

IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO.AAU 0099 of 2016
[In the High Court at Lautoka Case No. HAC 047 of 2014]

BETWEEN : RUSIATE TEMO ULUIBAU
Appellant

AND : STATE
Respondent

Coram : Prematilaka, JA

Counsel : Appellant in person
: Mr. S. Babitu for the Respondent

Date of Hearing : 18 August 2020

Date of Ruling : 21 August 2020

RULING

- [1] The appellant had been indicted in the High Court of Suva on two counts of Act with Intent to Cause Grievous Harm [section 255(a)], one count of Aggravated robbery [section 311(1)(a)] and Damage to property [section 369(1)] of the Crimes Act, 2009 committed with 04 others [three of whom are the appellants in AAU0092/2016, AAU 0100/2016 and AAU0067/2017] on 06 April 2014 at Nadi in the Western Division.
- [2] The information read as follows.

FIRST COUNT

Statement of Offence

ACT WITH INTENT TO CAUSE GRIEVOUS HARM: *Contrary to Section 255 (a) of the Crimes Decree 44 of 2009.*

Particulars of Offence

PENI YALIBULA, MIKAELE TURAGANIVALU, RUSIATE TEMO ULUIBAU, ULAIASI QALOMAI and TEVITA QAQANIVALU on the 6th day of April 2014 at Nadi in the Western Division, with intent to cause grievous harm to MANI RAM, unlawfully wounded the said MANI RAM by kicking, hitting and striking him in the head with a liquor bottle.

SECOND COUNT

Statement of Offence

ACT WITH INTENT TO CAUSE GRIEVOUS HARM: *Contrary to Section 255 (a) of the Crimes Decree 44 of 2009.*

Particulars of Offence

PENI YALIBULA, MIKAELE TURAGANIVALU, RUSIATE TEMO ULUIBAU, ULAIASI QALOMAI and TEVITA QAQANIVALU on the 6th day of April 2014 at Nadi in the Western Division, with intent to cause grievous harm to NAUSAD MOHAMMED, unlawfully wounded the said NAUSAD MOHAMMED by kicking, hitting and striking him in the head with a liquor bottle.

THIRD COUNT

Statement of Offence

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

Particulars of Offence

PENI YALIBULA, MIKAELE TURAGANIVALU, RUSIATE TEMO ULUIBAU, ULAIASI QALOMAI and TEVITA QAQANIVALU on the 6th day of April 2014 at Nadi in the Western Division, robbed MANI RAM of assorted liquor valued at \$3,400.00, assorted cigarettes valued at \$1,300.00 and \$5,300.00 cash all to the total value of \$10,000.00 and immediately before the robbery, force was used on the said MANI RAM.

FORTH COUNT

Statement of Offence

DAMAGING PROPERTY: *Contrary to Section 369 (1) of the Crimes Decree 2009.*

Particulars of Offence

PENI YALIBULA, MIKAELE TURAGANIVALU, RUSIATE TEMO ULUIBAU, ULALASI QALOMAI and TEVITA QAQANIVALU on the 6th day of April 2014 at Nadi in the Western Division, willfully and unlawfully damaged assorted liquor valued at \$3,200.00, assorted juice valued \$580.00, 1 x computer valued at \$650.00, dried Kava valued at \$220.00 and 1 x cash register valued at \$499.00 all to the total value of \$6,609.00 the property of MANI RAM.

- [3] After trial, the assessors expressed a unanimous opinion of guilty against the appellant on all charges on 06 June 2016. The learned High Court judge in his judgment on 13 June 2016 had agreed with the assessors and convicted the appellant as charged. He had been sentenced on 11 July 2016 to 10 years of imprisonment for all offences (aggregate sentence) with a non-parole period of 07 years.
- [4] The appellant being dissatisfied with the conviction and sentence had in person signed a timely application for leave to appeal on 27 July 2016 (received by the CA registry on 08 August 2016). He had tendered written submission on 10 June 2020 with three grounds of appeal against conviction only and he stated at the leave to appeal hearing that he would rely only on those grounds. The state had filed its submissions on 17 August 2020.
- [5] In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. The test for leave to appeal is '**reasonable prospect of success**' (see Caucau v State AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, Navuki v State AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and State v Vakarau AAU0052 of 2017:4 October 2018 [2018] FJCA 173, Sadrugu v The State Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and Waqasaga v State [2019] FJCA 144; AAU83.2015 (12 July 2019) in order to distinguish arguable grounds [see Chand v State [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), Chaudry v State [2014] FJCA 106; AAU10 of 2014 and Naisua v State [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.

[6] Grounds of appeal against conviction.

'That the Learned Trial Judge erred in law when His Lordship

(i) Did not direct the Assessors for the need for such a warning in clear terms on the dangers of convicting on recognition;

(ii) Did not direct the Assessors and himself to consider the appropriateness of the parade regarding the fact of having the Appellant as the only person with injuries in the identification parade; and

(iii) Did not warn the Assessors on the weakness of the identification parade with regards to the fact that the Appellant would have been seen by the Complainant when he was taken for reconstruction during investigation and before the identification parade on the 7th April, 2014.

[7] The prosecution evidence of the case as summarised by the learned High Court judge in the sentence order is as follows.

'[3] The Complainant, Mr. Mani Ram, had been running a shop in Matintar, Nadi, for the past 40 years. To cater to customers who enjoy the night life in the Airport City of Nadi, he kept his shop open till late night in the company of his security guard, Mr. Naushad. Five accused came in a mini-van, got off near the shop and started drinking alcohol. Around 3 a.m., they came to the counter of the complainant's shop in the guise of customers and tried to forcibly enter the shop through the opening at the counter. Failing of which they broke off the rear door and entered the shop forcibly. They went on rampage in the shop completely disregarding personal and property rights of the shop keepers. They wounded the complainant and his security guard kicking, hitting and striking brutally with bottles, and destroyed the property. They robbed valuable goods and cash. 1st accused was apprehended red handed by members of the public while others fled with the loot. The entire 'horrific drama' lasted nearly for eight minutes was being secretly recorded by six surveillance cameras installed in the shop. The CCTV footages obtained from cameras helped the police to identify the culprits who were later apprehended. 1st accused made a confession to police. Other accused were positively identified by the prosecution witnesses. The CCTV footage displayed during trial showed a systematic and coordinated brutal attack on the victims and their property.'

01st ground of appeal

- [8] To understand the appellant's complaint one has to look at the evidence led against him: The trial judge has set out the evidence of witness Mr. Mani Ram in the summing-up as follows.

'57. He had seen the third accused earlier as a customer. Even though the accused was a frequent visitor he had not known his name and where he was actually from, but he knew his face. At the time he gave his first statement to police he was not in a stable condition. He could not recall how many statements were given to police. He later admitted giving a statement on 30th of October, 2014, after watching the CCTV footage. He said that the description- 'a thin tall Fijian man' referred to in the 1st statement was about the man who first approached for a cigarette role.

*58. Speaking about the ID parade, Mr. Mani Ram said that people lined up were under 30 years of age, different in height and complexion. **He did not see any injury on the 3rd accused.***

116. 3rd accused was identified by Mr. Mani Ram at the ID parade within 36 hours after the incident. Mr. Mani Ram said that 3rd accused's face was familiar to him as a frequent visitor to his shop. 3rd accused denied having shopped at his shop earlier. 3rd accused took two different versions as to the basis of his identification at the ID parade. He said that he was pointed out by police officers to Mr. Mani Ram before the ID parade was conducted. On the other hand, he said he was singled out at the parade as the only person having injuries. You watched the CCTV footage also.

- [9] The trial judge had given his mind to the evidence against the appellant in the judgment as follows.

17. Witness Mani Ram identified 3rd accused as one of the robbers who entered his shop. He identified the 3rd accused at the identification parade within 36 hours of the incident. He said that 3rd accused's face was familiar to him as a frequent visitor to his shop.

18. The 3rd accused denied having shopped at Mani Ram's shop earlier. He took two different positions as to the basis of his identification at the identification parade. He said that he was pointed out to Mani Ram by police officers before the identification parade was conducted. On the other hand, he said that he was singled out at the identification parade as the only person having injuries.

19. On the 7th of April 2014, Mani Ram gave a statement to police. He had not mentioned in his first statement that he recognized the 3rd accused on the basis of familiarity as a frequent customer. Only description he had given to police was about a 'thin tall Fijian man'. He was not in a stable condition when he made his 1st statement at the hospital. He explained the 'thin tall Fijian man' as the person who first approached for a cigarette role. Video footage corroborated his evidence.

20. Even though the 3rd accused was a familiar customer, Mani Ram had not known his name and where he was actually from. He knew only his face. **In these circumstances, holding of an identification parade was logical.**

21. **Mani Ram denied that 3rd accused was pointed out to him by police officers before the identification parade.** He had been discharged from the hospital in the afternoon of the 7th whereas the 3rd accused had been arrested in the early morning of the 7th. 3rd accused said he was taken directly to Mani Ram's shop after his arrest. **By that time Mani Ram was still in the hospital.**

23. There is no reason to reject Mani Ram's evidence. I am satisfied that Mani Ram is an honest and reliable witness. This is not a fleeting glimpse case. Robbers had confronted the witnesses face to face for a considerable time. Their faces were not covered. Lighting condition had been good. Video footage confirmed that conditions were conducive for a proper identification. I am satisfied that Mani Ram positively identified the 3rd accused.

[10] Therefore, there was no need to give a special warning to the assessors on the 'dangers' of convicting on recognition as demanded by the appellant. However, in paragraphs 25 – 27 of the summing-up the trial judge had specifically warned the assessors to take special care in approaching the issue of identification and in fact given a Turnbull direction in paragraph 28. The trial judge had himself been very careful of the evidence of identification of the appellant by the eye witness.

[11] This ground of appeal has no reasonable prospect of success.

02nd ground of appeal

[12] The appellant argues that the trial judge should have directed the assessors to consider the appropriateness of the identification parade because he was the only person with an injury at the ID parade which had not been accepted by Mani Ram who identified him at the ID parade. The trial judge had addressed the assessors on the appellant's stand in the following manner.

103. *Temo resided at Waiyavi in Lautoka, Stage 1 in 2014. On the 5th day of April, 2014, he was in Lautoka. On the 5th of April, he was watching movies during night time with a friend. He knew nothing about the robbery. He was asleep at home. In the early morning of the 7th of April he was arrested and was taken to Nadi by police officers and taken to a shop in Martintur. From there, he was taken to the Nadi Police Station. He was shown to the Indian men there. Mani Ram and the security were present at the shop. He denied having any knowledge about the Daily Shop and the robbery. Then police officers started beating him. He received visible injuries and his leg got swollen. He was taken to the hospital and, on the 8th of April, was taken to an ID parade where some iTaukei people of different height and complexion were lined up. One of the same Indian men who was at the shop came and pointed at him. He was the only person with injuries. He denied shopping at Mani Ram's shop any time before the incident.*

116. *3rd accused was identified by Mr. Mani Ram at the ID parade within 36 hours after the incident. Mr. Mani Ram said that 3rd accused's face was familiar to him as a frequent visitor to his shop. 3rd accused denied having shopped at his shop earlier. 3rd accused took two different versions as to the basis of his identification at the ID parade. He said that he was pointed out by police officers to Mr. Mani Ram before the ID parade was conducted. On the other hand, he said he was singled out at the parade as the only person having injuries. You watched the CCTV footage also.*

117. *3rd accused took up a defence of alibi. He said that after watching a movie with a friend, he was sleeping at his house in Lautoka at the time the robbery took place. He did not call his friend as an alibi witness. He had not given prior alibi notice to police to check his alibi. You decide what weight you give to his evidence on alibi. However, you must remember, he has no burden to prove his alibi. Even if you do not believe a single word of his evidence, burden of proof remains with the Prosecution to prove that he was in fact present at the crime scene at the crucial time.*

118. *Taking into consideration the caution I have given to you, you decide if Mr. Mani Ram is an honest witness and whether he positively identified the 3rd accused.*

- [13] Therefore, it is clear that the trial judge had addressed the assessors of all aspects of the appellant's identification and coupled his cautionary note to them on having to take special care in the matter of identification as stated above I cannot see any reasonable prospect of this ground of appeal.

03rd ground of appeal

- [14] The appellant criticizes the trial judge for not having warned the assessors on the weakness of the ID parade given that witness Mr. Mani Ram may have seen him

when he was taken for the reconstruction of the scene on 07th April before the ID parade.

- [15] The trial judge had stated in paragraph 21 of the judgment that when the appellant was taken to Mani Ram's shop after his arrest the witness had been still in hospital. Therefore, the appellant would not have been seen by Mani Ram at the reconstruction of the crime scene.
- [16] There is no reasonable prospect of this ground of appeal.
- [17] Although, separately framed all three grounds of appeal are interrelated and interconnected. The totality of the summing-up and the judgment show the futility of all of the grounds of appeal relating to different aspects of identification of the appellant.
- [18] In **Sahib v State** AAU0018u of 87s; 27 November 1992 [1992] FJCA 24 the Court of Appeal said

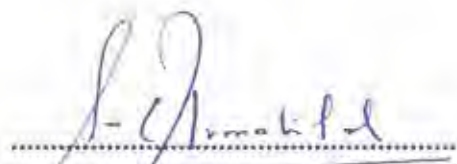
'It has been stated many times that the trial Court has the considerable advantage of having seen and heard the witnesses. It was in a better position to assess credibility and weight and we should not lightly interfere. There was undoubtedly evidence before the Court that, if accepted, would support such verdicts.

We are not able to usurp the functions of the lower Court and substitute our own opinion.'

Order

1. Leave to appeal against conviction is refused.




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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL