IN THE SUPREME COURT OF FIJI

[APPELLATE JURISDICTION]

CRIMINAL PETITION NO: CAV0009 OF 2021

Court of Appeal No. AAU 0005 of 2016

BETWEEN : **ETONIA VOSA**

Petitioner

AND : **THE STATE**

Respondent

Coram : **Hon. Mr. Justice Filimone Jitoko, Judge of the Supreme Court**

: **Hon. Mr. Justice Isikeli Mataitoga, Judge of the Supreme Court**

: **Hon. Mr. Justice Alipate Qetaki, Judge of the Supreme Court**

Counsel : **Petitioner In Person**

: **Mr. R. Kumar for the Respondent**

Date of Hearing : **13 June 2023**

Date of Judgment : **29 June 2023**

JUDGMENT

Jitoko J

[1] The appellant on 14th December, 2015 was found guilty along with three (3) others, of the offence of rape in the High Court, Suva contrary to section 207 (1) and (2) (a) of the Crimes Act 2009. Each of the four defendants were charged with four separate counts of rape, committed against the victim at Ritz Nightclub, Suva on 26 June 2014.

[2] After the three assessors had unanimously agreed that the defendants were each guilty of rape, the learned trial judge concurred with the assessors, convicted and sentenced all of them to 14 years imprisonment with a non-parole period of 13 years from 10 December, 2015.

[3] All the four defendants applied for leave to appeal against conviction. The appellant, in addition to his application for leave to appeal against conviction had also appealed against the sentence. Subsequently, before the hearing of the appeal, the appellant filed an application to abandon the appeal against the sentence.

[4] The Court of Appeal, in its judgment of 3 June 2021 allowed the appellant's leave application to abandon his appeal against his sentence. The Court in the process, also dismissed the appeal against his conviction.

[5] In his application for leave to appeal the High Court conviction, the appellant had set out the following two (2) grounds of appeal namely:

> *"1. That the learned trial judge erred in law and in fact when he allowed the state witness namely Adi Ema Barbara Toganivalu, during the trial to identify the appellant in the dock without prior foundation of identity parade or photograph identification.*
>
> *2. That the learned trial judge erred in law and fact when he failed to give a fair and balanced summing-up by not adequately putting the medical evidence to the assessors."*

[6] Leave was granted on the first ground whilst the second ground was refused.

[7] In his present application for special leave to the Supreme Court against his conviction, and the dismissal of his appeal by the full Court of Appeal, the appellant is seeking to resurrect grounds 2 of his appeal which had been refused by the single Justice of Appeal, but furthermore is seeking leave to amend it.

Leave to Reinstate and Amend Ground 2 of the Appeal

[8] The Supreme Court has inherent powers, notwithstanding the absence of any specific provisions of the law, be it under the Supreme Court Act 1998 or the Supreme Court Rules, to hear and entertain such application. Section 14 of the Act states:

> *"Powers of the Supreme Court generally S14. For the purposes of the Constitution of the Republic of Fiji, and this Act, the Supreme Court has, in relation to matters that come before it, all the power and authority of the Court of Appeal and that power and authority maybe exercised, with such modification as are necessary, according to the circumstances of the case."*

[9] In addition, sections 98 (4) and (5) of the Constitution of the Republic of Fiji empowers the Supreme Court to grant leave to appeal from the final judgment of the Court of Appeal and may:

> *"(a) review, vary, set aside or affirm decisions or orders of the Court of Appeal; or;*
>
> *(b) make any other order necessary for the administration of justice, including the orders for a new trial or an order awarding costs."*

[10] It is very clear from the laws above that this Court does have the power and authority to grant leave for the appellant to amend, introduce and or reinstate grounds of appeal to that already filed.

[11] However, ground 2 of the appeal had in fact been refused by the court below and the appellant had not pursued the matter before the full Court of Appeal, which confined the appeal to ground 1 only. As ground 2 was not argued before the Court of Appeal, it is outside the jurisdiction of this Court to hear matters that had not been ventilated and therefore is not part of the *"final judgment"* of the Court of Appeal.

[12] To reinstate ground 2, the appellant should have gone back to the decision by the single judge and file an appeal against the decision. He failed to do so and even if he were now to rely on the provisions of Rule 37 (2) of the Court of Appeal rules, the time for the filing without leave, had expired long ago.

[13] In the circumstances leave to reinstate and amend ground 2 of the appellant's appeal is refused. In any case, the amendments submitted by the appellant to the abandoned ground 2 of the appeal do not relate to the totality of the medical evidence put to the assessors, but a mere compilation of irrelevant issues on the trial judge's general summing up.

Appeal under Ground 1

> *1. That the learned trial judge erred in law and fact when he allowed the state witness namely Adi Ema Barbara Toganivalu during the trial to identify the appellant in the dock without prior foundation of identity parade or photograph identification.*

[14] The Petitioner's argument is that the learned trial judge should not have allowed the complainant to identify the petitioner in the dock without there being a proper identity parade or photo identification. Allowing dock identification in the circumstances of this case, made the petitioner's conviction unsafe and unsatisfactory.

The Dock Identification

[15] At common law, dock identification, also referred to as in-court identification, is permissible as a general rule once the evidence of an identification parade or photographic identification has been admitted. Of its own without the support of the identification parade or photographic support of the identification parade or photographic identification, although can still be admissible, is of little probative value.

[16] The dangers of dock identification are fully analysed in the Supreme Court decision of **Naicker v The State** [2018] FJSC24; CAV0019.2018 (1 November 2018). The warning is set out at para.25 of the judgment where Keith J opined:

> *"25. The dangers of dock identification (by which is meant offering a witness the opportunity to identify the suspect for the first time in court without any previous identification parade or other pre-trial identification procedure) have been pointed out many times. The defendant is sitting in the dock, and there will be a tendency for the witness to point to him, not because the witness recognizes him, but because the witness knows from where the*

defendant is in court who the defendant is, and can guess who the prosecutor wants him to point out. Unless there is no dispute over identity, and the defence does not object to a dock identification, it should rarely, if ever, take place. If it takes place inadvertedly, a strong direction is needed to the assessors to ensure that they do not take it into account."

[17] Our Court of Appeal had also underlined these propositions, emphasizing both their inherent dangers and the need for the courts direction in these circumstances, in **Lotawa v The State** [2014] FJCA 186.

[18] Nevertheless, our courts have also in the past allowed dock identification, where the witness had seen and recognized the suspect from previous occasion(s) prior to the dock identification. Thus in **Vulaca v The State** [2011] FJCA 39, the Court of Appeal did not disapprove of the witness's dock identification of the suspect because the witness had seen under good lighting, the suspect on two previous occasions and, also there were eight defendants in the dock.

[19] It is clearly established law that whenever a case against an accused depends wholly or substantially on the correctness of the identification of the accused, and especially where the accused in his defence alleges to be mistaken, the judge should warn the jury or the assessors of the need for caution and of the danger of conviction relying on the correctness of the identification. This warning in essence is what is known as the Turnbull direction following the English Court of Appeal judgment in **R v Turnbull** [1977]1 QB 224. Keith J has succinctly summarized the Turnbull direction in Naicker's case at para. 29, as follows:

*"... Where the case depends wholly or substantially on the correctness of someone's identification of the defendant, **Turnbull** requires the judge (i) warn the assessor's of the special need for caution before convicting on the basis of that evidence, (ii) to tell the assessors what the reason for that need is, (iii) to inform the assessors that a mistaken witness can be convincing witness and that a number of witnesses can be mistaken, (iv) to direct the assessors to examine closely the circumstances in which each identification was made, (v) to remind the assessors of any specific weakness in the identification evidence, (vi) to remind the assessors (in case where such a reminder is appropriate) that even in the case of purported recognition by witness of a close friend or a relative, mistakes can occur, (vii) to specify for the assessors the evidence, and (viii) to identify the evidence which might appear to support the identification but does not in fact do so."*

[20] All these requirements would not be necessary, if dock identification had been preceded by an identification parade or photograph identification.

[21] In any event, as stated by the Supreme Court in **Nalave v The State** [2019] FJSC 27,

> *"... the discretion to allow dock identification lies with the trial judge after weighing its probative value over its prejudicial effect."(para 36).*

Consideration

[22] In this case, it is conceded by the prosecution that there was no police identification parade done for the petitioner. He was merely identified to the police by the accused on the day following the incident and also later in court, although the court had not given any direction or comments on the dock identification of the petitioner by the victim.

[23] Was there **Turnbull** direction by the trial judge? Yes, at paragraph 34 of the Summing Up, the court, in respect of all the four (4) defendants, warned:

> *"34. In considering the complainant's identification evidence of the four accuseds, as a matter of law, I must direct you as follows. First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused which the defence alleged to be mistaken, I am warning you of the special need for caution before convicting in reliance on the correctness of the identification. This is because, in the past, it had been shown that an honest and convincing witness or witnesses could be mistaken. Secondly, you must examine closely the circumstances in which the identification by each witness was made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way? Had the witness even seen the accused before? How often? Had she any special reason for remembering the accused? Was a police identification parade held? Thirdly, are there any specific weakness in the identification evidence? The answers to the above questions will determine the quality of the identification evidence. If the quality is good, the identification evidence should be accepted. If its otherwise, it should be rejected. It is a matter entirely for you.*

[24] In the case of the petitioner, the important consideration is whether the dock identification without the **Turnbull** direction would have prejudiced his defence, or in the words of the

proviso to section 23 (1) of the Court of Appeal Act 1949, would have resulted in a *"substantial miscarriage of justice"*.

[25] The Court of Appeal in **Korodrau v The State** [2019] FJCA 193 framed the question in the words of Keith J in Naicker's case [at para 38]:

> *"The critical question, therefore, is whether, ignoring the dock identification of Naicker by Naqaruqara and Draunimasi which should not have been allowed, there was sufficient evidence – albeit of a circumstantial nature – on which the assessors could express the opinion that Naicker was guilty, and on which the judge could find Naicker guilty."*

[26] In this case, the prosecution pointed to the evidence of identification of the petitioner at the Nightclub and the Karaoke bar by both the complainant and PW2, over a period of two or more hours leading up to, and during the, actual act of rape. In particular, the prosecution submitted that:

> *"a.* *The complainant had the appellant in observation for about 2 hours therefore this was not a fleeting glance. She had first seen him in bright lights near the washroom,*
>
> *b.* *She was 5 inches away from him while he raped her for 45 minutes,*
>
> *c.* *PW1 identified the appellant later the same evening to police at Ritz Nightclub as the person who assaulted her and raped her,*
>
> *d.* *PW2 saw this appellant in the Karaoke Bar punching Ema. He is referred as the old man,*
>
> *e.* *Appellant was the employee of Ritz Nightclub and present at the Club on the alleged day of offending,*
>
> *f.* *PW1 and PW2 were able to clearly able to identify the appellant among 4 men in the accused box."*

[27] In addition, there was enough or sufficient light to recognize faces in both the Nightclub and the Karaoke Bar. More importantly, all the accused conceded in their evidence, that whilst the lights were dim, they were still sufficient illumination to identify faces in both rooms.

[28] I am convinced that the answer to the critical question posed in **Naicker's Case** that is whether there is still sufficient evidence, regardless of the dock identification, for the assessors to express their opinion of guilt, in this case must be a Yes.

[29] Prematilaka JA has summarised the facts and the law concisely in the Court of Appeal's judgment at paragraph 71 as follows:

> *"In the circumstances, why the 04th appellant was not produced at the ID parade could be understood. Given the complainant's prompt and previous identification of the 04th appellant at the Ritz Nightclub in the evening on 26 June 2014, the dock identification at the trial was correctly permitted as it was not a first time dock identification. The probative value of the complainant's dock identification of the 04th appellant far outweighed its prejudicial effect, if any. Thus, the dock identification was not obnoxious to the principles in **Nalave v State** (supra). In any event his counsel had not objected to the dock identification. Further, applying the tests formulated in **Naicker v State** (supra) and **Korodrau v State** even excluding the dock identification there was overwhelming evidence establishing the 04th appellant involvement with the crime beyond reasonable doubt. Such evidence was both sufficient and credible. His own suggestion shows that he had taken the complainant inside the Karaoke Bar. Any reasonable assessors and a trial judge would have without doubt found him guilty of the charge of rape on the totality of evidence available. Thus, there is no merits in the 04th appellant's only ground of appeal where leave to appeal was granted at the leave stage."*

[30] In our view, even although there was absence of an identification parade or photograph identification of the petitioner there being only dock identification without objection from the defence and no comments from the court, there nevertheless was a Turnbull direction at the Summing Up by the trial judge, and in any event, there are sufficient evidence as set out at paragraphs 26 and 27 above, to convince the assessors and the judge of the guilt of the petitioner. There was little probative value placed in the dock identification, and in the end, there was no substantial miscarriage of justice.

Mataitoga J

[31] I have read the draft judgment of Jitoko J. I support the reasons and conclusion reached.

Qetaki J

[32] I have read the judgment in draft, and I agree with it and the reasoning.

[33] **Orders**

1. *Application for leave is refused.*
2. *Appeal is dismissed.*
3. *No order as to costs.*

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Hon. Mr. Justice Filimone Jitoko
Judge of the Supreme Court

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Hon. Mr. Justice Isikeli Mataitoga
Judge of the Supreme Court

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Hon. Mr. Justice Alipate Qetaki
Judge of the Supreme Court