IN THE HIGH COURT OF FIJI

AT SUVA

[APPELLATE JURISDICTION]

CRIMINAL APPEAL NO. HAA 23 OF 2017

IN THE MATTER of an Appeal from the decision of the Navua Magistrate's Court in Criminal Case No. 220 of 2007.

BETWEEN	:	**JOHN ONO LUM ON**
		APPELLANT
AND	:	**THE STATE**
		RESPONDENT

Counsel	:	Ms. Talei Kean for the Appellant Ms. Shirley Tivao for the Respondent
Dates of Hearing	:	16 May 2018
Judgment	:	22 October 2018

JUDGMENT

[1] This is an Appeal made by the Appellant against his conviction and sentence imposed by the Magistrate's Court of Navua.

[2] The Appellant was charged in the Magistrate's Court of Navua for the following offence:

Statement of Offence (a)

ROBBERY WITH VIOLENCE: Contrary to Section 293 (1) (b) of the Penal Code.

Particulars of Offence (b)

JOHN ONO LUM ON, with others, on the 30th day of June 2006, at Navua, in the Central Division, being armed with a pinch bar robbed MADHU LATA s/o SHIU KUMAR of cash $3000.00 and assorted gold jewelleries valued at $3180.00 all to the total value of $6180.00 and at the time of such robbery did use personal violence on the said MADHU LATA s/o SHIU KUMAR.

[3] The Appellant pleaded not guilty to the charge. The trial proper was heard before two different Resident Magistrate's. The prosecution case was heard, on 29 March 2012, before one Resident Magistrate; while the defence case was heard, on 27 August 2015, before another Resident Magistrate.

[4] On 25 July 2016, the Appellant was found guilty and convicted of the charge of Robbery with Violence.

[5] On 16 February 2017, he was sentenced to 5 years imprisonment with a non-parole period of 2 years.

[6] Aggrieved by this Order the Appellant filed an Appeal against his conviction and sentence. The said appeal, was filed in person by the Appellant, and was 12 days out of time.

[7] However, when the matter came up for First Call before me, on 8 June 2017, the Learned Counsel for the Respondent submitted that the State would not be objecting to the enlargement of time to hear this appeal.

[8] On 22 June 2017, this Court granted the Appellant leave to file Amended Petition of Appeal and Grounds of Appeal.

Amended Grounds of Appeal

[9] The Amended Grounds of Appeal, which was filed by the Appellant, on 12 July 2017, is as follows:

APPEAL AGAINST CONVICTION

1. THE Learned Magistrate erred in law and in fact even after drawing its mind to the Turnbull guidelines found inconsistencies in the evidence of prosecution and yet convicted the Appellant.
2. THE Learned Magistrate erred in law and in fact when she did not draw her attention to the weakness of the identification parade by Police.
3. THE Learned Magistrate erred in law and in fact by allowing dock identification by PW2 without proper foundation (identification parade/photograph identification).
4. THE Learned Magistrate erred in failing to analyse the evidence before her and did not take the defence person and alibi evidence into consideration.

APPEAL AGAINST SENTENCE

1. THAT the sentence imposed was very harsh and excessive due to the given facts that the Appellant was a first offender.

[10] From the above it is clear that 4 Grounds of Appeal are against the conviction; and the final Ground of Appeal is against the sentence.

[11] During the hearing of this matter both parties filed written submissions, and also referred to case authorities, which I have had the benefit of perusing.

The Law and Analysis

[12] Section 246 of the Criminal Procedure Act No. 43 of 2009 ("Criminal Procedure Act") deals with Appeals to the High Court (from the Magistrate's Courts). The Section is re-produced below:

"(1) Subject to any provision of this Part to the contrary, any person who is dissatisfied with any judgment, sentence or order of a Magistrates Court in any criminal cause or trial to which he or she is a party may appeal to the High Court against the judgment, sentence or order of the Magistrates Court, or both a judgement and sentence.

(2) No appeal shall lie against an order of acquittal except by, or with the sanction in writing of the Director of Public Prosecutions or of the Commissioner of the Independent Commission Against Corruption.

(3) Where any sentence is passed or order made by a Magistrates Court in respect of any person who is not represented by a lawyer, the person shall be informed by the magistrate of the right of appeal at the time when sentence is passed, or the order is made.

(4) An appeal to the High Court may be on a matter of fact as well as on a matter of law.

(5) The Director of Public Prosecutions shall be deemed to be a party to any criminal cause or matter in which the proceedings were instituted and carried on by a public prosecutor, other than a criminal cause or matter instituted and conducted by the Fiji Independent Commission Against Corruption.

(6) Without limiting the categories of sentence or order which may be appealed against, an appeal may be brought under this section in respect of any sentence or order of a magistrate's court, including an order for compensation, restitution, forfeiture, disqualification, costs, binding over or other sentencing option or order under the Sentencing and Penalties Decree 2009.

(7) An order by a court in a case may be the subject of an appeal to the High Court, whether or not the court has proceeded to a conviction in the case, but no right of appeal shall lie until the Magistrates Court has finally determined

the guilt of the accused person, unless a right to appeal against any order made prior to such a finding is provided for by any law.

[13] Section 256 of the Criminal Procedure Act refers to the powers of the High Court during the hearing of an Appeal. Section 256 (2) and (3) provides:

"(2) The High Court may —

(a) confirm, reverse or vary the decision of the Magistrates Court; or

(b) remit the matter with the opinion of the High Court to the Magistrates Court; or

(c) order a new trial; or

(d) order trial by a court of competent jurisdiction; or

(e) make such other order in the matter as to it may seem just, and may by such order exercise any power which the Magistrates Court might have exercised; or

(f) the High Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

(3) At the hearing of an appeal whether against conviction or against sentence, the High Court may, if it thinks that a different sentence should have been passed, quash the sentence passed by the Magistrates Court and pass such other sentence warranted in law (whether more or less severe) in substitution for the sentence as it thinks ought to have been passed."

The First Three Grounds of Appeal Against Conviction

[14] In my opinion the first three grounds of appeal against conviction are inter related and relates to the identification of the Appellant. The said grounds are:

1. That the Learned Magistrate erred in law and in fact even after drawing its mind to the Turnbull guidelines found inconsistencies in the evidence of prosecution and yet convicted the Appellant.

2. That the Learned Magistrate erred in law and in fact when she did not draw her attention to the weakness of the identification parade by Police.

3. That the Learned Magistrate erred in law and in fact by allowing dock identification by PW2 without proper foundation (identification parade/photograph identification).

[15] In ***R v Turnbull*** (1977) Q.B. 224, [1977] 63 Criminal Appeal Reports 132, [1976] 3 WLR 445, [1976] 3 All ER 549, at 551 to 552, the English Court of Appeal enunciated special guidelines to assess the quality of disputed visual identification. Lord Widgery CJ articulated the said guidelines in the following words:

> *"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, 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.*
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> *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 ever 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 identification 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? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if*

the accused asks to be given particulars of such descriptions, the prosecution should supply them.

Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence.

Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger."

[16] The ***Turnbull*** guidelines have been accepted as the law in Fiji. This has been specifically stated by the Fiji Court of Appeal in ***Semisi Wainiqolo v The State*** [2006] FJCA 70; AAU0027.2006 (24 November 2006); and in ***Mesake Sinu v The State*** [2013] FJCA 21; AAU37.2009 (13 March 2013).

[17] In ***Rusiate Savu v The State*** [2014] FJCA 208; AAU0090.2012 (5 December 2014); the Fiji Court of Appeal held that the Learned Magistrate was in error when he concluded that the ***Turnbull*** guidelines did not apply to that case as it was not a situation of identification on a fleeting glance but one of recognition.

*"Clearly, the learned trial Magistrate misdirected herself when she said the **Turnbull** guidelines are not appropriate here as this was not fleeting glance case but was of recognition. The **Turnbull** guidelines equally apply to cases of disputed recognition as was the case here. In **R v Thomas** [1994] Crim. LR 120, the English Court of Appeal held that where there has been some form of recognition, the risk that needs to be assessed is whether the witness is mistaken in his or her purported recognition of the accused. That risk is assessed by taking into account the **Turnbull** guidelines against the circumstances in which the sighting occurred (**Wainiqolo** (supra) at [18]).*

[18] These principles were also considered by the Fiji Court of Appeal in ***Isoa Koroivuki & Another v The State*** [2017] FJCA 47; AAU0082.2012 (26 May 2017); and confirmed by the Fiji Supreme Court in ***Isoa Koroivuki & Another v The State*** [2017] FJSC 28; CAV7.2017 (26 October 2017).

[19] In this case the Prosecution called four witnesses to prove the charge against the Appellant - The complainant, Madhu Lata (PW1); her daughter, Prakashni Singh (PW2); and two Police Officers, Inspector Uraia Torau (PW3 - the Officer who conducted the identification parade) and Police Constable Tuwaci (PW4 - the Investigating Officer).

[20] At the close of the Prosecution case, by way of Written Ruling, delivered on 1 October 2012 (Ruling on No Case to Answer), the Court held that the Appellant had a case to answer.

[21] The Appellant testified on his behalf. The Appellant was taking up the defence of alibi. Thus, to prove his alibi, he called two witnesses, David Joseph Lum On (DW2) and Felix Amani Lum On (DW3), his two brothers.

[22] In her Judgment, the Learned Magistrate has duly analysed the evidence of both the Prosecution and the Defence. She has properly directed herself in relation to the issue of identification in terms of the Turnbull guidelines (at pages 49, 50 and 51 of the Magistrate's Court Record). She has identified the weaknesses or discrepancies in the Prosecution case. However, she has come to a finding that the said weaknesses or discrepancies were not fatal.

[23] The Learned Magistrate has stated as follows (at page 52 of the Magistrate's Court Record):

> *"After weighing the evidence and being caution under the principle of Turnbull, the Court must weigh out the identification evidence of PW1 as the sole witness. She had identified the Accused, for which some parts of the evidence were inconsistent with PW2.....*
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> *Despite these discrepancies, PW1 was able to identify the Accused during an identification parade with her husband, who did not give testimony in Court. She admitted she saw more than 5 people that entered her premises, but at the ID parade, she could only identify the Accused as he was the only one there.*
>
> *The Court finds that after weighing out the evidence of PW1 on identification, and finds that despite these discrepancies, the Court finds that these weaknesses were not fatal to the weight given to the evidence of the Prosecution and holds that there was some form of lighting available in order for the Accused to be seen by PW1."*

[24] Furthermore, the Learned Magistrate has clearly rejected the identification evidence of PW2 and has not given any weight to the dock identification made by PW2. In her Judgment she records as follows (at page 51 of the Magistrate's Court Record):

> *".....Furthermore, she (reference to PW2) only identified the Accused at the dock. Dock identification the Court cautions itself on. Given that there was only one Accused that is in the dock, the ability to identify the same person as the person in the dock for PW2 is obvious without any independent evidence from her regarding the Accused and his identification in her testimony on oath."*

[25] For the reasons enumerated above, the first three grounds of appeal against conviction fail.

The Fourth Ground of Appeal Against Conviction

[26] This ground of appeal is whether the Learned Magistrate erred in failing to analyse the evidence before her and did not take the defence person and alibi evidence into consideration.

[27] When reading the Judgment of the Learned Trial Magistrate, it could be observed that she has clearly analysed the manner in which alibi evidence should be considered (at pages 47-48 of the Magistrate's Court Record). Thereafter, she states as follows (at page 52 of the Magistrate's Court Record):

> *"The Accused has denied the charges and called Alibi witnesses. Each witness told Court that he was at home on the night of the alleged incident. However, each witness admitted they were not awake at the time in which the alleged robbery occurred and were only awoken at 4am by their mother for prayers. Therefore, anything that occurred prior to 4am would not have been known by any of the witnesses. The Court finds that the specified time has not properly been explained by all witnesses. I also caution myself as (to) their evidence given their direct relationship with (the) Accused and their motives. Thus, the Court finds that the evidence of the witnesses were not able to indicate to this Court the whereabouts of the Accused at the time of the offence."*

[28] It is clear from the above that the Learned Magistrate has analysed and considered all the evidence before her, including the alibi evidence put forward by the Appellant. For these reasons the fourth ground of appeal against conviction fails.

The Ground of Appeal Against Sentence

[29] The Appellant states that the sentence imposed on him was very harsh and excessive due to the given facts that the Appellant was a first offender.

[30] In the case of ***Kim Nam Bae v. The State*** [1999] FJCA 21; AAU 15u of 98s (26 February 1999); the Fiji Court of Appeal held:

> *"...It is well established law that before this Court can disturb the sentence, the appellant must demonstrate that the Court below fell into error in exercising its sentencing discretion. If the trial judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some relevant consideration, then the Appellate Court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (**House v. The King** [1936] HCA 40; [1936] 55 CLR 499)."*

[31] These principles were endorsed by the Fiji Supreme Court in ***Naisua v. The State*** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013), where it was held:

> *"It is clear that the Court of Appeal will approach an appeal against sentence using the principles set out in **House v. The King** [1936] HCA 40; [1936] 55 CLR 499; and adopted in **Kim Nam Bae v The State** Criminal Appeal No. AAU 0015 of 1998. Appellate Courts will interfere with a sentence if it is demonstrated that the trial judge made one of the following errors:*
>
> *(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."*

[32] Therefore, it is well established law that before this Court can interfere with the Sentence passed by the Learned Magistrate; the Appellant must demonstrate that the Learned Magistrate fell into error on one of the following grounds:

(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.

[33] The Appellant has been charged with Robbery with Violence, contrary to Section 293 (1) (b) of the Penal Code. The maximum penalty for this offence is life imprisonment and the tariff ranges from 8 to 14 years imprisonment.

[34] In ***Rarawa v. State*** [2015] FJHC 324; Criminal Appeal No. HAA 5 of 2015 (30 April 2015); His Lordship Justice Madigan held as follows:

> *"[8] The maximum penalty for robbery is 15 years imprisonment and the maximum penalty for aggravated robbery is 20 years imprisonment.*
>
> *[9] Up until 1st February 2010, the Penal Code being the then operative criminal law prescription, robbery could be robbery simpliciter (s.293(2)) with a maximum penalty of 14 years or aggravated robbery being armed with offensive weapons or robbery with violence (ss.293(1)(a) and 293(1)(b) respectively). Both of these aggravated offences attracted a maximum penalty of life imprisonment.*
>
> *[10] This latter offence of robbery with violence has not been translated into the Crimes Decree as a separate offence. There is no longer an offence of robbery with violence and it is not part of the offence of aggravated robbery which is predicated on either plurality of offenders and/or the possession of offensive weapons. Violence is not mentioned. A robbery with violence is now then subsumed in the offence of robbery.*
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> .....
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> *[15] While the tariff for aggravated robbery is now well settled, the tariff for robbery simpliciter is not. It has been informally accepted to be between 4 and 8 years imprisonment but it is quite apparent that such a range is totally inadequate for robberies that are carried out accompanied by violence. The use of violence in robberies should still attract the stiff penalties that they did under the Penal Code regime whilst robberies with little or no violence could be visited with a sentence of 3 or 4 years depending on the circumstances.*
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> *[16] 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.*

[35] Based on the said Judgment the Learned Magistrate adopted 8 to 14 year's imprisonment as the tariff for this offence of Robbery with Violence. She considered the starting point as 8 years, which is at the lowest end of the tariff.

[36] In her sentence the Learned Magistrate has stated that the aggravating factors are subsumed into the elements of the offence. As to the mitigating factors, she has considered that the Appellant is a first offender and has granted a discount of 3 years. This reduced the sentence to 5 years. The Appellant will not be eligible for parole until he serves 2 years of this sentence.

[37] As could be seen, the final sentence of 5 years imprisonment, is clearly outside the lower end of the tariff for this offence. Therefore, the sentence imposed on the Appellant cannot be considered to be very harsh and excessive. For these reasons the ground of appeal against sentence fails.

[38] Therefore, I conclude that this appeal should stand dismissed and the conviction and sentence be affirmed.

Conclusion

[39] In light of the above, the final orders of this Court are as follows:

1. Appeal is dismissed.
2. The conviction and sentence imposed by the Learned Magistrate Magistrate's Court of Navua is affirmed.

HIGH COURT OF FIJI SUVA

Riyaz Hamza

JUDGE

HIGH COURT OF FIJI

At Suva
This 22nd Day of October 2018

Solicitors for the Appellant : Office of the Legal Aid Commission, Suva.
Solicitors for the Respondent: Office of the Director of Public Prosecutions, Suva.