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

CRIMINAL APPEAL NO. AAU 174 of 2019
[In the High Court at Suva Case No. HAC 299 of 2017S]

BETWEEN : LORIMA KOROITAMANA

Appellant

AND : STATE

Respondent

Coram : Prematilaka, RJA

Counsel : Appellant in person
: Mr. R. Kumar for the Respondent

Date of Hearing : 25 January 2023

Date of Ruling : 31 January 2023

RULING

[1] The appellant with two others had been indicted in the High Court of Suva on two counts of aggravated robbery contrary to section 311(1) (a) of the Crimes Act, 2009 committed on 25 September 2017 at Sports City, Suva in the Central Division.

[2] The assessors had unanimously opined 'guilty' against the appellant on both charges and the learned High Court judge had agreed with the assessors and convicted him. He had been sentenced on 14 May 2019 to 12 years of imprisonment each (to run concurrently) for the two offences with a non-parole period of 11 years.

[3] After leave to appeal hearing into his appeal against conviction and sentence, the appellant was granted leave to appeal only against conviction on 17 February 2021. Thereafter, he had filed an application for bail pending appeal.

[4] The prosecution evidence of the case as summarised by the learned High Court judge in the sentencing order is as follows. The appellant was accused No.3 at the trial.

> 2. *The brief facts were as follows. The female complainant was Ms. Roseline Mudaliar (PW1). She was on 25 September 2017 employed as a teller for Real Forex Exchange Office at Sports City, Suva in the Central Division. At 8.30 am, she opened the main door of the Real Forex Exchange Office at Sports City. She had just started work. She then went into her office, which was separated from the customer area by a counter and glass partition. Suddenly Accused No. 2 and 3 came through the main office door. Another two were on guard outside the office.*
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> 3. *Accused No. 3 climbed over the counter and glass partition, and went into PW1's office. He opened the office door, and let Accused No. 2 into the same. The two then threatened PW1 not to raise the alarm, or they will kill her. They demanded money. They punched PW1 on the head and back. They then forced PW1 to open the office's safe. The two then stole the items mentioned in count no. 1 from the office safe. They also stole PW1's properties as itemized in count no. 2. The two then fled the crime scene, with the others outside the office.*
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> 4. *The matter was reported to police. An investigation was carried out. The two accuseds were arrested. They were interviewed by police. Both were later charged with aggravated robberies. They had been tried and convicted of count no 1 and 2 in the High Court.*

[5] The only evidence against the appellant was dock identification and he was allowed leave to appeal on 02nd, 03rd, 04th, 06th, 07th and 08th grounds of appeal concerning the first time dock identification by the eye-witness after 01 year and 07 months had lapsed since the incident. She identified the appellant in the dock as the *i-taukei* man who was wearing a hoodie covering his face at the time of the incident whose face she had observed for 1 ½ minutes at a distance of just 02 feet away from where she was. There had not been a police identification parade or even a photographic identification parade.

[6] Dock identifications are not, of themselves and automatically, inadmissible and the admission of such evidence should not be regarded as permissible in only the most exceptional circumstances. Nevertheless, the trial judge had to consider whether the admission of such testimony, particularly where it is the first occasion on which the accused is purportedly identified, should be permitted on the basis that its admission might imperil the fair trial of the accused (see **Maxo Tido v The Queen** (2010) 2 Cr. App. R23, PC, [2011] UKPC 16).

[7] The trial judge had directed the assessors as per Turnbull guidelines. However, he had failed to direct the assessors or himself on possible frailties or dangers of such evidence [see **Lawrence v The Queen** [2014] UKPC 2 (11 February 2014)]. There had been two other accused in the dock when the witness made the first time dock identification. Yet, the appellant is not a person she had seen before the incident. Therefore, the Court of Appeal will have decide whether **Vulaca v The State** AAU0038 of 2008: 29 August 2011 [2011] FJCA 39 could be followed in this situation.

[8] The tests for the appellate court to apply in a situation like this were formulated in **Naicker v State** CAV0019 of 2018: 1 November 2018 [2018] FJSC 24, **Saukelea v State** [2018] FJCA 204; AAU0076.2015 (29 November 2018) and **Korodrau v State** [2019] FJCA 193; AAU090.2014 (3 October 2019).

[9] In ***Korodrau*** it was held as follows:

> *'[35] However, the Supreme Court in **Naicker** went on to state in paragraph 38 that the critical question is whether ignoring the dock identifications of the appellant, there was sufficient evidence, though of a circumstantial nature, on which the assessors could express the opinion that he was guilty, and on which the judge could find him guilty and answered the question in the affirmative. Going further, the Supreme Court formulated a test to be applied when dock identification evidence had been led and no warning had been given by the trial Judge. The test to be applied is found in the following paragraph.*
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> > *'45. I return to the irregularities in the trial as a result of the **dock identifications** and the absence of a Turnbull direction. To use the language of the proviso to section 23(1) of the Court of Appeal Act 1949, has a*

*"substantial miscarriage of justice" occurred?.........The question, in my opinion, is whether the judge **would** have convicted Naicker of murder if there had been no **dock identification** of him at all by the two witnesses who chased a man with blood on his hands. That is a different question to the one posed in para 38 above, which was whether the judge **could** have convicted Naicker without the **dock identifications.** The question now is whether he **would** have done so. I have concluded that, for the same reasons as I think that the judge could have convicted Naicker without the **dock identifications,** the judge would have convicted him of murder in their absence. It follows that I would apply the proviso, holding that no substantial miscarriage of justice has occurred despite the irregularities in the trial.' (Emphasis added)*

[36] Thus, the Supreme Court appears to formulate a two tier test. Firstly, ignoring the dock identification of the appellant whether there was sufficient evidence on which the assessors could express the opinion that he was guilty, and on which the judge could find him guilty. Secondly, whether the judge would have convicted the appellant, had there been no dock identification of him. In my view, the first threshold relates to the quantity/sufficiency of the evidence available sans the dock identification and the second threshold is whether the quality/credibility of the available evidence without the dock identification is capable of proving the accused's identity beyond reasonable doubt. Of course, if the prosecution case fails to overcome the first hurdle the appellate court need not look at the second hurdle. However, if the answers to both questions are in the affirmative, it could be concluded that no substantial miscarriage of justice has occurred as a result of the dock identification evidence and want of warning and the proviso to section 23(1) of the Court of Appeal Act would apply and appeal would be dismissed.'

[10] Therefore, applying those tests to the appellant's complaint on the first time dock identification, it looks as if that without the dock identification there was no or insufficient evidence of identification of the appellant at the crime scene. Therefore, unlike in ***Naicker*** and ***Korodrau***, there being no other or insufficient evidence to establish the appellant's identity *vis-à-vis* the crime and no warning on the first time dock identification by the complainant, the Court of Appeal has to decide whether in this case there is any basis to apply the proviso to section 23(1) of the Court of Appeal Act as done in **Vulaca v The State** (supra).

[11] Therefore, it is for the full court to decide with the benefit of trial proceedings whether the verdict against the appellant could be upheld or not.

Bail pending appeal

[12] The legal position is that the appellant has the burden of satisfying the appellate court firstly of the existence of matters set out under section 17(3) of the Bail Act namely (a) the likelihood of success in the appeal (b) the likely time before the appeal hearing and (c) the proportion of the original sentence which will have been served by the appellant when the appeal is heard. However, section 17(3) does not preclude the court from taking into account any other matter which it considers to be relevant to the application. Thereafter and in addition the appellant has to demonstrate the existence of exceptional circumstances which is also relevant when considering each of the matters listed in section 17 (3). Exceptional circumstances may include a very high likelihood of success in appeal. However, an appellant can even rely only on 'exceptional circumstances' including extremely adverse personal circumstances when he fails to satisfy court of the presence of matters under section 17(3) of the Bail Act [vide **Balaggan v The State** AAU 48 of 2012 (3 December 2012) [2012] FJCA 100, **Zhong v The State** AAU 44 of 2013 (15 July 2014), **Tiritiri v State** [2015] FJCA 95; AAU09.2011 (17 July 2015), **Ratu Jope Seniloli & Ors. v The State** AAU 41 of 2004 (23 August 2004), **Ranigal v State** [2019] FJCA 81; AAU0093.2018 (31 May 2019), **Kumar v State** [2013] FJCA 59; AAU16.2013 (17 June 2013), **Qurai v State** [2012] FJCA 61; AAU36.2007 (1 October 2012), **Simon John Macartney v. The State** Cr. App. No. AAU0103 of 2008, **Talala v State** [2017] FJCA 88; ABU155.2016 (4 July 2017), **Seniloli and Others v The State** AAU 41 of 2004 (23 August 2004)].

[13] Out of the three factors listed under section 17(3) of the Bail Act 'likelihood of success' would be considered first and if the appeal has a 'very high likelihood of success', then the other two matters in section 17(3) need to be considered, for otherwise they have no direct relevance, practical purpose or result.

[14] If an appellant cannot reach the higher standard of 'very high likelihood of success' for bail pending appeal, the court need not go onto consider the other two factors under section 17(3). However, the court may still see whether the appellant has shown other exceptional circumstances to warrant bail pending appeal independent of the requirement of 'very high likelihood of success'.

[15] Given what I have already stated above although there is a reasonable prospect of success in his appeal against conviction, it is not possible for me to say affirmatively that there is a 'very high likelihood of success' without the trial transcripts. The appellant now has given a single page of the proceedings pertaining to cross-examination by him of the eye –witness who had stated that she could remember the descriptions of the men very well and the appellant whose face was not covered was present in her office on 25 September 2017 and that she saw him on that day and she was not mistaken. She identified the appellant as the same person whom she saw on the day of the robbery. Thus, the eye-witness had been adamant that the appellant was one of the robbers.

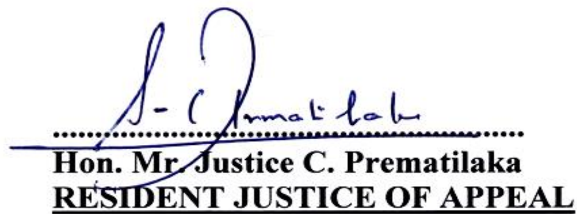
[16] Though, it is now not technically required, I shall still consider the second and third limbs of section 17(3) of the Bail Act namely '*(b) the likely time before the appeal hearing and (c) the proportion of the original sentence which will have been served by the appellant when the appeal is heard'* together.

[17] The appellant has so far served little over 03 years and 09 months of imprisonment. Given that the offending is aggravated robbery of a commercial establishment, if the conviction is upheld he will have serve a much longer imprisonment. Since the appeal records have been already prepared by the Registry and handed over to the appellant he is expected to file his written submissions for the full court hearing. The Registry may list this appeal along with the co-appellant's appeal AAU 050 of 2020 on a call over date to fix a date and time for the full court hearing. The Registry should act diligently and expeditiously to have the appeal records certified in AAU 050 of 2020 as well so that both appeals can be heard together by the full court without undue delay.

[18] It should be placed on record that this court delivered the last bail pending appeal ruling only on 25 July 2022 refusing the appellant's application for bail. This is his second application for bail pending appeal in the space of 06 months.

<u>Order of the Court:</u>

1. Bail pending appeal is refused.



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Hon. Mr. Justice C. Prematilaka
<u>RESIDENT JUSTICE OF APPEAL</u>