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

CRIMINAL APPEAL NO.AAU 121 of 2019
[High Court at Suva Case No. HAC 364 of 2018]

BETWEEN : **SAKEASI RADRAVU**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, ARJA**

Counsel : **Ms. S. Nasedra for the Appellant**
: **Ms. E. A. Rice for the Respondent**

Date of Hearing : **13 August 2021**

Date of Ruling : **20 August 2021**

RULING

[1] The appellant had been charged in the High Court of Suva with a single count of robbery contrary to section 310(1)(a) (i) of the Crimes Act, 2009 committed on 18 August 2018 at Nasinu in the Central Division. The information read as follows:

Statement of Offence

ROBBERY: *contrary to section 310(1) (a) (i) of the Crimes Act 2009.*

Particulars of Offence

Sakeasi Radravu *on the 18th day of August 2018 at Nasinu in the Central Division, robbed James Mani of $56.00 cash, the property of the said James Mani.*

[2] The trial judge had succinctly described the prosecution and defense cases in the judgment as follows:

> *[5] The first witness called on behalf of the prosecution was Mr. James Mani. His evidence was that;*
>
> *(a) He is the owner and the driver of taxi No. LT4252.*
>
> *(b) On the 18th of August 2018 at about 5.30pm he was robbed of $56.00 by a passenger.*
>
> *(c) On that day he was driving his taxi from Lami. A boy and a girl has got into it from Lami and wanted to go to Kinoya.*
>
> *(d) As he reached the AOG School in Kinoya, they told him to stop for the female passenger to get down. Once the female passenger got down he was asked by the male passenger to take him to Vesivesi Road as he lives there. When at Vesivesi Road he was asked to turn to the right and later to the left to Kokila Drive. At the roundabout, he was asked to stop the car and the said passenger has got down and come around and asked of the fare. When informed that it was $12.60, the witness was punched on the side of the face and opening his door, was dragged out on to the tar sealed road. The person, who punched, has got into the car and it was moving slowly as it was in a running gear. The witness has got up and gone behind and hanged on to the T-Shirt of the assaulter and pulled him out. Then both of them have fallen down on to the road and assaulter has got on top of the witness and while pressing him down has taken his money from the shirt pocket. They have fought thereafter for a while and the assaulter has tried to run away. The witness has held on to the assaulter's T-Shirt and it has torn. Then two persons have come and the assaulter has run away. Those persons have called the police and the police came and assisted him.*
>
> *(e) The witness affirms that he has been fighting with the assaulter for about 5-6 minutes, face to face, and the at a very close proximity under day light, around 5.30 pm. The witness further states that while he was fighting with the assaulter, his car went into the drain and got damaged.*
>
> *(f) The witness states that while driving them from Lami, which was about a 45 minute drive, he has looked at them for about 6-7 times. Further the witness states that it was the day of the Hibiscus Festival, it was a bright day, and it had sufficient day light at the time of the incidence.*

(g) Further, having dropped the female passenger while driving with the male passenger for about 10 minutes, he has been talking to him and looked at him 2-3 times in the rear view mirror.

(h) When the assaulter pulled him out and he fell on to the road, he fell sideways and saw his vehicle moving. At that time the assaulter kicked him and he tried to block the kicks.

[10] The accused elected to give evidence. His evidence is that;

(a) He has been living in Chadwick Road, Nakasi. Since two months prior to the alleged incidence.

(b) Prior to that he was living at Kaloa Street, Kinoya at his mother's house.

(c) The accused states what the PW1 stated is incorrect and on the said particular date he was at home in Chadwick Road.

(d) The witness further states that he has never had a fight with a taxi driver and he has been falsely framed.

[3] After the summing-up the assessors had unanimously opined that the appellant was guilty. The High Court judge had agreed with the assessors in the judgment and convicted the appellant as charged and sentenced him on 18 July 2019 to 06 years, 02 months and 20 days of imprisonment with a non-parole period of term of 04 years, 02 months and 20 days.

[4] The appellant had appealed (a few days out of time) against conviction on 23 August 2019 but it had been treated as timely. The Legal Aid Commission had tendered amended grounds of appeal and written submission on 29 January 202. The state had tendered written submissions on 01 March 2021. Both parties made oral submissions *via* Skype in addition to the written submissions already filed.

[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. For a timely appeal, the test for leave to appeal against conviction is **'reasonable prospect of success'** [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA

173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 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 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[6] The grounds of appeal submitted to this court by the appellant are as follows. The appellant has correctly identified whether he was the assailant of the taxi driver (complainant) at the time of the robbery as the main issue in the case and indeed in appeal. In other words it is the identity of the appellant that is central to his appeal:

> ***Conviction***
>
> ***Ground 1***
>
> *The Learned Trial Judge erred in fact and in law when he convicted the Appellant on identification evidence that was unsafe and could not be used to safely uphold the conviction.*
>
> ***Ground 2***
>
> *The Learned Trial Judge erred in fact when he intervened and interfered with the trial process disabling the Appellant from having a fair trial and prejudicing the Appellant in the process.*

01st ground of appeal

[7] The gist of the appellant's complaint relates to the Photographic Identification Parade ('PhIP') held by the police and the evidence that the complainant identified the appellant *via* the tattoos on his body in the photograph.

[8] The PhIP is challenged on the basis that out of 09 photographs shown to the appellant 05 had 2017 dates on them and whether the police could have gone ahead with PhIP when the appellant had refused to take part in a conventional Police ID Parade (line-

up parade/PoIP). The complainant's identification of the appellant is challenged on the premise that his photo was the only one with tattoos.

[9] I do not see a material irregularity in using 05 photographs having 2017 imprints out of 09 photographs at the PhIP as the alleged robbery took place in 2018. Thus, the photographs were recent enough. Secondly, there is also no bar for the police to hold a PhIP when an accused refuses to participate at a PoIP. If that be the case, an accused could refuse to be part of a PoIP and easily avoids being identified by the victim thus thwarting the whole investigation of a serious crime.

[10] Paragraphs 7 and 8 of the 'Identification By Photographs' available at Fiji Police Force Manual (FPM) which is appendix 'A' (FRO19/90) to Fiji Police Force Standing Orders (FSO) made by the Commissioner of Police by virtue of section 7(1) of the Police Act Cap 85 deal with PhIP.

[11] Paragraph 7 of FPM of states:

> *'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 identity parade of a person already in custody shall not be held.'*

[12] Paragraph 8 of FPM sets out in detail the procedure or the manner in which a PhIP should be conducted.

[13] When the appellant refused to participate at a PoIP the only mechanism available to the investigators to establish the identity of the assailant was to hold a PhIP, for otherwise it would have been a mere first time dock identification. The appellant had given no tangible reasons as to why he refused to part of a PoIP except to say that it would not be properly done. If any material irregularity was to take place at the PoIP the appellant could have contested the weight to be attached to the identification, if done at the PoIP, by highlighting the lapses, omissions or irregularity etc., if any.

[14] Therefore, considering that FSOs are not indispensable rules of law but procedural guidelines to ensure fairness, the police cannot be faulted for carrying out the PhIP when the appellant rejected the PoIP.

[15] On the issue of having only one photograph with tattoos at the PhIP one has to consider the totality of identification evidence.

[16] It is in evidence that the assailant was inside the taxi with a female for about 45 minutes in the bright daytime of the Hibiscus Festival day for about a 45 minutes and the complainant had looked at them for about 6-7 times during the journey. Having dropped the female passenger near the AOG School, while driving with the male passenger for about 10 minutes, the complainant had been talking to him and looked at him 2-3 times in the rear view mirror. He also had seen the assailant's face during the face to face fight with him. The complainant had seen tattoos on the assailant at the time his t-shirt was torn during the wrestle. The complainant had reported the matter to Valelevu Police Station on the same day and describing the assailant the complainant had stated that it was an iTaukei man of about 6 feet tall, and of medium complexion. Thus, it is clear that the complainant had ample opportunity to register the facial identity of the assailant in his mind in addition to seeing tattoos on his body.

[17] The complainant had also stated that he was shown a photo of the appellant in a mobile phone of a police officer on 18 August 2018, from which he identified the appellant initially. This perhaps explains as to why the appellant had been asked to come to the police station on 22 September 2018 as a person of interest. However, there is nothing to show that the appellant had been shown to the complainant when he went to the police station to do the PhIP. The appellant apparently had not been under arrest until the complainant had identified him at the PhIP though he was at the police station as a person of interest.

[18] Inspector Isireli Ravulolo had said that the criteria used in selection of the photos were the description of the assailant given by the complainant and accordingly, ethnicity, hair and beard were used in selecting the photos. He however conceded that the only photo with the visible tattoos was that of the appellant but denied of any

knowledge of the presence of appellant at Valelevu Police Station on 22 September 2018.

[19] Therefore, it is clear that the presence of tattoos on the appellant's body on his photograph was not the only or even the dominant reason why the complainant had managed to identify the appellant at the PhIP. Presence of tattoos on his photograph appears to have been only incidental to the complainant's identification of the appellant. This is what the trial judge had stated in the judgment:

> *'5.(k) The witness identifies PE3 (b) as the photo from which he identified the accused at the Valelevu Police Station. The witness states he identified the accused from his tattoos visible there in the photo, in addition to having had a face to face fight with him and travelling together with him for more than 45 minutes. The witness identifies the accused as the person who robbed him.'*

[20] Further, the appellant's evidence had been that he in fact was having a relationship with a girl-friend named Tofua Fotofili since 2015 but denied any knowledge of Tofua having a relation who is living at close proximity to AOG School in Kinoya where the complainant says he dropped the female who was with the appellant in the taxi on the day of the incident. However, the appellant's father had stated in his evidence that he was well aware of the appellant's girl-friend Tofua having a relation living near AOG School in Kinoya. Therefore, this evidence of the appellant and his father seems to have lent support and credibility to the complainant's evidence in general.

[21] The trial judge had addressed the assessors on these aspects fully at paragraphs 28 to 34 of the summing-up. He had directed the assessors specifically on **R v Turnbull & others** [1977] QB 224 [(1976) 63 CrAppR 132; [1976] 3 WLR 445; [1976] 3 AllER 549; [1976] CrimLR 565] at page 228 at paragraphs 37 and on the mobile phone identification and dock identification at paragraphs 38 and 39 respectively.

[22] The trial judge had once again traversed the evidence thoroughly in the judgment and examined the issue of identification of the appellant at paragraphs 13-16 of the

judgment and satisfied that the complainant's evidence of the appellant's identification was credible and acceptable.

[23] I think the decision in **Johnson v State** [2013] FJCA 45; AAU 90 of 2010 (30 May 2013) relied on by the appellant has to be distinguished on facts. Among other things, in **Johnson** the assessors had returned a verdict of not guilty and the trial judge had overturned it and convicted the accused. In **Johnson** the accused had participated at the police identification parade (PoIP) but was the only person with a bald head when all offenders were wearing pom-poms while committing the offending. There was also a suggestion that the accused had been shown to the complainant inside the police vehicle on the day before the ID parade.

[24] In the totality of the evidence led at the trial, I do not think that by holding the PhIP and having only one photograph with tattoos out of 09 which happened to be that of the complainant had caused a substantial miscarriage of justice [see **Baini v R** (2013) 42 VR 608; [2013] VSCA 157 and **Degei v State** [2021] FJCA 113; AAU157.2015 (3 June 2021)] as the conviction seems inevitable.

[25] Therefore, I am not inclined to grant leave to appeal on this ground of appeal.

02nd ground of appeal

[26] The appellant takes an issue with the trial judge having questioned the appellant and his father about the girlfriend of the former.

[27] To me it appears that when the judge inquired whether the appellant was having a girlfriend he had answered in the affirmative and come out with her name as well. The appellant and his father had answered respectively as follows (see paragraphs 33(g) and 34(d) of the summing-up and 10(g) & 11(d) of the judgment):

> *'Answering a question by the Court, the witness admits having a relationship with a girl-friend named Tofua Fotofili.*

Answering a question by the court the witness states that he is well aware of Sakeasi's girl-friend Tofua, having a relation living near AOG School in Kinoya.'

[28] Obviously, there was no pressure exerted by the trial judge on either of the defence witnesses to answer his questions in one way or another about a girl friend of the appellant. The trial judge would have been persuaded to inquire of this aspect as the appellant had got into the taxi with a female and he asked the complainant to drop her near AOG School in Kinoya stating that she was going to her in-law's place before the complaint was robbed by the male passenger.

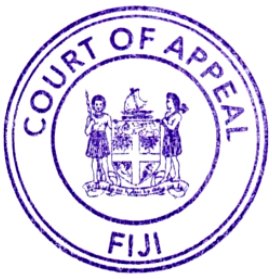
[29] This is far from the scenario that confronted the Court of Appeal in **Hussein v State** [2019] FJCA 108; AAU034.2015 (6 June 2019) where, while the examination-in-chief was in progress the learned trial Judge had posed 86 questions to the complainant, most of which pertained to cover prosecutorial functions and also it appeared that up to the time the trial judge gave the instructions to the victim including the ingredients of the offence of rape, the witness had not told court anything about a sexual assault. It had appeared on the record that the witness had started giving evidence of a sexual assault after receiving a briefing from the trial judge on the ingredients required for the constitution of the offence of rape. In the circumstances the Court concluded that that procedure was against all accepted norms of leading the evidence of a witness before a criminal court. Nevertheless, the Court of Appeal agreed that the mere fact that a trial judge intervenes excessively or inappropriately does not necessarily lead to a conviction being quashed and the decision for the Court is whether the nature and extent of the interventions have resulted in the applicant's trial becoming unfair.

[30] I am convinced that what the trial judge had inquired from the appellant and his father and their voluntary answers have not resulted in an unfair trial.

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

Order

1. Leave to appeal against conviction is refused.



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Hon. Mr. Justice C. Prematilaka
ACTING RESIDENT JUSTICE OF APPEAL