a Magistrates Court, at the election of the accused person; and*
>
> *(2) Notwithstanding the provisions of sub-section (l), a judge of the High Court may, by order under his or her hand and the seal of the High Court, in any particular case or class of cases, invest a magistrate with jurisdiction to try any offence which, in the absence of such order, would be beyond the magistrate's jurisdiction.*

10. Furthermore, Section 2(a) and (b) of the Criminal Procedure Decree 2009 states that an "Indictable offence triable summarily" means any offence stated in the Crimes Decree 2009 or any other law prescribing an offences to be an indictable offence triable summarily, and which shall be triable (a) in the High Court in accordance with the provisions of this Decree; or (b) at the election of the accused person, in a Magistrate Court in accordance with the provisions of this Decree. (emphasis added)

11. Indictable offences are tried in the High Court. However, indictable offences triable summarily, shall be tried by the High Court or Magistrates Court at the election of the accused person (Section 4 (1) (b) of the CPD). Cases involving Indictable offences triable summarily should be transferred to the High Court only if the accused has indicated to the Magistrate Court that he or she wishes to be tried in the High Court (Section 35 (2) (b) (II) of the Criminal Procedure Decree 2009).

12. The learned Magistrate had ensured that an inquiry was made with regard to the wish of the Appellant whether he would prefer to be tried in the Magistrate Court or the High Court. The Court record indicates at page 6 that, on the 2nd of May 2016, the Appellant was explained his right of election. The Appellant then opted to be tried in the Magistrate Court.

13. The Appellant was never prejudiced during the proceedings in the Magistrates Court as his option was explained to him by the Court. The charge had been read and explained to the Appellant in iTaukei, his preferred language. It can be assumed that his right of election was also explained to him in iTaukei through the interpreter. If he did not understand the nature of his right, he could have required a further clarification. He had replied 'I opt for Magistrate Court'. That clearly shows that Appellant had exercised his right of election and preferred to be tried by the Magistrate.

14. The Court had complied with the statutory obligation. These grounds should be dismissed.

Grounds (ii) and (iv) – Extended jurisdiction by the High Court pursuant to Section 4 (2) of the Criminal Procedure Act

15. The Appellant was charged with Robbery which is an indictable offence (triable summarily). The Appellant had elected a Magistrates Court trial. Therefore, there was no need for the Magistrate to transfer the case to the High Court. Case would have been different if the Appellant elected to be tried by the High Court. In such an eventuality, the Magistrate would have been required to transfer the case to the High Court and then the High court had the powers to remit the matter back to the Magistrates Court in extended jurisdiction *(Section 4 (2) of the Criminal Procedure Act).* The learned Magistrate had jurisdiction to hear Appellant's case.

16. These grounds should be dismissed.

Grounds (v) and (vi) – Identification Parade & Turnbull Guideline

17. The Appellant alleges that the Police did not conduct an identification parade to confirm the identity of the robber.

18. In the circumstances of this case there was no need for the police to hold an identification parade. The robber had fled the crime scene soon after the robbery. The complainant had given a chase and apprehended the robber. After an

altercation with the Complainant, the robber had managed to escape. However, police had arrested the robber soon after his escape. Robber was within complainant's sight all the time until he was arrested by police. Complainant was also present at the time of arrest.

19. **Turnbull** guidelines on visual identification have been accepted as the Law in Fiji. The guidelines are contained in the following passage by Widgery LCJ:

> *"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 some reference to the possibility that a mistaken witness can be a convincing one and that a 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, by 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 by them and his actual*

appearance? ... Finally he should remind the jury of any specific weakness which had appeared in the identification evidence.

20. In writing his judgment, the learned Magistrate had warned himself of the special need for caution before convicting the Appellant. When relying on the correctness of the complainant's identification evidence, the learned Magistrate, being the judge of law and fact, had applied **Turnbull** guidelines satisfactorily. (Pages 43 & 44 of the Court record show that the learned trial Magistrate had warned himself of the Turnbull guidelines). Paragraph 15 of the Judgment, the learned trial Magistrate had applied the Turnbull guidelines where he stated:

"The complainant had sufficient time to observe the accused. He has had encountered a brawl with the accused when trying to stop the accused. The accused had been identified during day light under circumstances of no obstruction to the vision of the complainant. This incident had occurred on 29/04/16 and the accused was apprehended at the same time without there been a break in the sequence of events relating to the incident and the complainant then identified the accused within the time spam of 1 ½ months from the date of the incident in Court. Warning myself of the dangers of mistaken identity and directing myself on the Turnbull guidelines, it is my considered view that the identification of the accused in this case has no flaws and that the complainant had positively identified the accused in relation to the alleged robbery".

At paragraph 16 the learned Magistrate stated the following:

".....The Complainant vowed with certainty that he confronted the accused as soon as he had felt his wallet been picked and the accused was standing just behind him at the time and that there was no one else behind him beside the accused at the time...."

21. A dock identification is generally considered unreliable; however, evidence led in trial shows that this is not a fleeting glance case. Complainant had seen accused's face clearly for some time. They were talking face to face and there was no obstruction. Robbery took place in broad daylight and Complainant's view was not obstructed in any way. The Appellant was arrested soon after the robbery in the presence of the complainant.

22. In ***R v Keeble*** [1983] Crim LR 737, the trial judge had told the jury to be aware of the risk of mistaken identification and to evaluate it, and that the risk would be high where the sighting had only been a fleeting glance, but that in every case it was a matter of degree. In ***R v. Oakwell*** [1978] 1 WLR 32 it was held that when identification is not a 'fleeting glance' identification thus it does not need for the full-blown legal requirement for identification as stipulated in the case of *R v. Turnbull* [1977] QB 224 (CA).

23. These grounds should be dismissed

Ground (vii) -

24. The Appellant alleges that the learned Magistrate erred in law in failing to direct his mind on the burden and standard of proof at the outset of the judgment.

25. The learned trial Magistrate stated specifically that the burden of proof was on the Prosecution and having considered all evidence led in the trial he was satisfied that the prosecution had proved the case beyond reasonable doubt. At paragraph 21 of his judgment he had stated the following:

> *"It is for the prosecution to prove their case beyond reasonable doubt. Section 57 of the Crimes Decree 2009 states that it is the prosecution that bears the legal burden of proving every element of an offence relevant to the guilt of the person charged. As per Section 58 of the Crimes Decree 2009, this legal burden of proof on the prosecution, must be discharged beyond reasonable doubt. This is the same legal position in every common law country. It is therefore clear that the prosecution cannot rely on the accused to prove their charge. The accused case is considered by Court only after the Court finds a case to be answered by the accused to see whether the accused through his case is successful in casting a reasonable doubt on the prosecution's case. Therefore, the legal burden is on the prosecution to prove all elements of the charge beyond reasonable doubt and shall never be shifted to the accused".*

26. The learned Magistrate had carefully evaluated all the evidence before coming to the opinion that the accused is guilty of the offence with which he was charged although he had talked about burden and standard of proof at the latter part of the judgment.

27. An appellate court is primarily concerned to satisfy itself that the conclusion reached by the trial court can reasonably be supported on the evidence adduced and upon the applicable law.

28. The principle on which an appellate court should proceed is conveniently stated in ***Watt v. Thomas*** [1947] 1 All ER 587 (as per Lord Thankerton) in these terms:

> *I. Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion.*
>
> *II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.*
>
> *III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.*

29. Further, in a case which depends on credibility of witnesses it is stated in ***Shinodra v State*** [1988] SPLawRp 58; [1988] SPLR 150 (2 December 1988)

> *"Where a case depends essentially, as the present case does, on the credibility of witnesses and findings of fact connected therewith, an Appellate Court ought to be guided by the impression made on the Magistrate who saw and heard the witnesses and not by its own evaluation of the printed evidence which can be misleading."*

30. Before the Appellant can succeed he has to show that there was no evidence on which the trial Magistrate could reach the conclusion which he did reach if he properly directed himself ***(Kamchan Singh v The Police*** (1953) 4 F.L.R.69; and as was said by Widgery L.J in ***R. v Cooper*** (1968) 53 Cr. App. R. 82 at p.p. 85 – 86 the circumstances in which the Court will interfere with the findings are as follows:

> *"However, now our powers are somewhat different and we are indeed charged to allow an appeal against conviction if we think that the verdict of the jury should be set aside on the ground that under all the circumstances of the case, it is unsafe or unsatisfactory. That means that in cases of this kind the Court must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such: it is a reaction which can be produced by the general feel of the case as the Court experiences it".*

31. In short, an Appellate Court would be loath to interfere with a Magistrate's finding of credibility or finding of facts which had been arrived at after him having had the benefit of seeing each witness give evidence first-hand. There is no error on the part of the Magistrate. I dismiss this ground.

Ground (viii)

32. The Appellant claims in his submission that there is a deficiency in the charge, however, the Appellant failed to state how the charge is defective.

33. In ***Shekar & Shankar v. State*** Criminal Appeal No. AAU0056 of 2004, the Court of Appeal made the following observations about the purpose of a charge:

> *"The purpose of the charge is to ensure that the accused person knows the offence with which he is being charged. Whilst the particulars should be as informative as is reasonably practicable, it is not necessary slavishly to follow the Section in the Act".*

34. As per the Charge Sheet, Appellant was charged with one count of Robbery contrary to Sections 310 (1) (b) (i) of the Crimes Act, 2009. It had been explained to the Appellant in the language he preferred (iTaukei). A charge is adequate if it tells a defendant the name of the offence or nature of the charge against him to enable him to prepare an adequate defence. The statement of the offence incorporated all the essential elements and right particulars of the offence.

35. This ground should be dismissed.

Grounds (ix) & (x)

36. The Appellant asserts that the learned trial Magistrate erred in law in failing to consider the lack of any direct evidence to support the charge of robbery. He further says that the learned Magistrate erred in law in failing to direct his mind to the lack of any corroborative evidence to support the complainant's evidence.

37. The Complainant who was an eye witness and also the person who felt the offence being committed had adduced direct evidence at the trial.

38. No corroboration is required to convict an accused in a robbery case if the trial Magistrate is satisfied that the witness (complainant) had told the truth. The learned Magistrate had warned himself of the special need for caution before convicting the Appellant, when relying on the correctness of the complainant's identification evidence.

39. This ground has no merit and should be dismissed.

Ground (xi):

40. The Appellant contends that the learned trial Magistrate erred in law in failing to direct his mind and considering that the use of force never occurred during the commission of the crime but away from the crime scene.

41. The Appellant had used forced on the Complainant when he was trying to escape after the robbery. The Complainant had suffered a broken finger when Appellant had stepped on his finger.

42. Section 310 (1) of the Crimes Act which describes the offence of Robbery reads as follows:

> *A person commits an indictable offence (which is triable summarily) if he or she commits theft and —*
>
> *(a) immediately before committing theft, he or she*
>
> *(i) uses force on another person; or*
>
> *(ii) threatens to use force then and there on another person with intent to commit theft or to escape from the scene; or*
>
> *(b) at the time of committing theft, or* ***immediately after committing theft****, he or she—*
>
> *(i) uses force on another person; or*
>
> *(ii) threatens to use force then and there on another person—*
>
> *with intent to commit theft or to* ***escape from the scene.***

43. Therefore, the elements of Robbery had been established. It does not make a difference whether he used the force before, during or after the robbery. The fact that he used force on the Complainant with intent to escape from the scene had made him criminally liable for Robbery.

Grounds against Sentence (xii, xiii, xiv)

44. I would consider all the grounds of appeal against sentence together as they all raised the point that the sentence was harsh and excessive in all the circumstances of the offence.

45. In selecting the tariff for Robbery the learned Magistrate correctly considered the guideline judgment in ***Rarawa v State*** *[2015] FJHC 324.* Introducing a new tariff for Robbery, Justice Madigan in ***Rarawa*** said:

> *"To facilitate sentencing for robbery simpliciter, it would be appropriate to apply two tariffs one for robberies accompanied by violent force should be in the range of 8 to 14 years (in recognition of the lower maximum penalty applied to robbery by the legislature as opposed to the penalty for aggravated robbery). The general tariff for robbery, not accompanied by violence, can then be visited with sentences in the range of two to seven years."*

46. The learned Magistrate proceeded to sentence the Appellant on the basis that the Appellant had committed a robbery accompanied by violent force and therefore be punished in the tariff range of 8 to 14 years.

47. Having perused all evidence led in the trial I would take a different view on this point. I find that learned Magistrate's selection of the tariff reserved for robberies accompanied by violent force and a starting point of 9 years is harsh and excessive for a pickpocket, in light of circumstances of this case.

48. It appears from evidence of the complainant that the Appellant had used minimum force to ensure his escape when the complainant had tried to thoroughly check his pockets.

> *Q:* *Isn't it correct that my client when he was approached, you searched him for your wallet?*
>
> *A:* *Yes, I have searched regarding the wallet.*
>
> *Crt:* *When did you search him?*
>
> *A:* *When he snatched my wallet then I grabbed him, then I checked and asked him, where is my wallet, he said he didn't take my wallet and he started to punch me and then…*
>
> *Crt:* *Where did you search on him?*
>
> *A:* *I didn't search him, but I checked his pocket and he took my wallet or not then he punched me and we both fall down.*
>
> *Crt:* *Which pocket did you check?*

A: *The front pocket.*

Q: *When you searched him, you did not find any wallet on him?*

A: *I didn't search him properly because he wanted to punch me.*

Clk: *I didn't search him properly while searching him he started punching me and we both fall down.*

Q: *Where did he punch you?*

A: *He wanted to punch me but I wasn't punched and I grabbed him.*

Q: *When you grabbed him, witness, isn't it correct that he pushed you and he fell down?*

A: *We both fall down and he stood up, when he stood up then I held one of his leg and he stepped on my finger and he started running, if he had not stolen the wallet then why he was running.*

Q: *I put it to you that you had searched him and found nothing on my client?*

A: *I was given the opportunity to search the accused.*

49. The complainant had received the injury when the Appellant stepped on his finger as Appellant was trying to free himself from the complainant who was holding on to his leg.

50. I do not think a situation like this should attract a harsher punishment prescribed for robberies accompanied by violent force in the range of 8 to 14 years.

51. It is therefore appropriate in terms of Section 256 (3) of the Criminal Procedure Act to quash the sentence passed by the learned Magistrate and substitute another sentence which is proportionate to the gravity and circumstances of the offending.

52. I select a starting point of 4 years in the middle range of the tariff for Robbery simplicity. There are no aggravating circumstances. I deduct 12 months for mitigating circumstances and for time spent in remand. The final sentence is 3 years' imprisonment.

53. The Appellant is eligible for parole after he has served 30 months in prison.

54. **ORDER**

I. **Conviction recorded by the learned trial Magistrate is affirmed.**

II. **Sentence passed by the learned Magistrate is quashed.**

III. **Appellant is sentenced afresh to 3 years' imprisonment from the date of original sentence (14th October, 2016) with a non-parole period of 30 months.**

55. Appeal succeeds to that extent.

Aruna Aluthge

Judge

At Lautoka

17th May, 2017

Solicitors: Appellant in Person

Office of the Director of Public Prosecution for Respondent