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

CRIMINAL APPEAL NO. AAU 0012 of 2023
[In the High Court at Suva Criminal Case No. HAC 196 of 2021

BETWEEN	:	**MANASA ROKOTUIVEIKAU**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Appellant in person**
	:	**Ms. R. Use for the Respondent**
Date of Hearing	:	**19 June 2024**
Date of Ruling	:	**20 June 2024**

RULING

[1] The appellant (and two others) had been charged in the High Court at Suva for having committed aggravated robbery contrary to section 311 (1)(a) of the Crimes Act 2009. The particulars of the offence are:

> *'**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 01st accused had pleaded guilty and the 02nd accused had been acquitted after trial. The trial judge had convicted the appellant on the count of aggravated robbery and sentenced him on 27 April 2023 to a final sentence of 07 years and 07 months of imprisonment with a non-parole period of 05 years and 01 month.

[3] The appellant's appeal against conviction and sentence is timely.

[4] In terms of section 21(1) (b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence 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) that will 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)].

[5] The grounds of appeal raised by the appellant are as follows:

'Grounds of Appeal

i. *THAT the quality of evidence upon which the trial Court convicted the appellant was flawed, inadequate and not sufficient for the trial Court to safely convict.*

ii. *THAT the Judge erred in law and in fact when he made erroneous assumption of fact that the defective photo identification was done professionally by Mr Ofuti promoting injustice to the appellant.*

iii. *THAT the Judge erred in law and in fact when he made erroneous assumption of the fact of physical harm that was adding by the lady complainant on her evidence had said, stated that she had been punched and knocked down on the floor and the assailant have jumping on her back.*

[6] According to the sentencing order, the brief summary of facts is as follows:

> *'4. The three Accused named were alleged to have committed this robbery jointly. If I may recap the incident, on the 11th September, 2021 Ms. Poonam Sarita was stepping out of the Pharmacy around 7pm when you* ***Mr. Manasa*** *approached her and attempted to grab her handbag, then as she resisted and held on to her bag you punched her and put her on the ground when two others joined you and jumped on her when she was on the ground. You forcibly grab her bag and run to the rear of the shopping complex to which place the complainant came and pleaded with you to take the money and return her belongings when you escaped.'*

Ground (i)

[7] The gist of the first ground of appeal is on the question whether verdict should be set aside on the ground that it is unreasonable or it cannot be supported having regard to the evidence. The evidence against the appellant was that of the eye-witness account of the complainant and the photo identification evidence made by her on the day after the robbery. The trial judge had discussed this evidence in detail at paragraphs 09-13 of the judgment. The appellant had refrained from cross-examining the complainant, the reason being that he did not want to make her suffer again in reliving the story.

[8] The appellant's position under oath was that he was not present at the crime scene and therefore did not participate in the robbery. His witness, the 01st accused who had then pleaded guilty, had said that the appellant was not involved in the robbery but he was forced to give the names of the 02nd accused and the appellant to the police. The learned trial judge had not believed the defense evidence.

[9] In **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992) and **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015) it was emphasised that in terms of section 23 (1) of the Court of Appeal Act, the Court shall allow the appeal if the Court thinks that (1) the verdict should be set aside on the ground that it is unreasonable or (2) it cannot be supported having regard to the evidence or (3) the judgment of the Court should be set aside on the ground of a wrong decision of any question of law or (4) on any ground there was a miscarriage of justice. In any other case the appeal must be dismissed but the proviso to section 23(1) enables the Court to dismiss the appeal notwithstanding that a point raised in the appeal might be decided in favour of the appellant if the Court considers that no substantial miscarriage of justice has occurred.

[10] The test to be applied under section 23 of the Court of Appeal in considering a challenge to a verdict of guilty on this basis has been elaborated again in **Kumar v State** AAU 102 of 2015 (29 April 2021) and **Naduva v State** AAU 0125 of 2015 (27 May 2021) in relation to a trial by a judge with assessors [the assessors were dispensed with by the Criminal Procedure (Amendment) Act 2021 effective from 15 November 2021] as follows:

> *'[23] ……**the correct approach by the appellate court is to examine the record or the transcript** to see whether by reason of inconsistencies, discrepancies, omissions, improbabilities or other inadequacies of the complainant's evidence or in light of other evidence the appellate court can be satisfied that the assessors, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt. To put it another way the question for an appellate court is whether upon the whole of the evidence it was open to the assessors to be satisfied of guilt beyond reasonable doubt, which is to say whether the assessors must as distinct from might, have entertained a reasonable doubt about the appellant's guilt. "Must have had a doubt" is another way of saying that it was "not reasonably open" to the assessors to be satisfied beyond reasonable*

doubt of the commission of the offence. ***These tests could be applied mutatis mutandis to a trial only by a judge or Magistrate without assessors.'***

[11] This is the same test where the trial is held by a judge alone – see **Filippou v The Queen** (2015) 256 CLR 47).

[12] The Supreme Court in **Ram v State** [2012] FJSC 12; CAV0001.2011 (9 May 2012) held that the function of the Court of Appeal or the Supreme Court in evaluating the evidence and making an independent assessment thereof, is essentially of a supervisory nature and *the Court of Appeal should make an independent assessment of the evidence* before affirming the verdict of the High Court. In **Vulaca v State** [2012] FJSC 22; CAV0005.2011 (21 August 2012) the Supreme Court elaborated the pronouncement in ***Ram*** as follows:

> *35. Praveen Ram Vs Sate (supra) distinguishes the duty of a trial judge and an appellate court. The trial judge having seen and heard the witnesses testifying in court like in the case of assessors could independently assess the evidence and decide whether he could confirm the opinion of the Assessors or differ from the opinion of the assessors. If the Judge differs he has to give his reasons.*
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> *36. …… As the appellate courts have not seen and heard the witnesses it cannot independently assess and evaluate the evidence led at the trial to the extent of a trial court judge. But an analysis of evidence is necessary for two reasons one is to ascertain whether there is evidence to convict the accused. If there is no evidence it is a question of law, the Court of Appeal have to take into consideration in arriving at its finding. The other is to ascertain whether on the given facts if a properly directed panel of assessors would have come to the same decision. This is to ascertain whether the assessors were properly directed in the application of law on the given facts. However the Court of Appeal will not set aside a verdict of a High Court on a question of law (s.21(1)(a)) or fact (s.21(1)(b)) unless a substantial miscarriage of justice has in fact occurred (s.22(6)).*

[13] Therefore, it appears that while giving due allowance for the advantage of the trial judge in seeing and hearing the witnesses, the appellate court is still expected to carried out an independent evaluation and assessment of the totality of the evidence by *inter alia* examining the inconsistencies, discrepancies, omissions, improbabilities or other inadequacies of the prosecution evidence and the defence evidence, if any, in

order to satisfy itself whether the verdict is reasonable and supported by evidence ***and*** whether or not the trial judge ought to have entertained a reasonable doubt as to proof of guilt; as expressed by the Court of Appeal in another way, whether or not the trial judge could have reasonably convicted the appellant on the evidence before him (see **Kaiyum v State** [2013] FJCA 146; AAU71 of 2012 (14 March 2013). This exercise involves both subjective and objective elements which, however, do not exist in watertight compartments.

[14] Keith, J adverted to this in **Lesi v State** [2018] FJSC 23; CAV0016.2018 (1 November 2018) as follows:

> *'[72] Moreover, not being lawyers, they do not have a real appreciation of the limited role of an appellate court. For example, some of their grounds of appeal, when properly analysed, amount to a contention that the trial judge did not take sufficient account of, or give sufficient weight to, a particular aspect of the evidence. An argument along those lines has its limitations. The weight to be attached to some feature of the evidence, and the extent to which it assists the court in determining whether a defendant's guilt has been proved, are matters for the trial judge, and any adverse view about it taken by the trial judge can only be made a ground of appeal if the view which the judge took was one which could not reasonably have been taken.'*

[15] Upon a perusal of the judgment, I cannot say that the verdict of guilty is unreasonable or unsupported by evidence.

Ground (ii)

[16] The trial judge had addressed the matter of photo identification evidence extensively at paragraphs 39-44 of the summing-up. The highlight of it is his examination of its validity *on the premise* that by the time the photo identification took place the appellant was in police custody. The appellant had admittedly refused to participate at the police ID parade. The relevant paragraphs are as follows:

> *"Photo Identification Parade of 3rd Accused*
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> *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****"*
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> *"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 places 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".*
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> *"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."*

[17] I think the trial judge has correctly laid down the law and procedure relating to photographic identification parade and his reasoning and conclusions are correct. The judge at paragraphs 48-51 discussed the police evidence as to conducting the photo ID parade and the complainant's evidence as to her ability to see the appellant clearly at the crime scene in the light of *Turnbull* guidelines at paragraphs 54-58 and the reliability of her recognition of the appellant at the photo ID parade. I see no issue with the judge's logical reasoning in both respects.

[18] However, the appellant insisted at the leave hearing that he was arrested by the police on 01 January 2022. The photo ID parade had been conducted on 12 September 2021. The incident had happened on 11 September 2021. If so, the appellant was not in police custody when photo ID parade took place.

Ground (iii)

[19] The guidelines to be followed when a sentence is challenged in appeal are whether the sentencing judge (i) acted upon a wrong principle; (ii) allowed extraneous or irrelevant matters to guide or affect him (iii) mistook the facts and (iv) failed to take into account some relevant considerations [vide **Naisua v State** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **House v The King** [1936] HCA 40*;* (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011)].

[20] The issue is whether the sentence imposed on the appellant in the light of ***Tawake*** guidelines formulated by the Supreme Court in **Tawake v State** [2022] FJSC; CAV 0025 OF 219 (28 April 2022) is excessive and harsh.

[21] The incident has the hallmarks of an aggravated robbery in the form of street mugging with somewhat more than usual aggravating features. Nevertheless, there may be an arguable question whether the harm caused to the complainant is medium or high in terms of ***Tawake*** sentencing guidelines where the maximum sentence would be 07 years' or 09 years' imprisonment. The judge had treated for reasons set out at paragraph 10 in the sentencing order that the harm was in the 'high' bracket and started with 07 years. The sentencing error would be whether '*serious physical or psychological harm (or both)'* has been suffered ('High') by the complainant over and above '*no or only minimal physical or psychological harm'* ('Low') to fall between high and low ('Medium'). If the harm is medium the starting point would have been 05 years and the interim sentence would have been 07 years less 06 months (for mitigating factors). Given his remand period of 11 months the final sentence would have been 05 years and 07 month instead of 07 years and 07 months.

[22] I think, this is a matter the Full Court should look into and determine.

Orders of the Court:

1. Leave to appeal against conviction is refused.
2. Leave to appeal against sentence is allowed.

COURT OF APPEAL FIJI

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

Solicitors:

Appellant in person
Office of the Director of Public Prosecution for the Respondent