

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 196 of 2021

STATE

vs.

- 1. JONA ROKOSUKA [DEALT WITH]**
- 2. MARCELLIN CHAMPAGNAT ATUNAISA LALABALAVU**
- 3. MANASA ROKOTUIVEIKAU**

Counsel: Ms. M. Naidu for the State
Mr. J. Biaukula for 1st Accused
2nd Accused In Person

Date of Hearing: 27th to 31st March 2023

Date of Closing Submission: 11th April 2023

Date of Judgment: 19th April 2023

JUDGMENT

Introduction

1. The Director of Public Prosecutions has charged the accused for the following offences as per the Information dated 17th March 2022:

COUNT ONE

Statement of Offence

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

Particulars of Offence

JONA ROKOSUKA, MARCELLIN CHAMPAGNAT ATUNAISA LALABALAVU & MANASA ROKOTUIVEIKAU on the 11th day of September, 2021 at Nasinu, in the Central Division, in the company of each other stole 1 x hand bag containing 1 x purse, \$290.00 cash, 1 x Samsung Galaxy J2 Core Mobile Phone, 2 x Sim Cards, 1 x Perfume, 1 x FNPF Cards, 1 x Driver's License Card, 4 x FIRCA Cards, 3 x Westpac ATM Cards, 2 x COVID-19 Vaccination Cards, 2 x Voter's Identification Cards, 3 x Vodafone e-Transport Bus Cards, 1 x BSP Hospital Card and 4 x Government Issued Medical Cards from **POONAM SARITA** and immediately before stealing from **POONAM SARITA** used force on her.

COUNT TWO

Statement of Offence

RESISTING ARREST: contrary to Section 277 (b) of the Crimes Act, 2009.

Particulars of Offence

JONA ROKOSUKA, on the 15th day of September, 2021 at Nasinu, in the Central Division, resisted the arrest from **DETECTIVE CONSTABLE 5404 RUSIATE** in the due execution of his duty.

2. The 1st accused pleaded guilty at the outset and he was convicted and sentenced. Then upon entering of pleas of not guilty by the 2nd and 3rd Accused the matter was taken up for trial on the 27th of March 2023. At this trial the prosecution called seven witnesses. PW1 Poonam Sarita is the victim and apart from her all other witnesses are police witnesses and the doctor. They are: PW2 - D/IP Edward Ofati, PW3 – WPC 4160 Laite, P`W4 – WPC 7350 Litiana, PW5 – PC 6098 Suliano, PW6 – Doctor Shain Hussein and PW7 – WPC 5029 Lusiana. Upon the conclusion of the prosecution case, the defence was called for and the second Accused as well as the third accused gave evidence and the third accused called Jona Rokosuka as his witness. He was the 1st Accused who pleaded guilty and was convicted and sentenced at the outset. The trial then proceeded against the second and third

accused persons. The fact of the first accused pleading guilty will not be considered against the other accused in this case.

3. Subsequently, the Court heard both the learned Counsel and all the parties tendered written submissions. 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

4. The constituent elements of the offence of the Aggravated Robbery as charged are that:
 - (i) the accused Jona Rokosuka, Marcellin Champagnat Atunaisa Lalabalavu and Manasa Rokotuiveikau did
 - (ii) in the company of each other,
 - (iii) commit robbery on Poonam Sarita and stole of the items referred to in the particulars of the offence.
5. 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.
6. Accordingly, the Prosecution has to prove beyond a reasonable doubt that:
 - (i) the accused,
 - (ii) with each other,
 - (iii) dishonestly appropriated the items referred to in the particulars of offence,

- (iv) with the intention of permanently deprive it,
- (v) and used force on Poonam Sarita immediately before or after stealing the said items.

7. The first element requires the proof of the identity of the offenders and to prove beyond reasonable doubt that the Accused with each other committed this offence in the company and together with each other. 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 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

8. 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.

Summary of Evidence

9. The only eye witness to the alleged robbery is the victim **PW1 Poonam**. She narrated the incident. The accused do not challenged the happening of an incident as narrated by Poonam. However, the two accused deny being present at the scene or participating in the said robbery and their position appears to be one of mistaken identity. (This aspect will be considered later in detail). I will now summarize the incident as narrated by Poonam.

10. On the 11th of September 2021 Ms. Poonam had gone to Pharmacy at Nadera Shopping Complex around 7pm. When she stepped out of the Pharmacy, she noticed some i-Taukei boys and a girl in the vicinity and was suspicious of their behavior. As she came out of the

Pharmacy door, one of the i-Taukei boys attempted to grab and snatch her hand bag which she was holding and the strap was around her shoulder which then slipped down her arm. She had held on to the hand bag when the other i-Taukei boys too had approached. The first boy had punched her face, she had fallen on the cement floor and the second boy had jumped on her. Then the first boy had grabbed and taken her hand bag and run in the rear of the shopping complex. She had got up and run towards that direction and then seen the first boy with her hand bag near a garbage bin. She had asked him to take the money and return her belongings. The first boy had then jumped over the wall and disappeared.

11. Both the Accused persons do not seriously challenge the said sequence of events. To that extent it remains unchallenged. The issue is the identity of the two accused. Ms. Poonam has immediately complained to the Valelevu Police and then on the 12th of September 2021, she had been summoned to the police for a photo identification. She had out of 10 photographs, pointed out and identified photograph number 6 to be that of the person who came to her first, grab the hand bag and who run away to the rear of the shopping complex. It was the photograph of Manasa. She then identified him to be the third accused, Manasa present in court.
12. She had then participated at an identification parade on the 25th of September 2021 at which parade she had pointed out and identified the second boy who participated in the robbery. This was the person who was standing between the 7 and 8 persons at the parade. She identified that to be the second accused Marcellin in court.
13. She also said that she lost \$299 in cash, J2 Mobile Phone with two sim cards, 3 FNPF cards, 3 bus cards, her driver's licence, 3 bank cards of the Westpac Bank, 1 BSP card, 4 CWM cards and a bottle of perfume all of which were in her hand bag. She had not found or recovered any of the said items.
14. **PW2 D/IP Ofati** has arranged and conducted the photo identification of the third accused and the identification parade of the second accused. The photo ID was conducted as the third accused Manasa did not agree to participate at an identification parade. Mr Ofati explained in detail the procedure followed in conducting these two parades. Ms Poonam

had been called on both these occasions and she had identified the second accused as well as the photograph of the third accused to be that of the persons who robbed her.

15. **PW3 WPC 4160 Laite** was the crime recorder who was engaged to take down notes at the identification parade and the photo identity. She confirmed that the victim Ms Poonam identified the second accused Marcellin out of ten persons present.
16. **PW4 WPC Litiana** was the escorting officer who on the 26th of September 2021, escorted Poonam from the room she was kept to the crime office where the identification parade was held.
17. **PW5 PC 6098 Suliano** escorted the second accused to the ID parade room from the cell block on the 26th September 2021. After the identification parade was concluded he had taken him back to the cell block.
18. **PW7 WPC 5029 Lusiana** has escorted Ms. Poonam from the room she was kept to the photo ID at the Valelevu Police Station. She confirmed that Ms. Poonam identified photo number 6 as being one of the persons who robbed her.
19. **PW6 Doctor Shain Hussein** has been serving at the CWM hospital and was on duty on the 11th of September 2021. The victim Ms. Poonam was brought to hospital around 8pm and on examination she has observed scratch marks on the knees, bruises on the left hand and on the left neck. The victim has narrated that she sustained the injuries during the alleged robbery. The doctor confirmed that the injuries are compatible with her narration.

Defence Evidence

20. The first accused **Marcellin Lalabalavu** in his evidence said that his full name was Champagnat Atunaisa Lalabalavu. He has lived in the Nadera area for almost 18 years and is a baker by profession. On the 11th of September 2021, he claims to have been at work at the Waisake Bakery at Nadera. His shift commenced at 6pm and ended the following morning around 6am. He was working with his co-worker that night and then went back to his house after his shift. He completely denies any involvement in the robbery. A few days

after the alleged incident he had heard about it and that the police were looking for him on the 24th of September 2021. He had gone to a shop to buy some things when 6 to 7 policemen in civilian attire had arrested him and taken him to the Valelevu Police Station. His interview under caution had been recorded and he had also consented to an Identification parade.

21. On the 24th night he had been locked up at the police station and on the 25th he had been put before an identification parade at which the victim had pointed him out. His position is that he was photographed shortly before the incident and it was shown to Ms Poonam. He also stated that he was not allowed to change his clothes before the parade and that he continued to be in a red t-shirt. He had not seen Ms Poonam before the ID parade.
22. The third accused **Manasa Rokotuiveikau** in his evidence denies the participation in this robbery. He was living in the vicinity and on this day around 7pm when he was alone at his house he had heard some persons running past his house. He had not check on who they are. He admits knowing Marcellin and Jona Rokosuka. However, he said that Ms. Poonam had identified his photograph because she was coached to do so.
23. Defence witness **Jona Rokosuka** who was the first accused was called by the third Accused as a defence witness. He admitted pleading guilty for this charge and said that he participated in this robbery and robbed Ms. Poonam on 11th of September 2021 near the Nayans Supermarket at Nadera. However, he said that the second or third accused did not participate and it was two others named Anare and Inia who were also called Nix and Rex who participated at this robbery.
24. Under cross examination he admitted that he was living in this area around the Nayans Supermarket for several years. He had known Manasa since his childhood as they used to play touch-rugby at the Duru grounds in that area. He admitted that his nickname was *Fish*. That he also admitted that he did not inform the names of 'Nix' and 'Rex' to any Magistrate or Judge up until the day he gave evidence in this matter in 2023. However, he had informed the other two accused of the said names when they were all produced together at the High Court. It was suggested to him that the name mentioned in his caution

interview are that of the second and the third accused persons. He admitted that these names appear in the caution interview but says that it was the interviewing officer who forced to implicate them and wrote their names.

Evaluation of the Defence Evidence

25. Both the 2nd and the 3rd Accused gave evidence on their behalf. Both of them denied the participation and attempted to take up an alibi as a defence. The alibi of the 2nd Accused is that he was working at Visako Bakery. However, his co-worker who was his intended alibi witness was not called. 2nd Accused admitted that the said bakery is in the vicinity of the crime scene and there was no physical impossibility for him to come there.
26. As for the 3rd Accused his position was that he was at home at about the time the robbery has taken place. The 3rd Accused admitted that his house was adjacent to the Nayans Supermarket at which premises the robbery took place. There too I see no physical impossibility of the Accused to be present at the scene of the crime at the relevant time. Therefore, the defences of alibi taken up by the 2nd and the 3rd Accused in fact do not establish a physical impossibility and there are **no alibi witnesses either**.
27. The 2nd Accused did make a subtle attempt to distance himself from the 1st Accused Jona and the 3rd Accused. However, the 1st Accused called by the 3rd Accused in evidence clearly established that these three Accused were living in this area and have been long standing mates and acquaintances. Therefore, the 2nd Accused was making a deliberate attempt to falsely conceal his actual relationship and the friendship he had with other two Accused. To that extend the evidence of the 2nd Accused is untruthful, false and highly improbable.
28. As for the 3rd Accused, he too did attempt to distance himself from the 2nd Accused and also conceal the full extent of his close friendship with Jona. He summoned Jona to convince this court that Jona has committed this robbery with two others namely Anare and Inia and not with him or the 2nd Accused. Jona in evidence clearly admitted that he informed the 3rd Accused when they met him in this court at the inception of *Anare* and *Inia*. If that was so then the 3rd Accused ought to have suggested this to the prosecution

witnesses or he should have stated this in his evidence before this court. He did not do so. Therefore, the evidence of his witness blaming two others and excluding the 3rd Accused is highly inconsistent and is a belated position taken up at the end of the trial. The 3rd Accused himself clearly appears to be involved in this fabrication of a false defence with the assistance of his long-standing friend Jona.

29. The 3rd Accused admitted that his house is just over the wall of the scene of crime. He also admits that he heard people running across his garden and some noises. In the normal course of event if you hear such noises and people running across your garden you would expect a person living in that house to naturally come out and ascertain what the commotion was about. He had opted to remain in his house which is highly improbable. Considering the above analysis and especially the demeanour of the 3rd Accused it is apparent and obvious that the 3rd Accused is not truthful and his evidence is so improbable.
30. In the above circumstances I am of the view that the evidence of both the 2nd and the 3rd Accused is false and they are untruthful. Accordingly, I reject the evidence of these two Accused.
31. The 1st Accused of this case Jona who pleaded guilty was summoned by the 3rd Accused as his witness. Jona at the inception was a co-accused. However, with his pleading guilty and conviction his status changed from that of an Accused to a convict. Accordingly, he is a compellable witness. When a witness is called for one of the Accused the evidence of such witness would become evidence in respect of the entire case as of any other witness. This applies to defence witness Jona too. It is for this reason that the 2nd Accused was afforded the opportunity to cross examine Jona.
32. Jona's evidence was that he did participate in robbery of Ms. Poonam. He admitted pleading guilty and also testified under oath that he with two others grabbed the bag of this victim. However, he mentioned that it was Anare and Inia who were also referred to as 'Nix' and 'Rex'. In cross examination he admitted that the names Anare and Inia or 'Nix' and 'Rex' are not in his interview under caution. He also admitted that the names of the 2nd and the 3rd Accused Marcellin and Manasa are mentioned in his interview under caution as

being the other two who participated of this robbery. His explanation was that it was the police officer who wanted Marcellin and Manasa implicated and the recording officer has written those two names. Jona admitted that up until he gave evidence in this court, he had not informed or stated the names of Anare and Inia either at the Magistrate Court or in the High Court. However, he claims to have instructed his counsel and also has informed other two Accused of this fact.

33. Until Jona mentioned the said names there was no suggestion made on behalf of the 2nd or the 3rd Accused nor did they mention these names in their evidence either. If Jona had informed the 2nd and the 3rd Accused of Anare and Inia, one would naturally expect the accused to have necessarily have suggested these names to the prosecution witnesses or at least have state this in their evidence. The absence clearly shows that Jona's evidence is highly improbable and is in all probabilities a fabrication.
34. Jona admitted that he was the first to be arrested and the 2nd and the 3rd were arrested sometime later. During the cross-examination of the police witnesses and the two Accused in their evidence did not make any allegation of deliberate fabrication against the police witnesses. Considering the totality of evidence the police does not appear to have any reason to fabricate a case against the 2nd and the 3rd Accused if Jona had actually implicated two different persons. In these circumstances the explanation advanced by Jona is extremely improbable and in all probabilities it is false.
35. This court will not in any way consider as substantive evidence the truth of the contents of the contradictions elicited from Jona's caution interview. The alleged contradictory portions naming the 2nd and 3rd Accused as the two others will be considered only in respect of deciding on the credibility of Jona and the truth which will not in any manner considered against the Accused in this case or be considered as substantive evidence in this case.
36. I observe the demeanour of Jona when he gave evidence. It was obvious that he was evasive and always attempted to give an excuse when confronted with a contradictory position and sifts his stance. He is also a long-standing friend of both the Accused. Thus,

he is an extremely partial witness. His evidence was so improbable which I have found to be false. Accordingly, the evidence of 2nd and the 3rd Accused as well as the defence witness Jona are all rejected for the reasons stated above.

37. I do not believe the defence evidence, but this by itself does not lead to a finding of guilt. It is the Prosecution who is required to prove the guilt. I must assess all the evidence that I accept as reliable and consider if the evidence satisfy me of the Accused's guilt beyond reasonable doubt. As stated at the outset the starting point is the presumption of innocence. I must treat the Accused persons as innocent until the State has proved their guilt. They do not have to establish their innocence. The State must prove that Accused are guilty beyond reasonable doubt. Proof beyond reasonable doubt is a very high standard of proof. It is not enough for the prosecution to persuade this court that the Accused are probably guilty or even that they very likely guilty. It is certainly not an absolute certainty. What then is reasonable doubt? A reasonable doubt is an honest and reasonable uncertainty left in my mind about the guilt of the Accused after I have given careful and impartial consideration to all of the evidence. In summary, if, after careful and impartial consideration of the evidence, I am sure that the Accused are guilty is when I can find them guilty. On the other hand, if I am not sure that they are guilty, I cannot find them guilty. Now let's evaluate the prosecution evidence.

Evaluation of the Prosecution Evidence

38. The prosecution's evidence is basically the victim's testimony supported by a physical ID parade of the 2nd Accused and a photo ID parade of the 3rd Accused.

Photo Identification Parade of 3rd Accused

39. The 3rd Accused did challenge the photo ID parade held in respect of him. In his written submissions he alleges that D/IP Ofati failed to follow the procedure of the identification by photographs. As for the procedure for photo ID parade the police and the investigators are guided and they follow the Fiji Police Force Standing Orders. According to the said Standing Orders paragraphs 1 to 6 deals with conducting physical identification parade of persons or things. Paragraphs 7 to 10 under the sub head "Identification by photographs" deals with photo identification. Paragraphs 7 - 10 of the said Police Force Standing Orders (FSO) reads as follows:

“7: identification Parades by photograph will be carried out only when the identity of the offender is unknown and there is no other way of establishing his identity; or, if it is suspected that there is no chance of arresting him in the near future. A photographic Identification Parade of a person already in custody shall not be held”

“8: An Identification Parade by photograph will be conducted by placing on a table 9 photographs of persons similar in size, detail and nationality as that of the suspect. The photographs will be numbered 1 to 9 on the reverse, and placed on a table. The suspect’s photograph will then be placed in the line-up and a note made of its position. The first witness will then be called and asked to identify. The first witness will then be placed in a separate room and out of sight of the other witnesses. The same procedure will then be followed as for a physical Identification Parade except that the conducting officer will re-arrange the photographs prior to each witness being called and record details in his notebook. As soon as a witness has identified the photograph as that of the would-be accused then the parade will cease. The remaining witnesses will be used as in para. 10 below”.

“9: As far as possible the photographs used should bear no numbers or other markings on their front.”

“10: Where Identification has been made by photograph and a suspect is subsequently arrested, a physical identification parade will then be held as in paras. 2 to 5”.

40. According to paragraph 7 it appears that a photo identification parade should not be held if the alleged suspect is already in custody. In the present case D/IP Ofati had conducted a photo ID parade as the 3rd Accused had refused to participate in an identification parade. Thus, there appears to be a violation of the said prohibition as contemplated by FSO Rule 7. No doubt according to the scheme of the FSO does contemplate photo identification in a situation in which the suspect has not been arrested. This is further confirmed by FSO 10 which requires that a physical identification be held if the suspect is subsequently arrested upon a photo identification.

41. According to this provision of FSO photo identification may be resorted to as an investigatory step to identify an unknown suspect in order to facilitate his arrest. However, the FSO does not recognize or provide for a photo identification after an Accused is apprehended. Further, the FSO, do not contemplate and provide for a situation in which a suspect may refuse to participate in a physical identification parade. That being so was the conducting of the photo identification parade of the 3rd Accused regular and proper?

42. Sections 13(1)(a)(ii) and 13(1)(b) and (c) of the Constitution provides for the right to remain silent, the right not to incriminate oneself and the right to be presumed innocent until proven guilty. Similarly Sections 13(1) and 14(2) of the Constitution make it abundantly clear that this protection exists from the inception of the criminal process that is on arrest, until its culmination up to and during the trial itself. This is to ensure that an accused is treated fairly in the entire criminal process. However this protection has nothing to do with the need to ensure the reliability of evidence adduced at the trial. An ID parade is to assist the investigation to identify the Suspect and most importantly to ensure the reliability of an identifying witness whose evidence may be adduced at the trial. The Accused may not be compelled to submit to an ID parade, but this will not prevent the investigators from resorting to fair and alternate methods of investigation. Therefore, where a suspect refuses to take part in a traditional identification parade or where it is impracticable to hold such a parade law does not prevent the conducting of a photo ID parade.
43. Force Standing Orders do not have the force of law nor are they regulations of a binding nature. They are more of guidelines for investigators and the police in the conduct of their day to day matters and investigations. These are guiding principles provided to facilitate clarity, consistency and credibility of the investigatory process. They are akin to Judge's Rules. The arbitrary deviations may result in an unfair or improper process that may be considered to be prejudicial to an Accused. This however does not prevent or prohibit an investigator from resorting to a fair method of investigating which may be necessary in a given situation even though it may be inconsistent with the FSO or not specifically provided for.
44. When a suspect is apprehended who was not known to the victim prior to the incident, the holding of a physical ID Parade is necessary and important. Failing which the end result would be a dock identification which is not always reliable. The suspect identification necessary to facilitate the carrying out of investigations is a vital part of any investigation. Thus as a general guideline, photographs of suspects or accused persons should not be shown to witnesses for the purposes of identification if the circumstances allow for a

physical identification parade. However, if a suspect refuses to take part in a physical identification parade or where it is impracticable to hold such a parade, the fairest and the only means of investigating and determining will be to show a witness a selection of photographs in accordance with the standard procedures as outlined by FSOs 8 and 9. Thus where it is the only available method of identification, a photograph identification may be held for the purpose of identification, whether or not the suspect has been apprehended. That is exactly what D/IP Ofati has done in this investigation. I see no illegality, irregularity or impropriety in this course of conduct. As a matter of necessity this should be an exception to the prohibition as stated in FSO 7.

Physical Identification Parade of 2nd Accused

45. As for the physical identification parade of the 2nd Accused, PW2 D/IP Ofati has conducted the same in accordance with FSO guidelines. The 2nd Accused admits that he participated and that Ms. Poonam pointed him out at the Identification Parade. The challenge is based on three grounds. Firstly, a photo of the 2nd Accused was taken just before the parade on the mobile phone by PW5 PC Suliano and it was shown to the complainant prior to the parade. Secondly, that he was compelled to wear a red t-shirt and it was only him out of the 10 persons at the parade who was in red t-shirt. The inference is that the complainant was informed to identify the person in the red t-shirt. The next ground of challenge is that the other 9 i-Taukei men were not of similar features as of the 2nd Accused. Apart from these three grounds the 2nd Accused takes up the position that he was not given the right to object to any of the participants.
46. As stated above what is required is to have persons who are similar at a parade. It is humanly impossible to find persons who look identical in that sense. The evidence of 3 police witnesses including D/IP Ofati and the recorder is that the other persons were similar I-Taukei males. However, they were not in the same colour clothing. The Accused alone appears to have been in a red t-shirt. When persons are randomly collected to stand at an ID parade the clothing if there are of a similar natures that is t-shirt and Lee short or shirt and sulu is what is primarily necessary. The colour may vary. The difference in the colour of the clothing by itself will not prejudice the Accused. The allegation is that his red t-shirt may have been used to help Ms. Poonam to separate and identify the Accused from

the others. It is alleged that PC Suliano photographed the 2nd Accused just before taking him to the parade. Let us consider the veracity of this allegation. The 2nd Accused was held in police custody for several hours from the day before the ID parade was held. If the police wanted to photograph they had sufficient time and opportunity to do so well before discretely and without making it obvious. In the normal course of events it is very unlikely and improbable that the accompanying officer to be photographing the Accused just before taking the suspect is taken to the ID parade. Secondly, if this Accused was the only person in a red t-shirt that by itself would have been a sufficient means of identify the Accused. If so photographing in this manner when been taken for the parade was not necessary. No objection had been raised and 2nd Accused had participated at the ID parade willingly. Thus, it is highly probable that this was a false position taken up to challenge the ID parade.

47. Considering the totality of the evidence I am satisfied that the evidence proved beyond reasonable doubt that the identification parade of the 2nd Accused was conducted properly and failing and it is lawful.
48. PW2 Inspector Ofati has conducted this photo ID and explained that the 3rd Accused refused to participate at a physical ID parade and he arranged for this photo ID parade. The procedure followed was explained by DIP Ofati and the 10 photographs used for this purpose was marked and produced as PE1. In cross-examination it was suggested that certain numbers written on the reverse of the photos were visible. These photos are printed on A4 paper and a colour prints. Mr. Ofati said that these were obtained from the police computer database. On an overall comparison they are sufficiently similar in basic attributes with that of the Accused. No doubt persons of similar looks and features with that of the Accused are required to be used for identification parades. The 3rd Accused is an i-Taukei man of somewhat of a dark complexion and a person of about 20 to 25 years. All these photos but two are of an i-Taukei men comparable with the complexion, the said features and attributes that of the Accused. Just two of the photos appears to be i-Taukei men of lighter complexion. Though in the common usage it is required to have a persons of similar looks in reality you cannot find 9 others with features and looks identical to that

of the Accused. What is required is that they should be similar as far as practicable and possible. The photos utilized in this instance are sufficiently similar to that extent.

49. Witness Poonam has correctly pointed out and identify the photograph that of the Accused which is number 6 (marked PE2). According to witness Ofati she had quiet confidently and without hesitation after observing all the photos so pointed out. This is also confirmed by the recording officer. To that extent Ms. Poonam had exhibited a clear and positive nature in identifying which supports that she had infact clearly perceived and registered the identifying features of the 3rd Accused Manasa, during the incident.
50. It was submitted that the distinctive numbers written on the reverse of these photos were visible. I have perused all 10. Photos printed on A4 paper. All of which have been numbered by a black pen on the reverse. If one looks carefully you may see that something is written on the reverse but you cannot decipher as to what is so written on the reverse. When all photos are laid in line and a witness is required to observe and identify it is almost impossible to see or decipher what the numeral on the other side is. Therefore, this objection or challenge is more in just and it thus baseless.
51. The photo identification has been conducted in accordance with FSO para 8 and the evidence considered of all the officers and Poonam I am satisfied that this identification has been regularly properly and fairly conducted.

Evaluation of Ms. Poonam's Evidence

52. The only evidence that connects the 2nd and 3rd Accused persons to this incident emanates from the sole eyewitness Ms. Poonam. She had promptly made a police report and her statement had been recorded. She identified the 2nd and 3rd Accused as being two of the persons who robbed her on the 11th September, 2021. During her cross-examination there were no significant, contradictions or omissions that were raised. However, in her evidence in chief she did refer to two persons grabbing her bag but in cross-examination when asked as to the presence of another person whom she could not identify she did admitted that there was a third person whom she did not identify.

53. The defence called the first accused who pleaded guilty on as a witness of the 3rd Accused. He admitted participating in this robbery with two others. Thus, the fact of three persons participating in this robbery is common ground and the victim had not been able to observe and see the one of them clearly. However, she had seen two persons with sufficient clarity and those are the two she identified as being the 2nd and the 3rd Accused. Therefore, her failure to mention the presence of a third person in her evidence-in-chief is possible. It is more of an oversight I would say, as she was not able to identify that person positively. However, she did say that, “... *I saw these two Accused with the few other people which I cannot recognize at the moment but I saw two clearly because of the light on the ceiling [sic]*” and when questioned in cross-examination she promptly admitted the presence of and the participation of the third person. Therefore, I see no appreciable contradiction, omission or inconsistency on this issue.
54. This incident has taken place around 7pm., after darkness has fallen. However, there was LED light above the place of incident as well as other bright lights in the pharmacy from where she came out. Therefore, the evidence establishes that there was sufficient light to identify a person if seen within close proximity. The 3rd Accused Manasa was the first person she had seen when she came out of the pharmacy, he tries to pull her handbag; she resists and she is punched on her face. During this 2 to 3 minutes she has the opportunity to see and observe the 3rd Accused at close proximity. Then she had fallen face downwards and at this point her bag had been taken away from her hold. During this struggle she had seen the face of the 2nd Accused. Next she follows the 3rd Accused who took her handbag and ran to the rear of the shop. At that point she sees the 3rd Accused once again. She even pleads that he taken the money and return her other belongings. The 3rd Accused then climbs the wall and jumps over.
55. In the above circumstances, Ms. Poonam had several occasions and the opportunity to see, observe and perceive the features of the 3rd Accused with sufficient light. As she was suspicious of his behavior as she came out her attention had been drawn to the 3rd Accused and she certainly had the opportunity to clearly observe him at that moments. Therefore, Ms. Poonam certainly was able to recognize if the 3rd Accused was seen subsequently. On

the 25th September 2021 she identified the photo of the 3rd Accused from amongst 10 photographs at the photo identification parade. This evidence is reliable.

56. On an evaluation of her evidence I find that her evidence is prompt and does not contain any appreciable contradictions or omissions. Her version is probable and I see no improbabilities either. The fact that she was robbed as narrated by her remains unchallenged. Her demeanour clearly demonstrated that she was narrating an incident which she had actually experienced and to that extent her demeanour was consistent of that of a truthful witness. There was not even a suggestion of a false implications. She had no reason of whatever nature to falsely fabricate or make a false allegation against the 2nd or the 3rd Accused person. Therefore, I am satisfied that PW1 Poonam is a credible and a truthful witness.
57. Apart from her evidence as to the incident she also participated in a physical as well as photographic ID parade. Her evidence was clearly that the Accused persons were seen during the incident and next it was at the identification parades (2nd Accused in person and 3rd Accused's photograph). She denied being shown of any photograph or being coached prior to the identification parades. She said that she was able to recognize the 3rd Accused and that she had several opportunities to see him during that incident. However, as for the 2nd Accused she appears to have had only one opportunity to clearly observe him for a brief period of less than 5 seconds. When Poonam identified the 2nd Accused at the ID parades in person and the 3rd Accused in the photo I am satisfied that she was being truthful. She sincerely and truthfully appears to believe that these two are the persons whom she saw. When she pointed out the Accused in open court and identified the two Accused then too she appears to be sincere and truthful. However, considering the identity evidence of this nature in view of the *Turnbull* principles it is necessary for this court to consider and be mindful of the reliability of her evidence.
58. This was an incident in the night. However, there was a bright light just above and sufficient light was available. It is the 3rd Accused who initially approaches her, punches her and grabs her handbag. Ms. Poonam certainly did have sufficient opportunity and

occasion to see, observe and perceive the identifying features of the 3rd Accused. In evidence she is specifically said of a unique feature of the 3rd Accused that she observed, that is the 3rd Accused has the tendency to held his two lips between his teeth. I too observed the 3rd Accused doing the same whilst he was in the dock and when he gave evidence during this trial. Ms. Poonam also followed the 3rd Accused to the rear of the shop and sees him and then also speaks to him and pleads with him to take her money and return her documents. This gives her another opportunity to see and observe the 3rd Accused Manasa. Thus, I am satisfied that Ms. Poonam certainly had the opportunity under sufficient conditions of light to see, observe and perceive the identifying features of the 3rd Accused. Therefore, she was able to identify his photograph at the photo identification parade. Accordingly, Ms. Poonam's evidence of identity of the 3rd Accused is reliable and is safe to act upon.

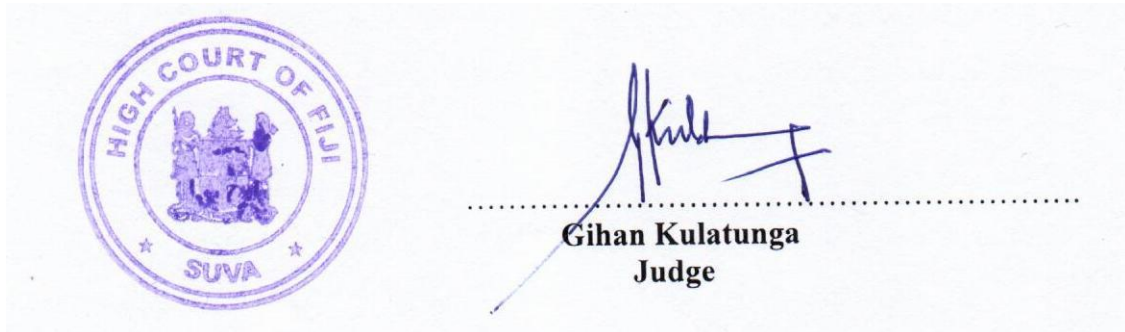
59. However, as regards the 2nd Accused Marcellin she had only a single occasion of a short duration to see the face of the 2nd Accused. That too was when she was under attack. 2nd Accused is no doubt an i-Taukei man however, he appears to be of a fair complexion then other i-Taukei men in general. Thus, when he was brought for the ID parade with i-Taukei men there is a possibility the others or atleast a majority may have been of a darker complexion. When Ms. Poonam saw 10 persons there is a possibility she may have picked the person of a lighter complexion who she believed was similar to the person she saw that night. Similarly when Ms. Poonam identified the 2nd Accused at the ID parade as well as in the dock she did sincerely express what she believed to be true However, as stated above the opportunity she had was something akin to a fleeting glance of the 2nd Accused that night. Hence, as far as the 2nd Accused is concerned relying on Ms. Poonam identification is unsafe in view of the *Turnbull* guidelines.

Proof of the Charge

60. On the evaluation of the totality of the evidence the evidence has proved the following. On the 11th September 2020, at Nasinu. Ms. Poonam's handbag containing 1 x hand bag containing 1 x purse, \$290.00 cash, 1 x Samsung Galaxy J2 Core Mobile Phone, 2 x Sim Cards, 1 x Perfume, 1 x FNPF Cards, 1 x Driver's License Card, 4 x FIRCA Cards, 3 x Westpac ATM Cards, 2 x COVID-19 Vaccination Cards, 2 x Voter's Identification Cards, 3

x Vodafone e-Transport Bus Cards, 1 x BSP Hospital Card and 4 x Government Issued Medical Cards was forcibly take away from her and in order to take it away forced has been used. She had been punched on the face, pushed on the ground, jumped on her back. She had also suffered some injuries. According to Ms. Poonam atleast 3 persons have participated in this robbery. In fact the defence evidence of Jona confirmed this.

61. Jona giving evidence establish that he was one of the participants. Ms. Poonam's evidence and the identification parade together has proved that the 3rd Accused is one of the participants and he in fact was the main person who had grabbed the handbag, punched Ms. Poonam and taken away the handbag. The presence of the 3rd person is thus proved beyond reasonable doubt.
62. In these circumstances I hold that the prosecution has proved beyond reasonable doubt that the 3rd Accused Manasa with two others acting together did commit Aggravated Robbery as charged. Accordingly, I find the 3rd Accused guilty and hereby convict him for the said offence of Aggravated Robbery as charged.
63. However, I hold that the prosecution has failed to prove beyond reasonable doubt the charge against the 2nd Accused as there is a doubt as to the identity of the 2nd Accused. Accordingly, the 2nd Accused is hereby acquitted of the charge.



At Suva
19th April 2023

Solicitors
Office of the Director of Public Prosecutions for the State.
Legal Aid Commission for the 2nd Accused
3rd Accused In Person