IN THE HIGH COURT OF FIJI

AT LAUTOKA

APPELLATE JURISDICTION

CRIMINAL MISCELLANEOUS CASE NO: HAA 07 OF 2018

BETWEEN	:	**PAULA NAMUA**
		Appellant
AND	:	**STATE**
		Respondent
Counsel	:	**Appellant in Person**
		Mr. S. Babitu for the Respondent
Date of Hearing	:	**30th April, 2018**
Date of Ruling	:	**31st May, 2018**

JUDGMENT

1. This is a timely appeal filed by the Appellant against the conviction entered on the 27th of November, 2017 by the Learned Magistrate at Lautoka.

2. The Appellant was charged with one count of Robbery contrary to Section 310 (10) (a) (i) of the Crimes Act 2009.

3. After trial, the Appellant was found guilty and convicted. On the 3rd of January, 2018, he was sentenced to 3 years and 8 months' imprisonment with a non-parole period of 2 years.

Grounds of Appeal

4. On his Notice of Appeal dated 20th of December 2017, the Appellant appeals his conviction on the following grounds;

I. That the Learned trial Magistrate erred in law in failing to warn himself and direct his mind on the burden and standard of proof when delivering his Judgment.

II. That the Learned Magistrate acted upon wrong principle when he failed to allow adjournment when the Appellant failed to turn up with his witnesses for continuation of hearing and he proceeded to the judgment *in absentia*.

III. That the continuation of trial *in absentia* is not in compliance with Section 13 (1) (h) of the 2013 Constitution and he was prejudiced due to lack of legal representation.

IV. That the Learned trial Magistrate erred in law in failing to warn himself and direct his mind to Turnbull Guidelines in respect of identification.

V. That the Learned trial Magistrate erred in law in allowing dock identification which deviates from the established principle required in law.

VI. That the Learned trial Magistrate erred in law in allowing the inconsistent out of Court evidence and evidence on oath of both witnesses of the prosecution.

5. In his written submission filled on the 20th of March 2018, the Appellant submits that he is relying only on grounds ii, iii, iv, v and vi.

Factual Matrix

6. On the 19th of November, 2016, at about 10.30 am, the complainant was waiting for a taxi at the Thompson Crescent Junction at Tavakubu Road. A man came down from Gold Link side sniffing a piece of cloth that looked like an underwear. As the complainant was waiting for a taxi, he crossed the road, approached the complainant and pulled her bag. This man started to swear at the complainant. He pulled the shirt of the complainant whereby the complainant fell on the ground. Then this man punched the complainant on her right shoulder and took a pouch which was inside her bag. The pouch contained $300.00. He fled the scene after snatching the pouch. A woman constable managed to recognise this man as the Accused Paula, a known criminal in her area.

Analysis

Grounds ii and iii – Adjournments on request and trial *in absentia*

7. The Appellant complains that, when his matter was adjourned for further hearing for his *alibi* witnesses to be called, the Learned Magistrate proceeded to trial *in absentia* without taking into consideration the fact that he found it difficult to locate his *alibi* witnesses.

8. When the trial was taken up on 25th of September, 2017, and the prosecution closed its case, the Appellant gave evidence in his defence.

9. It appears that the Appellant had not given any notice of *alibi* under Section 125 of the Criminal Procedure Act 2009 and had not informed the Court that he is intending to call *alibi* witnesses. Still, the Learned Magistrate had given about 6 months

from March, 2017 to contact Appellant's *alibi* witnesses. The Appellant failed to appear in Court when he was given an opportunity to present his evidence.

10. Section 171 of the Criminal Procedure Act states as follows:

> *(1) If at the time or place to which the hearing or further hearing is adjourned-*
>
> *(a) the accused person does not appear before the Court which has made the order of adjournment, the court may (unless the accused person is charged with an indictable offence) proceed with the hearing or further hearing as if the accused were present; and*
>
> *(b) if the complainant does not appear the Court may dismiss the charge with or without costs.*
>
> *(2) If the accused person who has not appeared is charged with an indictable offence, or if the Court refrains from convicting the accused person in his or her absence, the Court shall issue a warrant for the apprehension of the accused person and cause him or her to be brought before the Court.*

11. According to page 25 of the Court Record, the Learned Magistrate had asked the Appellant if he could call his two witnesses. The Appellant had answered in the affirmative. The matter was then adjourned to 2.00 pm on the 24th of November, 2017, for continuation of trial. The case was called twice on that day, at 2.30 pm and at 3.30 pm. However, the Appellant failed to appear. The Learned Magistrate decided to fix the matter for judgment and issued a bench warrant.

12. The case was called again on the 27th of November, 2017, the date to which the bench warrant was extended. The Appellant was not present. The Learned Magis-

trate than delivered the judgment in the absence of the Appellant. He cited Section 171 of the Criminal Procedure Act 2009 as the basis for his decision.

13. The Appellant was charged with an indictable offence which is triable summarily by a magistrate. Section 171 of the Criminal Procedure Act 2009 gives the Magistrate a discretion to convict an accused person in his or her absence. The discretion must be exercised judiciously after considering all the facts and the law. The Learned Magistrate in the first place did not proceed to convict the Appellant in his absence; instead he issued a bench warrant on two occasions. When a warrant report was filed by police stating that checks were made at Appellant's residence and other places given by Appellant's relatives, the Learned Magistrate was satisfied that the Appellant was absconding willfully. The Learned Magistrate then decided to deliver the judgment in the absence of the Appellant.

14. In Appellant's written submissions, he emphasizes the fact that no statements or affidavit was in the Court Record to substantiate the prosecution's application for trial *in absentia.* It appears that Appellant's submission is misconceived.

15. The Constitution of the Republic of Fiji, under Section 14 (2) (h), guarantees the right of an accused person to be present when being tried, unless (i) the court is satisfied that the person has been served with a summons or similar process requiring his or her attendance at the trial, and has chosen not to attend...

16. The Learned Magistrate informed the Appellant to be present at 2. pm on 24th of November, 2017. Hence the Appellant was properly informed of the date and time for his appearance by the Magistrate himself. Having perused the report filed by police and taken judicial notice of what happened in his court, the Learned Magistrate was satisfied that the Appellant had chosen not to appear for his case knowing full well that the case was adjourned for him to call his witnesses.

17. When the Appellant was produced before the Learned Magistrate after the execution of the bench warrant, he had not advanced any reason as to why he never turned up to Court. He had never mentioned the fact that he found it difficult to locate his *alibi* witnesses. If he was unable to locate his witnesses, he could have attended court and informed about his difficulty which he never did. Under these circumstances it was safe for the Learned Magistrate to conclude that the Appellant willingly chose not to attend court and call his witnesses. The Appellant had waived all his rights to be tried in his presence.

18. In ***Peniame Drova v State*** Criminal Appeal No. HAA 23 of 2012 Madigan J noted at paragraph 8

> *"This being a summary offence, there is no reason why the appellant should not have been tried in absentia, especially when in the knowledge of the hearing date he deliberately absented himself by leaving the jurisdiction. By doing so he is waiving all rights to be heard at the hearing."*

19. The Learned Magistrate had correctly exercised his discretion to proceed to conviction in the absence of the Appellant.

20. On 23rd November, 2016, the Appellant was properly explained his right to counsel by the Learned Magistrate. The Appellant had waived his right and opted to defend himself. The Appellant had 30 previous convictions of similar nature and was not new to the system. It appears that the Appellant had ably cross examined the witnesses called by the prosecution. The right to counsel is not an absolute right. The Appellant has not been prejudiced.

21. Grounds ii and iii lack merit and fail.

Grounds iv and v- Identification

22. The Appellant submits that he did not commit the said offence and raises issues with identification evidence led in the trial.

23. In this case, the prosecution adduced identification evidence of two witnesses who placed the Appellant at the scene; the complainant (PW1) and WPC Maneisi Likuivalu (PW2) who had recognized the Appellant as the person who committed the robbery.

24. Despite Appellant's objection, the Learned Magistrate had allowed dock identification of the Appellant by PW1. When reading through the judgment, it is not clear if the Learned Magistrate was satisfied that a proper foundation had been laid before allowing a dock identification. It appears however, that the prosecution had led evidence to satisfy what is called Turnbull Guidelines. There was evidence that the robber in this case was walking towards the complainant with no obstruction in sight to block the complainant's view of his face. The robbery had happened in broad day light and the robber did not have his face covered. The complainant had observed the robber for some time before and at the time the offence. Therefore, it was not a 'fleeting glance case'.

25. Furthermore, there was recognition evidence before the Learned Magistrate to satisfy himself as to the identity of the Appellant. The prosecution was able to prove identification through the woman constable Likuivalu (PW.2). PW 2 said that she recognized the Accused when she was driving through Tavakubu Road in that morning. She said she knew the Accused beforehand as he was a well-known criminal in her station. He was also once her suspect in a case of Damaging Property. PW2's evidence is consistent with her previous statement and its credibility was never impeached.

26. If there were issues about identification in relation to the complainant's evidence, PW2's evidence resolved those issues when it reinforced the evidence of the complainant. It appears that there was no need to hold identification parade because not only the complainant identified the Appellant but also PW2 recognized the Appellant as the person who was robbing the complainant.

27. Turnbull Guidelines 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.*

28. In ***Wainiqolo v The State***, Crim. App. No. AAU0077 of 2006, the Court of Appeal held that an identification parade adds nothing to the accuracy of previous identification of the accused by the witness, where the witness has recognized rather than identified the accused. When recognition evidence is allowed, the reliability of such evidence is a matter for the assessors taking into account the Turnbull guidelines against the circumstances in which the sighting occurred.

29. In ***R v Curry and 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. The defence appealed on the basis that there should have been a full Turnbull warning. The English Court of Appeal dismissed the appeal stating that the warning in Turnbull was not intended to deal with every case involving a minor identification problem but only with the ghastly risk run in cases of fleeting encounters.

30. This is not a 'fleeting glance' case as far as the complainant is concerned. She clearly identified the Appellant without any obstructions in her sight. She identified the Appellant as the robbery happened in broad daylight. She had observed the appellant for some time. PW2 who recognised the Appellant is a reliable witness. It was never suggested that PW2 was mistaken or that the Appellant was never under PW2's investigation in a case of Damaging Property. Police officers have often been said to possess certain skills from their work environment and one of those is identification of people. It is important that PW2, who is an experienced police officer, recognized the Appellant as one of her suspects in a damaging property case.

31. I am of the view that the prosecution had proved the identification of the Appellant beyond reasonable doubt. The learned Magistrate did not fall into error. Grounds iv and v should therefore be dismissed.

Ground vi - Inconsistencies

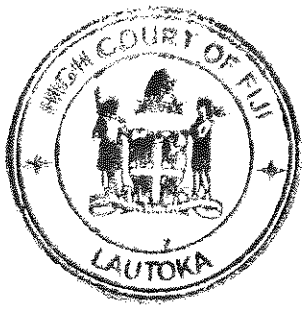
32. This ground of appeal seems to suggest that there are inconsistencies between complainant's evidence in Court and her previous statement given to the Police.

33. There are no material contradictions between the two versions of the complainant. According to her previous statement, complainant had not told police that she will be able identify the culprit if she is given an opportunity to see him in future. In her explanation complainant said that she was traumatized after the incident. This explanation is acceptable. Furthermore, she cannot be expected to mention this fact unless a question to that effect was asked by police. This ground lacks merit and fails.

Conclusion

34. For reasons given, appeal against conviction is dismissed. The Judgment of the learned Magistrate at Lautoka is affirmed.

35. 30 days to appeal to the Court of Appeal.



Aruna Aluthge

Judge

AT LAUTOKA

31st May, 2018