

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 45 of 2021

STATE

vs.

JONA ULUCEVA ROKOSUKA

Counsel: Ms. B. Kantharia for the State
Mr. T. Varinava for the Accused

Date of Hearing: 26th and 27th July 2022

Date of Closing Submission: 27th July 2022

Date of Judgment: 28th July 2022

JUDGMENT

Introduction

1. The Director of Public Prosecutions has charged the accused for the following offences as per the Information dated 05th March, 2022:

COUNT ONE

Statement of Offence

AGGRAVATED ROBBERY: Contrary to Section 311 (1) (a) of the Crimes Act, 2009.

Particulars of Offence

JONA ULUCEVA ROKOSUKA with others on the 1st day of January, 2021 at

Nasinu, in the Central Division, in the company of each other stole 1x Wallet containing \$80.00 cash, 1x Driver's License, 1x FNPF Card, 1x Medical Card, 1x Voter Identification Card, 1x BSP ATM Card, 1x Westpac ATM Card, 1x Samsung Galaxy J7 mobile phone and 1x Taxi Meter from **RAJESH CHAND** and immediately before stealing from **RAJESH CHAND**, used force on him.

2. Upon entering a plea of not guilty by the Accused, the matter heard between the 26th and 28th of July 2022. The Prosecution presented the evidence of five witnesses. Upon the closing of the case for the prosecution the defence was called for and the Accused opted to remain silent and called no evidence. Subsequently, the Court heard the oral submissions of both the learned Counsel and the Prosecution tendered written submissions too. Having carefully considered the evidence presented during the hearing and the respective submissions of the parties, I now proceed to pronounce the judgment.

Elements of the offence

3. The constituent elements of the offence of the Aggravated Robbery as charged are that:
 - (i) the accused Jona Uluiceva Rokosuka did
 - (ii) in the company of other persons,
 - (iii) commit robbery on Rajesh Chand and stole 1x Wallet containing \$80.00 cash, 1x Driver's License, 1x FNPF Card, 1x Medical Card, 1x Voter Identification Card, 1x BSP ATM Card, 1x Westpac ATM Card, 1x Samsung Galaxy J7 mobile phone and 1x Taxi Meter.
4. Robbery is an aggravated form of theft. Theft is committed if that person dishonestly appropriates the property belonging to another with the intention of permanently depriving the other of that property. The elements of 'dishonestly' and "the intention of permanently depriving the other of the property" is the state of mind of the accused at the time of committing the offence which could be drawn from the conduct of the accused. 'Appropriation of property' is taking possession or control of the property without the consent of the person who has possession or control of the property. Theft becomes robbery if the accused, immediately before, or at the time of, or immediately after, committing theft use force or threaten to use force on another person with the intent to commit theft or to escape

from the scene. If more persons than one are involved in committing robbery it is Aggravated Robbery.

5. Accordingly, the Prosecution has to prove beyond a reasonable doubt that:
 - (i) The accused,
 - (ii) with other persons,
 - (iii) dishonestly appropriated 1x Wallet containing \$80.00 cash, 1x Driver's License, 1x FNPF Card, 1x Medical Card, 1x Voter Identification Card, 1x BSP ATM Card, 1x Westpac ATM Card, 1x Samsung Galaxy J7 mobile phone and 1x Taxi Meter.
 - (iv) with the intention of permanently deprive it,
 - (v) and used force on Rajesh Chand immediately before or after stealing the said items.

6. The first element requires the proof of the identity of the offender and to prove beyond reasonable doubt that Jona Uluiceva Rokosuka with others committed this offence in the company and together with others. Where two or more persons commit a criminal offence, whatever the participation each person may be if they are acting together as part of a joint plan or agreement to commit the offence, each one of them will be guilty. However no formal plan and agreement is not required as an agreement to commit an offence may arise on the spur of the moment. The essence of joint responsibility for a criminal offence is that each accused shared a common intention to commit the offence and played his part in it, of any degree to achieve that aim.

Presumption of innocence

7. The accused is presumed to be innocent until he is proved guilty. As a matter of law, the onus or burden of proof rest on the prosecution throughout the trial, and it never shifts to the accused. There is no obligation or burden on the accused to prove his innocence. The prosecution must prove the accused's guilt, beyond reasonable doubt. If there is a reasonable doubt, so that the court was not sure of the accused's guilt, or if there be any hesitation in my mind on any of the ingredient or on the of evidence or led by of the prosecution the Accused must be found not guilty of the charge and accordingly acquitted.

8. The following are admitted by the parties,
- 1) On 2nd February, 2021, PC Waisake arrested Jona Uluiceva Rokosuka.
 - 2) On 3rd February, 2021 at about 8.15am, Jona Uluiceva Rokosuka was interviewed under caution by DC 5481 Rarasea at the Valelevu Police Station.
 - 3) Jona Uluiceva Rokosuka agreed to participate in an identification Parade during the caution interview at Question and Answer 55.
 - 4) D/IP Savou conducted the Identification Parade for this matter on 3rd February, 2021.

Prosecution case

9. According to the complainant Mr. Rajesh Chand on 01 January 2021 around 9.30 pm he had gone to a bread shop at Duvula in Nadera. When he returned to his car it has not started and he stepped out of the car and was standing nearby. Then 3 ITaukei boys have come by and one of them has put his hand into the car from the driving side window. Then Mr. Chand had immediately stepped in from the left passenger door and held that person's hand. At this moment the other two boys have grabbed Mr. Chand from his rear and pulled him out of the car, searched him and taken his wallet and his mobile phone from his pocket. During this time other boy has been ransacking the car and then all of them have fled the scene. After the boys ran away some persons have come to his help he had also called home and within 15 minutes the police have arrived. There had been two tube lights in the veranda of a nearby shop which was about 2 meters away from the car.
10. The immediate search by the police was not successful. The complainant has proceeded to the police station and made a statement the same night. Within 2 days on the request of the Investigating officer DC Rarasea the complainant has proceeded to the police station and he was shown photos of 5 or 6 boys on a mobile phone. Mr. Chand had identified one of the boys in the photos as being the person whom he saw that night. Then Mr. Chand had been summoned on the 3rd February, 2021 for an ID parade at the Valelevu Police Station.

11. He had participated at the ID parade and pointed out the Accused Jona. Mr. Chand admits that there were several persons some were young and others old of different skin colours and heights. Mr. Chand identified the accused in court as being the person who put his head in to the car. He claims to have seen his face at close proximity. However, in cross examination it transpired that no description in his statements. Further the photo identification too is not mentioned in his second statement. Apart from these omissions several other omissions were raised.

Police Evidence

12. The prosecution led the evidence of DC Rarasea, PC Waisake, PC Apenisa and D/IP Savou. If I may summarize their evidence in its totality it will be thus. PC Waisake upon being directed on 2/2/2021 has arrested the accused around 1600 hours of that day. He was arrested near the Davula Bread shop. DC Rarasea the main IO had recorded both statements of the complainant and conducted investigations and obtained some photos of boys hanging around that area from a neighbor. On 3/1/2021, he had called Mr. Chand and shown these photos from which the photo of Jona the accused was identified by the complainant. He had made attempts to arrest Jona but as he was not at home there had been a delay in arresting him. Finally, on 2 February 2021 Jona was arrested and DC Rarasea has interviewed Jona who did not answer many questions but has agreed to an ID parade. He had arranged for an ID parade and the identification officer was D/IP Savou. DC Rarasea admits that he recorded both statements from the complainant and the accused and also accompanied Mr. Chand to the ID parade. He has also remained in the ID parade room when it was in progress.
13. During cross examination it transpired that he has not made any notes or a statement on the photo identification made by Mr. Chand. PC Apenisa has accompanied the accused from the cell block to the ID parade room. DC Savou has presided over the ID parade and explains the procedure followed. However, admits that certain procedures were not followed and was somewhat vague and not sure if proper notes and records were maintained of the ID parade. He says that Mr. Chand pointed out and identified the accused.

Defence position

14. The aforesaid evidence was not challenged except in relation to the identification of the accused and the failure to follow the procedure prescribed by Fiji Police Force Standing Orders. Thus, the issue of identification is the main contentious *issue inter alia* on the basis that it is a mistaken identity.
15. The complainant admits that the accused was not known to the complainant Mr. Chand prior to the date of the robbery. It is also clear from the evidence that according to the complainant Mr. Chand saw the accused for the first time on the date of the alleged incident. Thereafter, the complainant claims to have been shown a photo/picture of the accused on 3 January 2021 which he is said to have identified and then at the identification parade held on 3 of February 2021. Finally, Mr. Chand identified the accused in Court on 26th July 2022 in the course of his testimony.
16. The defence did not challenge the incident but is challenging the evidence of identification made by Mr. Chand on the basis that it is a mistaken identification and also is impeaching the manner in which the said identification parade was conducted by the police and submits that it was conducted irregularly and improperly and that the manner in which the said identification parade was conducted was flawed. The ID parade had been held almost one month thereafter the incident on 03/02/2022. The Accused is arrested on 2 February 2021 by PC Waisake based on the photograph forwarded to him on WhatsApp and then the complainant identifies the Accused at the ID Parade at the Valelevu Police Station. This is preceded by the photo identification made by the Complainant on 23 January 2021 02/02/2021.

Legality of Photo Identification

17. The practice of showing photographs and ascertaining the identity of a possible suspect during criminal investigations is considered a useful tool in the process of investigations as done in this case. The legality and propriety of this method was considered in *KING v DWYER and FERGUSON (1925) 2KB 799* and *ALEXANDER v. THE QUEEN (1981) 145 CLR 395* (8

April 1981) and it was held that it is permissible for the police when in doubt as to who the suspect is, to show photographs and to obtain information in the course of the investigatory process. In *Alexander v Queen* (supra) the Australian High Court considered a series of cases dealing with photo identification during the investigatory stage and expressed certain views and opinions and some guidelines. It is relevant and necessary for the purposes of the present to summarize and place on record some of the said observations and guidelines that may be followed if photo identification is resorted during the investigatory stage. They are:

- (1) Evidence of identification from police photographs is admissible and permissible when made before a particular accused is under suspicion.
- (2) It is improper to use photo identification after the arrest of the accused or if the identity of the accused is otherwise known to the police.
- (3) If photos are shown to ascertain the identity of probable suspect several photographs of different persons should be shown to the victim and should call upon such witness to identify and point out the perpetrator without being suggestive.
- (4) Notes should be maintained and statements should be recorded from the witness and the officer.
- (5) If any photo identification is resorted to during investigations that should be disclosed to the defence as pre-trial disclosures.
- (6) Showing of photos to a witness will affect the value of the evidence of an ID parade and may taint the testimony in court.

As for the present case all the above have been followed in the breach and violated save and except for No.3 above by showing several photographs of different persons to Mr. Chand.

Conduct of the ID parade

18. The defence is impeaching the manner in which the said identification parade was conducted on the basis that it was conducted irregularly and improperly and the manner in which the said identification parade was conducted was flawed. Now let's consider the manner in which the identification parade was conducted in this case. The Identification Parade was conducted by D/IP Savo. The Identification Parade

had been held inside the Crime Office of the Valelevu Police station. DC Rarasea and Apensea too have assisted. These witnesses testified as to the manner in which the Identification Parade was conducted. They admitted that the Fiji Police Standing Orders (FPSO) provide the procedures and guidelines under which Identification Parades should be conducted. These witness and the complainant admit that the others in the parade were not of similar build, height, complexion, height, age or appearance including clothing as the accused.

19. It was suggested to the witnesses that they have not followed the proper procedure in conducting the ID Parade as per the FPSO. D/IP Savo admitted that although under the FPSO the conducting officer is required to make notes in the notebook it was not followed. DC Rarasea was the IO who recorded the complainant's statement, interviewed the accused had escorted and accompanied the Complainant to the D parade and has been present whilst the ID parade was in progress. Tjhis is extremely unsatisfactory by any standard. The FPSO may not have the force of Law but the compliance is desirable. [vide -**Temo v State Crim.** Appeal No. AAU 117 of 2016 (26th May 2022)].
20. In this case the IO being present and accompanying the complainant in conjunction with the fact that others in the parade not being of similar appearance, the ID parade room being opened to several policemen is been in violation of the said standing orders. These directives are put in place to ensure fairness of the procedure in conducting ID parade and to ensure that the ID parades are fairly conducted without prejudice and in an acceptable manner. The presence of the IO certainly is not conducive and would lead to an inference that there may be some undue interference which may prejudiced the accused. For instance, as the Complainant has identified the photo provided by the IO, his presence will have a compelling effect on the complainant to point out the same person even if he had any doubt upon seeing the said person. This certainly will diminish the probative value of the ID parade. Further, the fact that Mr. Chand was shown a photograph of the accused during the investigation further dilutes and affects the veracity of the identification made by Mr.

Chand at this parade.

Visual identification

21. The English Court of Appeal in **R v Turnbull** [1977] QB 224 prescribed rules to guide Judges faced with contested visual identification evidence. When a case depends wholly or substantially on the correctness of one or more identifications of the accused which the defence claims are mistaken, the judge should be cautious before convicting the accused in reliance on the identification. The judge should examine closely the circumstances in which the identification by the witness came to be made. This may include considering inter alia as to how long did the witness have the accused under observation, at what distance, what light, was the observation impeded in any way, had the witness ever seen the accused before and had he any special reason for remembering the accused. Further the time elapsed between the original observation and the subsequent identification to the police and if there be any material discrepancy between the description given by the witness and the actual appearance of the accused are matters to be considered as per the *Turnbull* guidelines. The *Turnbull* guidelines are now accepted in Fiji; vide-*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).
22. The contentions issue in this trial is the identity of the Accused by the side eye witness Mr. Chand. Firstly, if Mr. Chand was able to positively identify the Accused at or during this incident and then the reliability and the propriety of the identification.
23. This is a case of an identification of a person not known or seen prior to the incident as opposed to the recognition of a person known prior to the incident.
24. Mr. Chand's evidence as regards the incident remains unassailed and there was no impeachment of his evidence as being untruthful. The challenge was that it was a mistaken identity. In the aforesaid circumstances, I am inclined to consider that witness is a truthful witnesses. Merely by deciding that the evidence of Mr. Chand is credible will not be sufficient to determine the testimonial trustworthiness of a witness. In considering the

testimonial trustworthiness of a witness there are two aspects that a court is required to consider. One is the *credibility or veracity* and the other is the *accuracy and reliability*. The former relates to the witness's sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns and relates to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is an honest witness, may, however, still be unreliable. [vide; R. v. Morrissey (1995), 22 O.R. (3d) 514 (C.A.), Doherty J.A. (at p. 526); 2014 MBCA 74 (CanLII) and R. v. H.C., 2009 ONCA 56, 244 O.A.C. 288 R. v. H.C., 2009 ONCA 56, 244 O.A.C. 288]

25. I will consider Mr. Chand's ability to accurately observe, recall and recount the events of the night of 1 January 2021. I am mindful that Mr. Chand may be a truthful witness still could have genuinely believed that the person he saw that night was the Accused. Thus, I should now consider if Mr. Chand had the occasion and the opportunity to observe the person and identify him as he claims. As stated above this was a night time incident; Mr. Chand says that there were 2 tube lights of 4 feet each about 2 meters away from the car. Mr. Chand says that he saw the Accused "face to face" when he in the vehicle. This is the moment he is gets the opportunity to see and observe the facial features of the robber. Undoubtedly it is less than 2 minutes. Since this was momentary and in state of shock and agitation Mr. Chand did not have the opportunity to clearly observe the intruder. As both of them were in the car from the two sides of the case obviously the light from outside world certainly be impeded from coming into the car to a great extent. Then the identification was certainly not in the best of light, conditions and the circumstances as admitted by Mr. Chand himself. In this backdrop Mr. Chand's statement does not include any description of the robber in the car.
26. The evidence Mr. Chand by itself as attended no more than a fleeting glance of the robber in the car. Mr. Chand has been grabbed from the rear and pulled out of the car almost as he was getting in to the car. He admits that as he was stepping into the car (putting on leg from

the left front door) he was pulled out of the car (grabbed). As, he does not have had much time this is no more than a fleeting glance under poor conditions of light and visibility. Thus, his omission to mention the features in his statements compounds the weakness and the unreliability of identification. If he in fact did identify he should have stated that in his statement. Then in the course of his evidence-in-chief when asked what the complexion of the person he saw was Mr. Chand's spontaneous response was that he was of "fair complexion".

27. As I clearly observe the Accused in court is certainly nowhere near "fair" in complexion. He is an ITaukeian man of obvious dark complexion. I observed that Mr. Chand when questioned by the prosecutor as to the complexion of the robber he saw, momentarily the witness went back in memory to the incident and spontaneously answered "fair". This clearly establishes that either the person whom he saw was fair in complexion or that he was not sure as he may have not had the opportunity to sufficiently observe that person. Whatever be the reason this creates a serious doubt as to the reliability of Mr. Chand's identify of the Accused and most certainly if it was a person of fair complexion that he had seen by no stretch of imagination can it be the Accused.
28. No doubt that an ID parade was held and Mr. Chand has pointed and the Accused of the parade. The defence does not challenge this however Mr. Chand admitted that he was shown a photo or a picture of the Accused on 3 February 2021 whom he identified as the robber. That may have been a photo/picture of the Accused. But as discussed above Mr. Chand may not have been able to sufficiently observe the identifying features but may have had some faint idea and upon being shown a photo/picture in all probabilities may have picked someone who was close to the features he remembered. It is not that Mr. Chand is untruthful but he may have genuinely believed so. But this being an identification of a previously unknown person as opposed to recognition. The danger of a mistaken identity in the circumstances of this case is extremely high. Thus I hold that it is unsafe to rely on the evidence Mr. Chand as to the identity of the Accused.
29. The fact that a photo of the Accused was shown in the in the said circumstances taint and has the propensity to corrupt the identification made at the ID parade. As Mr. Chand may

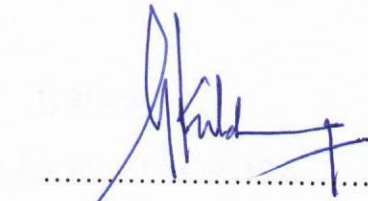
have had only a very faint idea as to the identifying features and when shown a photo with some similarity he appears to have given that identity to the person in his memory and then the features on the photo has the propensity to taint and add to the features of the person Mr. Chand may have observed. Thus, the identity made at the ID parade is tainted.

30. This is further compound by the irregularities or the failure to follow the procedure of holding ID parade. The presence of the Investigating Officer, the witness being accompanied by the Investigating Officer and there being no note made of the parade as well as the others in the parade not being similar persons make it extremely unsafe to accept the identity made at the ID parade.
31. Another matter of concern is the shown of a photo of the accused to the witness Chand on 3rd January 2021 during the investigations before the Identification Parade was conducted. The investigating officer and the complainant admit this. It is a matter of common experience that, once a witness has picked out the accused at the photo line-up before the IO, he is not likely to go back on his word later on. The fact that a photo of the accused was shown to the witness before the Identification Parade and the presence of the IO/ DC Rarasea at the parade affects the probative value and the integrity of the said parade and the identification of the Accused made by Mr. Chand.
32. Further, Mr. Chand had made two statements to the police regarding the incident on 1 January 2021 and 3 February 2021 he has not provided the police with any form of description of any of the persons including that of the person whose hand he held. There is no mention is made of the photo identification either. These are serious omissions on the evidence of the witnesses including that of the investigating officers.
33. One of the essential elements of the **Turnbull** guidelines is to consider if there be material discrepancies between description given to the Police by the witness of the criminal and his actual appearance. Here there is a total absence of any description. This in my view this goes beyond 'the discrepancy' as contemplated by **Turnbull** guidelines. This will lead to the inference that the witness was unable to observe or see any such features of the perpetrator.

Conclusion

34. This case is based solely on the visual identification of the Accused made by Mr. Chand. There are no recoveries or other circumstances that implicate the Accused. In the totality of the circumstances I am convinced that the identification is unreliable. Hence, I hold that the prosecution has failed to prove the identity of the Accused beyond reasonable doubt and thus failed to prove the charge of Aggravated Robbery preferred against him. Accordingly, the Accused is acquitted of the said charge of Aggravated Robbery.




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K.M.G.H.Kulatunga
JUDGE

At Suva

28th July 2022

Solicitors

Office of the Director of Public Prosecutions for the State.

Legal Aid Commission for the Accused.