IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL AAU 0103 OF 2014
CRIMINAL APPEAL AAU 0104 OF 2014
(High Court HAC 158 of 2010)

BETWEEN	:	**FILIPE DELANA**	*1st Appellant*
		SANAILA TABUAVULA	*2nd Appellant*
AND	:	**THE STATE**	*Respondent*

Coram	:	**Calanchini P** **Gamalath JA** **Bandara JA**
Counsel	:	**1st Appellant in person** **Mr S Waqainabete for the 2nd Appellant** **Mr S Vodokisolomone and Ms S Tivao for the Respondent**
Date of Hearing	:	**17 May 2018**
Date of Judgment	:	**25 June 2018**

JUDGMENT

Calanchini P

[1] I have read in draft the judgment of Bandara JA and agree that the appeal against conviction by Delana should be allowed and a new trial ordered. I also agree that the appeal against conviction by Tabuavula should be allowed and a verdict of acquittal

entered. The appellant Delana is to be remanded in custody and brought before a Judge of the High Court within 10 days of the date of this judgment.

Gamalath JA

[2] I agree.

Bandara JA

[3] The appellants were charged with the following two counts before the High Court at Suva.

"Particulars of the Offence being;

Count One
Aggravated Robbery: Contrary to section 331(1)(b) of the Crimes Decree No.44 of 2009.

Particulars of Offence
Filipe Delana and Sanaila Tabuavula on the 22nd day of July 2010 at Suva in the Central Division being armed with an offensive weapon stole a compact laptop valued at $3,000.00, assorted perfumes worth at $1,600.00, wrist watch valued at $7,000.00, Motorola mobile phone valued at $40.00, cash $870.00, a gold chain valued at $4,000.00, 3 rings valued at $1,000.00, Citizen Wrist watch valued at $400.00, Alcatel mobile phone value at $299.00 all to the total value of $23,908.90 from Ajay Narayan.

Count Two
Theft of motor vehicle; contrary to section 291 of the Crimes Decree No.44 of 2009.

Particulars of Offence
Filipe Delana on the 22nd day of July 2010 at Suva in the Central Division stole vehicle registration number DX 110, the property of Pranil Narayan.
Dated at Suva on this 14th day of May 2014."

[4] Upon the appellants pleading not guilty to the charges, the matter proceeded to trial and at the conclusion, the assessors returned unanimous opinions of guilty on the charges against both appellants and the learned High Court judge concurred.

[5] Accordingly on the 20th May 2014 the two appellants were convicted by the High Court Judge and, the 1st Appellant was sentenced to 8 years and 9 months imprisonment on count 1 and 2 years on count 2. The sentences were ordered to be served concurrently with a non-parole term of 7 years.

[6] The 2nd Appellant was sentenced to 8 years and 2 months imprisonment on count 1 with a non-parole term of 5 years and 6 months.

[7] This appeal arises out of the said convictions and sentences. In the Appeal hearing the 1st Appellant was represented by himself. The four grounds of appeal put forward on behalf of the 1st Appellant are as follows:-

> *"(i) the trial Judge failed to direct the assessors that the co-accused's caution statement was admissible only against the maker and not against the 1st Appellant.*
>
> *(ii) The trial Judge gave inadequate directions on Turnbull guide lines on identification evidence.*
>
> *(iii) The trial Judge gave no directions on the first time dock identification.*
>
> *(iv) The trial Judge gave no directions on provisions inconsistent statement made by the witness Mr Narayan."*

[8] The grounds of appeal put forward on behalf of the 2nd Appellant are as follows:-

> *"(1)The learned Trial Judge erred in law and in fact when he stated in the voir dire that it was for the appellants to produce evidence to support his allegations of police assault despite being taken to the doctor in police custody.*
>
> *(2) The learned Trial Judge erred in law and in fact when he incorrectly directed the assessors that both the accused were charged with theft when only the other Accused was charged with theft thereby causing prejudice to the Appellant.*

(3) The learned Trial Judge erred in law and in fact when he informed the assessors without cautioning them that the witness called by the appellant who saw the appellant been assaulted by police officers at Nabua Police Station, was there for an interview in an embezzlement matter which was an offence of dishonesty thereby causing substantial miscarriage of justice.

[9] I shall now briefly refer to the facts of the case. The appellants along another person unknown to the prosecution broke into the complainant's house in the early hours of 22 July 2010. Narayan Senior and Narayan Junior testified before the High Court as the eye witnesses to the incident. In the early hours of 22nd July 2010 Narayan Senior Ajay Narayan was awoken by the cries raised by Narayan junior Pranit saying *"Dad call the Police. There is someone in the house."* Narayan Senior had managed to get the phone and dialed the emergency number and say *"thieves in the home come to house."* At this point a tall person approached him and grabbed the phone from him. The witness had seen three intruders enter his house. The tall man who grabbed the phone from him had not masked his face whereas the other two intruders were masked. One of the intruders had told the witness that they had smacked his son with a bolt cutter. All four residents of the house, which included Ajay Narayan, his wife, son, and the house boy, were brought to Ajay Narayan's bed room and were asked to sit on the bed. They had asked for money and snatched the necklace and ear rings belonging to his wife. The intruders stole jewellry, mobile phones; money; perfumes; and a watch etc. The tall person had asked for the key of the vehicle. Ajay Narayan had identified the tall man in court as the 1st accused. The intruders had remained in the house engaging in the robbery for about 30 to 40 minutes. The robbers had got away in the vehicle belonged to Ajay Narayan having taken the key from him.

[10] On 21st July 2012 the police consequent to a raid conducted at a hotel apartment, arrested the 1st accused whilst he was lying on a bed, smelling of liquor and appearing fully drunk. Upon searching the accused, police found the key of the car belonging to the complainant hidden in his under wear. No finger prints had been taken from the car. The police had returned the recovered car to the owner.

Issues pertaining to identification of the 1st Appellant

[11] An identification parade had not been conducted at any stage of the investigation. It is a firmly rooted legal principle, that due to the fallibility of human observation, courts should approach evidence of identification with some caution.

[12] The two eyewitness's (Ajay Narayan's and Pranit Narayan's) identification of the 1st accused was solely based on 'dock identification' though it was not similar to a ***"fleeting encounter"*** in adverse lighting conditions. Robbers were in the company of the 1st Appellant for about 30 to 40 minutes, and in close proximity. Pranit Narayan had also previously seen 1st appellant at a police cell when he was in incarcerated over an incident of drunk driving.

[13] It is a well-established rule that identification at an identification parade is not necessarily substantive evidence against the accused in a criminal case. The substantive evidence against the accused is the evidence given in court by the identifying witnesses in the witness-box. Yet the identification at an identification parade corroborative evidence greatly enhancing the credibility of the evidence of identification given in Court. However, as a rule of caution and prudence where an identification parade has not been held in respect of an accused who was a stranger to the witnesses, the court should necessarily look to find some good corroborative evidence in support of dock identification.

[14] The **Turnbull** [1976] 3 WLR 445 principles which are designed to reduce the risk of miscarriage of justice resulting from the admission of unreliable identification evidence, is not a fixed formula, so it does not have to apply to every case in the same way. The application for the guidelines is up to judges' discretion, as long as it complies with the sense and spirit of the guidelines.

[15] However, in the jurisdiction of Fiji, it is well established, that Turnbull guide lines are a judicial warning to the assessors about identification evidence. Therefore where

identification of a stranger is in issue, special need for caution in a summing up is necessary since the experience has often shown it is possible even for an honest witness to make a mistaken identification.

[16] In ***R v Turnbull*** (supra) the English Court of Appeal laid down the following directions to be followed by the trial judges when identity was an issue;

> *"First whenever the case against an accused depends wholly or substantially on the corrections of one or more identifications of the accused when 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 reasons for the need for such warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witness can all be mistaken.*
>
> *Provided this is done in clear term the judge need not use any particular forms of words. Secondly the judge should direct the jury to examine closely the circumstances in which the identification of each witness came to be made".*

[17] The significance of following the above guide lines has been firmly established in many judicial authorities in Fiji. **Isei Turagabula v State** [2012] 2 Fiji LR 218. In the instant case the trial judge had not made any reference to the Turnbull principles in his summing up. I also observe that directions in regard to the issue of identification contained in paragraph 11 and 12 of the summing up are totally inadequate in circumstances of the case. Hence I would hold grounds 2 and 3 of the grounds of appeal of the 1st Appellant based on the issue of identification succeed.

[18] The trial judge's failure to direct the assessors in his summing up that the co-accused's caution statement was admissible only against the maker (the second accused) and no part therein should be considered against the first accused is an irregularity fatal to the conviction. As Archbold points out: (1999 Edition, 15 -368):

> *"It is a fundamental rule of evidence that statements made by one defendant either to police or to others (other than statements, whether in*

the presence or absence of a co-defendants, made in the course or pursuance of a joint criminal enterprise to which the co-defendant was a party), are not evidence against the co-defendants unless the co-defendant either expressly or by implication adopts the statements and thereby makes them his own.

"It is the duty of the judge to impress on the jury that the statement of one defendant not made on oath in the course of the trial is not evidence against a co-defendant and must be entirely disregarded"

[19] In the circumstance I would hold that the 1st ground of appeal of the 1st appellant should succeed.

[20] At the trial proceedings, 1st accused had opted to remain silent, whereas the 2nd accused had given evidence under oath. He had denied any involvement in the robbery in question, and had stated that he was subjected to a severe police assault.

Vital issues pertaining to 2nd Appellant

[21] Whether the 2nd accused was assaulted by the police is a contentious issue in the instant appeal, since the latter's caution interview was the only evidence against him. At page 349 of the Appeal record this Court found a Medical Examination Form pertaining to the second appellant Tabuavula. In the course of the hearing the Court perused the medical report and found page 2 and 4 of the same are missing. Upon perusal of the High Court file the Court found the original of the Medical Examination Form containing pages 2 and 4. Accordingly court found that the second accused had been produced before the doctor for medical examination on 3rd of August 2010.

[22] Segment 4 of the said form which deals with background information states:

"Alleged being assaulted by Strike Back Officer at Nabua Police Station on 23/07/10.

In column D (14) of the Medical Examination Form the doctor states that;
"Nil Injuries – new or old noted (if any injury as claimed by the patient 2 weeks ago would have healed by now)."

[23] Furthermore this court finds that in the Magistrates Court proceedings the following minute made by the Magistrate on the 26th July 2010, directing the prison authorities to produce both accused for a medical examination upon a complain of assault.

> *"Court – This is an aggravated robbery – called on 02/08/2010 to send the mater in High Court. The two accused state that the police assaulted them. I direct the prison to produce the two accused in hospital.*

[24] This order made by the Magistrate had not been carried out.

[25] On the 2nd August 2010 the Magistrate upon being informed by the accused that they were not produced for a medical examination had made the following minute ordering them to be produced forthwith. *"Accused inform that they were not taken to hospital as on their committal order. Prison ordered to take accused to hospital for medical examination immediately".*

[26] There is nothing in the court records to indicate that someone deliberately prevented the 2nd appellant being produced for medical examination until the injuries sustained in the cause of a police assault was healed. However since the evidence available against the second accused consists only the admissions made by him in his caution interview, these factors should have been looked into at the voir dire inquiry when assessing the voluntariness of the caution interview.

[27] A witness was called on behalf of the 2nd Appellant who stated that he witnessed the second accused being assaulted by the police. The only evidence available against the Second Appellant is his own admission of guilt in the caution interview. Therefore whether the said admission was obtained by use of force is the foremost substantive issue in the case against the 2nd Appellant.

[28] The record of the caution interview conducted with the second appellant on the 23rd and 24th July 2014 had been ruled admissible after voir dire inquiry. Whilst giving evidence

at the voir dire inquiry the 2nd Appellant had stated that after his arrest he had been assaulted by the police and after the said assault he was taken to Samabula Health Centre where he had been examined by a Doctor by the name of Wan Lee Motel (Page 371 of the trial proceedings).

[29] In paragraph 10 of the voir dire Ruling the trial judge states;
(Page 109 of the trial proceedings)

> *"At about 6pm he was taken to the hospital. In fact it was to Samabula Health clinic where he saw a Doctor with the preposterous name of Dr. Wireless Hotel."*

At paragraph 13 the trial judge states;

> *"It is remarkable that there was no evidence nor any report from the Dr. Wireless Hotel which would if it exists have made the allegations of the accused unassailable."*

[30] The prosecution failed to bring to the trial judges' notice, at the voir dire inquiry against the second appellant:

(i) The non-compliance of the learned Magistrates order dated 26/07/2010, and

(ii) The medical report dated 03/08/10, has resulted in a substantial miscarriage of justice in determining the voluntariness of the caution interview, which was the only evidence against him, and on that ground of conviction against him cannot stand.

[31] Having regard to the above:

(1) I would allow the appeal of the 1st appellant against his conviction and sentence and order a new trial against him.

(2) I would allow the appeal of the 2nd appellant against the conviction and sentence and quash conviction and the sentence against him.

Orders:

1. *Appeal by Delana against conviction is allowed.*
2. *A new trial is ordered for Delana.*
3. *The appellant Delana is remanded in custody and must be brought before a Judge of the High Court within 10 days of the date of this judgment.*
4. *Appeal by Tabuavula against conviction is allowed and the conviction is quashed.*
5. *A verdict of acquittal is to be entered in respect of Tabuavula.*

Hon. Justice W. D. Calanchini
PRESIDENT, COURT OF APPEAL

COURT OF APPEAL FIJI

Hon. Justice S.Gamalath
JUSTICE OF APPEAL

Hon. Justice W.N.Bandara
JUSTICE OF APPEAL