

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

CRIMINAL APPEAL NO.AAU 0076 of 2015
[High Court Criminal Case No. HAC 052 of 2014]

BETWEEN : **PENISONI SAUKELEA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Gamalath, JA**
Prematilaka, JA
Bandara, JA

Counsel : **Appellant in person**
: **Mr. S. Vodokisolomone for the Respondent**

Date of Hearing : **16 November 2018**

Date of Judgment : **29 November 2018**

JUDGMENT

Gamalath, JA

[1] I read in draft the judgment of Prematilaka, JA and agree with the reasons and conclusions.

Prematilaka, JA

- [2] This appeal arises from the conviction of the Appellant by the Magistrate's Court exercising extended jurisdiction on a single count of Aggravated Robbery alleged to have been committed on 01 February 2018 at Suva in the Central Division. The charge reads as follows.

Statement of offence (a)

Aggravated Robbery contrary to section 311(1)(a) of the Crimes Decree Number 44 of 2009.

Particulars of offence (b)

Penisoni Saukelea and Metuisela Tuinaro on 01st day of February, 2014 at Suva in the Central Division robbed James Kumar of 01 Samsung Galaxy mobile valued \$900.00 assorted jewelleries valued \$400.00 and cash valued \$1000.00 to the total value of \$2,300.00 the property of the said James Kumar.

- [3] The Appellant was the first accused and the second accused was Metuisela Tuinaro whose caution interview was ruled inadmissible on 13 January 2014 after the *voir dire* inquiry. Later his application in terms of section 178 of the Criminal Procedure Code was allowed and he was acquitted by the Learned Magistrate on 15 April 2015. The Appellant's caution interview was ruled admissible and his application under section 178 was refused by the Learned Magistrate. No amended information had been filed by the prosecution after the 02nd Accused was acquitted.
- [4] After trial the Learned Magistrate had convicted the Appellant on 02 July 2015 and on 10 July 2015 sentenced him to 09 years and 07 months of imprisonment with a minimum serving period of 08 years.
- [5] The Appellant in person had applied timely for leave to appeal by way of an application for leave to appeal dated 09 July 2015 against the conviction and sentence. He had substituted the original grounds of appeal with a new set of grounds of appeal by the notice dated 10 July 2015 followed by another notice dated 11 December 2015

containing broadly articulated six amended grounds of appeal. His hand written submissions are dated 10 February 2016 and the State's written submissions are dated 13 October 2016.

[6] At the hearing into leave to appeal, the Appellant had abandoned his appeal against sentence which he reiterated before the Full Court. The single Judge of the Court of Appeal who considered the Appellants' Leave to Appeal Application refused leave to appeal on all six grounds of appeal against conviction on 30 November 2016. The Appellant had sought to renew those grounds of appeal before the Full Court in terms of section 35(3) of the Court of Appeal Act by his renewal application dated 02 December 2016. He had tendered written submissions dated 17 October 2018 while the Respondent too had filed written submissions dated 01 November 2018. It appears that the Appellant had added a couple of fresh grounds of appeal in his written submissions which had been dealt with by the Respondent in its written submissions.

[7] Thus, the broad topics covered by the grounds of appeal that would be considered in this Judgment could be itemised as follows.

- (i) *'Incompetent counsel.'*
- (ii) *'Defective charge.'*
- (iii) *'Challenge to the caution interview.'*
- (iv) *'Inconsistencies'*
- (v) *'Identification'*
- (vi) *'No direct evidence'*

[8] I shall now proceed to examine each of the above grounds.

'(i) 'Incompetent counsel (Grounds 1, 9 and 13).'

[9] The Appellant had stated in his written submissions filed prior to the leave to appeal hearing that his counsel had not been sufficiently competent and/or fearless in representing him. He has cited the failure on the part of his counsel to file closing submissions after the *voir dire* inquiry as an example of such incompetence. Although

the Learned Magistrate had referred to this omission and said that therefore he would consider only the submissions of the other accused it is clear from his Ruling that the trial Judge had fully considered the totality of evidence including that of the Appellant before allowing the Appellant's caution interview to be led at the trial. I do not think that the failure to file written submissions on behalf of the Appellant had resulted in any miscarriage of justice.

- [10] On the other hand after the leave to appeal Ruling the Appellant seems to have abandoned his earlier criticism of his counsel and changed his stance, in that his written submissions filed thereafter states that the Learned Magistrate had not given him sufficient time to instruct his counsel on his defence coupled with the fact that several counsel had represented him. His complaint is with regard to the *voir dire* inquiry.
- [11] Upon a perusal of the case record I find that the Appellant had been on bail from 10 July 2014 and the *voir dire* inquiry had commenced on 08 December 2014 as fixed on 19 November 2014. In the circumstances, the Learned Magistrate had refused the Appellant's application for an adjournment on the basis that he could not find any reason for the Appellant not to go and give instructions to the counsel of the Legal Aid Commission. His counsel, Mr. Vuki had appeared throughout the *voir dire* inquiry for the Appellant.
- [12] I have examined the Appellant's evidence at the *voir dire* inquiry and he had taken up the position that he was threatened by sergeant Mika that he would be taken to the Army Camp if he did not admit the commission of the offence. He had feared for his life and 'voluntarily' made the caution statement. However, this position had not been suggested to D/Sgt. 2560 Mikaele Koro (sergeant Mika) when he was cross-examined by the Appellant's counsel. Nevertheless, the Learned Magistrate had not considered that failure against the Appellant. In any event the Appellant had not made any complaint of such a threat to the Magistrate when he was first produced in court.

- [13] Further, this position had not been put to Mikaele Koro under cross-examination at the trial on 09 April 2015 (after three months from the *voir dire* Ruling). Moreover, I note that the Appellant had not said anything more on this matter while giving evidence later at the trial but had even attempted to explain why no question was put to sergeant Mika at the *voir dire* inquiry. The Appellant had not at any stage disclosed what instructions he could not give to his counsel due to insufficient time regarding the *voir dire* inquiry. Therefore, it could be safely assumed that the Appellant had no more instructions to give to his counsel other than that he was made to make the confessional statement under threat and therefore should not be admitted in evidence. The Magistrate had fully considered that position in the *voir dire* Ruling.
- [14] The Appellant also complains of his *alibi* notice not having been filed by his counsel and him not calling witnesses to support the *alibi* at the *voir dire* inquiry. *Voir dire* inquiry was conducted to determine the voluntariness of the caution interview and the Appellant's position had been that he made it under threat. Therefore, *alibi* notice and *alibi* evidence could not have been of any relevance at the *voir dire* inquiry. In any event I note that even at the trial the Appellant had not made any application to call any witnesses to support his *alibi*.
- [15] In those circumstances, I do not think that any miscarriage of justice had resulted in the Learned Magistrate refusing the Appellant's application for an adjournment to commence the *voir dire* inquiry. I reject the first ground of appeal.

'Defective charge (Grounds 2, 3, 4, 5 and 7).'

- [16] This ground of appeal had not been raised in this form at the leave to appeal stage but the Appellant had contended that the Trial Judge had wrongly applied the principle of joint enterprise after the acquittal of the co-accused. The single Judge refused leave on that ground on the basis that the evidence clearly shows the participation of two men acting together in the robbery and the principle of joint enterprise still applied. I am in agreement with that ruling.

- [17] The Appellant now submits that the trial was held on two different sets of charges under section 310 and 311(1) and (2) of the Crimes Decree, 2009 (now Crimes Act, 2009). This contention seems to be rather misconceived. The Charge dated 04 February 2014 makes it clear that the Appellant and the co-accused Metuisela Tuinaro had been charged for Aggravated Robbery under section 311 (1) (a) of the Crimes Decree, 2009 and not under section 310 of the Crimes Decree. The Learned Magistrate had made no mistake in referring to this charge in the Judgment dated 02 July 2015.
- [18] The words ‘in the company with one or more other persons’ in section 311(1) (a) was not there in the Charge and it was not necessary to insert those words as both the Appellant and the co-accused were charged under one Charge and therefore the necessary and only logical implication was that each one had committed the offence in the company of the other. The appellant should be deemed to know this all along. But it is a good practice to always use the words ‘in the company of each other’ under the particulars of the offence in this type of situations. However, no serious complaint can be made of the omission of the aforesaid words. The Appellant cannot be said to have been misled in his defence. Nor can he be said to have been prejudiced by the said omission.
- [19] The following are examples where such omissions or errors in charges have been held not to be fatal to the outcome of the trial. In Koroivuki v State CAV7 of 2017:26 October 2017 [2017] FJSC 28 the petitioners had been charged with aggravated robbery under section 311 (1)(a) of the Crimes Decree but the particulars of the offence had read Isoa Koroivuki and Tila Williams on the 7th day of August, 2011, Suva in the Central Division, stole....’. The Supreme Court said

‘[49] However, no prejudice was caused to the petitioners. They knew at all times that the charge they were facing was one of aggravated robbery. They knew that what they were supposed to have done amounted to robbery, and not just theft, because they knew that they were alleged to have used force on Yuan Hua Ye immediately before they stole the items referred to in the particulars of the offence. And they knew that what was supposed to have made this robbery an aggravated one was that there had been more than one of them at the time. But good practice requires the particulars of the offence to

match the statement of the offence. That would not have been difficult in this case. The Particulars of Offence should have read:

Isoa Koroivuki and Tila Williams on the 7th day of August, 2011, in Suva in the Central Division, in the company of each other, robbed Yuan Hua Ye of [the items stolen], the property of Yuan Hua Ye..' (emphasis added)

[20] However, after the co-accused was acquitted at the end of the prosecution case the charge should have been amended to state that the Appellant committed the aggravated robbery 'in company with another' because section 311(1)(a) requires the commission of the robbery by one person in company with one or more other persons. Yet, this omission also cannot be said to have misled the Appellant in his defense or caused such a prejudice to the Appellant as to be fatal to the conviction.

[21] In **Skipper v Reginam** Criminal Appeal No 70 of 1978: 29 March 1979 [1979] FJCA 6 the Court of Appeal held

'Section 3 of the Indictments Act 1915 (U.K.) is, for the purposes of the present question, in the same terms concerning the framing of charges as section 123 of the Criminal Procedure Code. A line of cases has now established that, if it is clear that no embarrassment or prejudice was caused by an omission to state the required particulars correctly, the proviso would be applied and the appeal would be dismissed. It is sufficient to cite instances in R. v McVitie, 44 C.A.R. 201; R v Power 66 C.A.R. 159; R v. Yule 47 C.A.R. 229 and R. v. Miller and Hanomer (1959) Crim. L.R. 50. Clifford Nelson 65 C.A.R. 119 in another case and further reference will be made to it.(emphasis added)

[22] Similarly there is no merit in the submission of the Appellant that the police officer when charging him had used the word 'stole' instead of the word 'robbed' and thus the charge and the particulars were not matching causing prejudice to him, for the charging officer had clearly indicated to the Appellant that he was being charged for the offence of aggravated robbery contrary to section 311 (1)(a) of the Crimes Decree. The use of the word 'stole' at the charging stage could not have caused any prejudice to the Appellant at the trial.

[23] Therefore, assuming but not conceding that there is any merit in the Appellant's complaint this is an appropriate situation to apply the proviso under section 23 of the Court of Appeal Act and dismiss this ground of appeal.

[24] I reject the second ground of appeal.

'Challenge to the caution interview (Grounds 10, 11 and 12).'

[25] The Appellant submits under this ground that the Learned Magistrate had made a wrong assessment of the circumstances in which his caution interview was conducted where his rights had not been fully or adequately explained causing unfairness leading to a substantial miscarriage of justice. This is in some way connected to Ground 01. The Appellant seems to be also aggrieved by the Learned Magistrate having rejected the co-accused's caution interview but proceeded to accept his caution interview as being voluntary. He argues that the trial Judge had shifted the burden to him by stating that he had not made a complaint of any threat to the Magistrate. He also complains of the fact there was no other officer present at the interview.

[26] The Appellant also submits that the Learned Magistrate had not considered whether there is more general unfairness exists in the way in which the police behaved perhaps acting in breach of Judges Rules in the final judgment based on the decision in **Ganga Ram and Shiu Charan v Reginam** Criminal Appeal No.46 of 1983: 13 July 1984.

[27] To what extent a trial judge should give reasons for any procedural ruling has been dealt with by the Supreme Court in **Lesi v State** CAV0016 of 2018: 01 November 2018 [2018] FJSC 23 where it was held following **Wallace v. R** [1997] Cr App R 396 that there was no obligation on the judge to give reasons for his ruling and disagreed with the complaint that the judge should have given reasons. The Supreme Court said

'[59] In Fiji, it has been the practice in trials before the High Court where there have been voir dire inquiries, for the trial judge to give a ruling with an economy of words. This is mainly to avoid situations at the trial which follows any bias on the part of the trial Judge.'

'[60] The Privy Council in Wallace v. R [1997] 1 Cr App R 396 stated that there is no rule of general application that a judge should give

reasons for any procedural ruling made in the course of a trial within a trial. There may be circumstances where it would be unwise to give reasons which the accused would conclude that he would not be believed on the general issue if he chose to give evidence.'

'62] The ruling on the voir dire inquiry of the learned trial though economically worded was sufficiently reasoned out. His directions to the Assessors in his summing up regarding the confessions has been adequate and therefore the contention of the 2nd Petitioner as well as the 1st Petitioner based on their confessions being inadmissible is without merit....'

'[85] But the complaint proceeds on the assumption that the judge should have given reasons for his ruling. The judge himself cited what O'Regan JA had said in Kalisogo v Reginam (Criminal Appeal No 52 of 1984) at p 9, namely that "in giving a decision after a trial within a trial there are good reasons for the Judge to express himself with an economy of words". But giving one's reasons economically is different from not giving any reasons at all, and so one needs to look elsewhere for the answer. It is not hard to find. The issue was addressed head on by the Privy Council in Wallace and Fuller v Reginam [1997] 1 Cr App R 396, to which Chandra J has referred. In that case the judge gave no reasons for finding that the statements under caution were admissible, beyond stating that he found them to be voluntary, and it was contended in the Privy Council that a judge should always express his reasons for any procedural ruling given during a trial. The Privy Council rejected that contention, saying that it all depended on the particular circumstances of the case. Good practice may require a reasoned ruling, for example, where the judge was deciding a question of law so that his reasoning could be reviewed on appeal, or where the judge was deciding a mixed question of law and fact so that the law could be put in context, or where the judge was exercising a discretion in circumstances in which the existence of the discretion was in issue.'(emphasis added)

- [28] Thus, it can be safely assumed that at least where there is no medical evidence corroborating the accused's version at the *voir dire* inquiry, the pronouncements in Lasi would apply meaning that there is no rule of general application that a trial judge should give reasons for any procedural ruling made in the course of a *voir dire* inquiry but in Fiji, as a good practice the trial judge may give a ruling with an economy of words where there has been a trial within a trial.

- [29] I have examined the Ruling of the Learned Magistrate dated 13 January 2014 carefully and find that he had started by referring to the Appellant's objection to the admission of his confessional statement on the basis that it was obtained through oppression at Totogo Police Station by D/Sgt 2560 Mikaele Koro who was the interviewing officer and also that his Constitutional Rights were not given. He had referred to the evidence of all 04 police officers and the evidence of the Appellant. He had referred to helpful decision in Wong Kam-ming v The Queen (1980) A.C. 247, P.C., Ganga Ram and Shiu Charan v Reginam Criminal Appeal No.46 of 1983: 13 July 1984 and Priestly v. R (1965) Cr App R 1 in respect of the legal tests applicable to the admission of a caution interview. He has identified that the burden is on the prosecution and the standard of proof is beyond reasonable doubt and cited Miller v. Minister of Pensions (1947) 2 All ER 372 to describe what a reasonable doubt means. As pointed out in the leave to appeal Ruling, there is nothing to suggest that the trial Judge had made a complete wrong assessment of the evidence at the *voir dire* Ruling. Nor could it be said that he had failed to consider the relevant legal principles.
- [30] I do not think that the Magistrate's reference to the Appellant's failure to make a prompt complaint of the alleged threat to court in the first instance could be described as shifting the burden of proof but he had rather referred to that as a matter affecting the credibility of the Appellant's version. On the other hand the trial Judge had not found anything to discredit the police officers. He had also been impressed by their demeanour.
- [31] I also do not think that the absence of another officer at the interview other than the interviewing officer D/Sgt 2560 Mikaele Koro *per se* defeats the voluntariness of the caution interview though it is always preferable and a good practice to have a witnessing officer. Mikaele Koro had explained at the trial why he could not have another officer in attendance at that time and he had not been questioned further on that at the *voir dire* inquiry.
- [32] I also find from the caution interview that the interviewing officer had apprised the Appellant of his Constitutional Rights of consulting a lawyer or having a member of his family at the interview and the Appellant had declined to exercise any of them.

[33] Therefore, considering the totality of the impugned *voir dire* Ruling I am of the view that it measures up to or goes beyond what is envisaged in Lasi. It is certainly more than a ruling with an economy of words and cannot be faulted.

[34] I have also considered the judgment dated 02 July 2015 to see whether the Learned Magistrate after admitting the Appellant's caution interview, had failed to deal with any general grounds of alleged unfairness including the breach of Judges Rules in the behaviour of the police as part of the trial proper. He had said in the judgment as follows.

'PW2 was DSgt 2560 Mikaele, the interviewing officer of the 1st accused as well as the investigating officer. There was no ID parade to identify the suspects. He conducted the interview on 01/02/2014 in Totogo Police Station. The accused was given all his rights and was given a break during the interview. The interview was marked as PE-01. In cross-examination the officer said he recorded the complainant statement on the same date. The accused was not forced to admit. The complainant identified the 1st accused in the cell and at that time there were other suspects there.'

'7. The 1st accused in his evidence denied committing this offence. He said on that day he was at home with his wife and daughter and was not in that pawn shop. He also denied visiting that shop on 31/01/2014 to pawn some rugby boots. The police came and arrested him and threatened to admit the offence. The accused did not accept the identification also in the court. In cross-examination the accused said the complainant identified him in the court because he has seen him in the police station when he was arrested. The police threatened him to admit and did not give a chance to read the statement. They wrote whatever they like and told him to sign. On that day, he was with his wife and daughter. The accused admitted they were not present to give testimony.'

[35] Thus, the Learned Magistrate had in fact referred in ample detail to the Appellant's contentions but perhaps not specifically referred to the absence of another officer at the caution interview. I have already adverted to this aspect earlier and held that this omission is not fatal to the voluntariness of a caution interview and may add that the failure to refer to that omission on the part of the police in the judgment is not fatal to the conviction either.

[36] Accordingly, I reject third ground of appeal too.

'Inconsistencies (Grounds 14 and 15)'

[37] The Appellant has submitted under this new ground of appeal which was not urged before the single Judge that the Learned Magistrate had not considered some inconsistent evidence fatal to the conviction resulting in grave and substantial miscarriage of justice. Some alleged inconsistencies relate to the interviewing officer's evidence and the complainant's evidence. The Appellant had cited the decisions in **Singh v The State** CAV0007U of 2005S: 19 October 2006 [2006] FJSC 18 and **Ram v State** CAV0001 of 2011: 9 May 2012 [2012] FJSC 12 which have dealt with situations where a witness has made a statement on oath directly inconsistent with evidence he or she gives in court and particularly when that evidence implicates the accused person.

[38] I have examined all the alleged inconsistencies highlighted by the Appellant in his written submissions and find that they are, firstly not material inconsistencies and secondly, they do not directly implicate the Appellant. They are mostly on peripheral matters which do not shake the basic version of the interviewing officer or the complainant. Neither do they go to the root of the conviction.

[39] In **Nadim v State** AAU0080 of 2011: 2 October 2015 [2015] FJCA 130 the Court of Appeal made some important remarks on this issue and they were followed in **Nalave v State** [2017] AAU0096 of 2013:14 September [2017] FJCA 108

*'....., the weight to be attached to any inconsistency or omission depends on the facts and circumstances of each case. No hard and fast rule could be laid down in that regard. The broad guideline is that discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance (see **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280).'*

- [40] The Indian Supreme Court held in Bharwada Bhoginbhai Hirjibhai v State of Gujarat (supra)

“Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important "probabilities-factor" echoes in favour of the version narrated by the witnesses. The reasons are: (1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen; (3) The powers of observation differ from person to person. What one may notice, another may not. It is unrealistic to expect a witness to be a human tape recorder;”

- [41] Therefore, I do not find any merit in the fourth ground of appeal and reject the same.

‘Identification (Grounds 16, 17, 18 and 19) ’

- [42] The Appellant also complains that the Learned Magistrate had not followed Turnbull Guidelines (Turnbull [1977] QB 224/ R v Turnbull 1976, 63 Cr App R 132) in accepting the complainant’s dock identification. The Court of Appeal (UK) said in Turnbull

"In our judgement when the quality is good as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the Jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it".

"When in the judgement of the Trial Judge, the quality of the identifying evidence is poor as for example when it depends solely on a fleeting glance, or on a longer observation made in difficult conditions, the situation is very different. The Judge should then withdraw the case from the Jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification".

- [43] In **Mills & Others v The Queen** (1995 CLR 884 and TLR 1/3/95) the Privy Council emphatically rejected the mechanical approach to the Judge's task of summing up stating that

'R v Turnbull was not a Statute and did not require an incantation of a formula - the Judge did not need to cast his directions in a set form of words'.

'All that was required of him was that he should comply with the sense and spirit of the guidance in Turnbull'.

- [44] In **R v Keeble** (1983) Crim. and **R v Curry** and LR 73, the Court of Appeal dismissed the appeal stating that the warning in Turnbull, was not intended to deal with every case involving a minor identification problem (following **Oakwell** 1978, 66 Cr. App. R. 174) but only with the ghastly risk run in cases of fleeting encounters.

- [45] A Turnbull direction need not be provided unless the prosecution case depends wholly or substantially on visual identification. However, where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused – which the defence alleges to be mistaken – the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification(s). The judge should tell the jury that: caution is required to avoid the risk of injustice, a witness who is honest may be wrong even if they are convinced they are right, a witness who is convincing may still be wrong, more than one witness may be wrong, a witness who recognises the defendant, even when the witness knows the defendant very well, may be wrong.

- [46] Then, in giving the Turnbull direction the judge should direct the jury to examine the circumstances in which the identification by each witness can be made. Some of these circumstances may include the length of time the accused was observed by the witness, the distance the witness was from the accused, the state of the light (visibility), obstructions blocking the witness's view, whether the accused had been known or seen before, any other reason for the witness to remember who he saw, the length of time elapsed between the original observation and the subsequent identification to the police or identifying the accused at an identification parade,

errors or discrepancies between the first description of the accused seen given by the witness to the police and the actual appearance of the accused.

[47] The trial Judge had dealt with the issue of identification as follows.

'13. The State is relying on the direct and the documentary evidence. The direct evidence is coming from the complainant where he said on that day two people came to his shop and stole items. One of the people threw punches at him. He identified the 1st accused as the person who entered in to his shop on that day through the gap.

14. He also identified the 1st accused in the court (dock identification) which was objected by the counsel for the accused. There was no ID parade conducted by the police after the accused was arrested and he was identified in the cell which I consider was conducted in an improper manner.

15. However, there is evidence to show that this identification was more of recognition by the complainant. According to him, the 1st accused on 31/01/2014 came to his shop to pawn some rugby boots. The accused was at shop for nearly 01 minute and he recognized him when he came to rob his shop on 01/02/2014.

16. I have further considered the Turnbull guidelines and satisfied of the identification made by the complainant. The accused was in his shop for nearly 05 minutes in broad day light and in such a close distance I do not believe he would make a mistake about the identification. Therefore even without an ID parade I think I can consider the identification made by the complainant in the court.'

[48] This is not a case where the prosecution case depends wholly or substantially on visual identification, for the caution interview of the Appellant alone is sufficient to bring home the charge of aggravated robbery against the Appellant. Therefore, I do not think that a Turnbull direction in its full force should be insisted upon in this case. Yet, the Learned Magistrate had said that he paid due regard to those guidelines. In any event, this is not a case of a fleeting glance as the complainant had seen the Appellant on two consecutive days in broad daylight at close quarters for a period of time long enough to recognise him at the trial.

[49] In the circumstances I find myself in agreement with the following observations of the single Judge

“[8] At trial, the appellant’s trial counsel challenged the identification evidence, but the trial magistrate found the identification evidence reliable after applying the Turnbull guidelines. This was not case of a fleeting glance to make the identification unreliable. The victim had recognized the appellant as the same person who had come to his shop a day before the alleged incident to sell rugby boots. The appellant was inside the shop for about 5 minutes and the identification was made in broad daylight. There is no arguable ground to suggest that the trial magistrate’s assessment of the identification evidence was wrong.”

- [50] Further, it was held by the Privy Council in **Maxo Tido v The Queen** (2010) 2 Cr. App. R23, PC, [2011] UKPC 16

“17. Dock identifications are not, of themselves and automatically, inadmissible. In Aurelio Pop v The Queen [2003] UKPC 40 the Board held that, even in the absence of a prior identification parade, a dock identification was admissible evidence, although, when admitted, it gave rise to significant requirements as to the directions that should be given to the jury to deal with the possible frailties of such evidence

—
‘that it is important to make clear that a dock identification is not inadmissible evidence per se and that the admission of such evidence is not to be regarded as permissible in only the most exceptional circumstances. A trial judge will always need to consider, however, 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.’

- [51] Therefore, the Learned Magistrate cannot be faulted for accepting the identification of the Appellant in court by the complainant for the reasons set out in his judgment as quoted above despite having no identification parade. It would have been preferable to have an identification parade after the arrest of the Appellant but I do not think that the omission to hold one had necessarily imperilled a fair trial.

- [52] Thus, there is no merit in the fifth ground of appeal and I reject it.

‘No direct evidence (Ground 20)’

[53] The Appellant's complaint here is that there was no evidence supporting the complainant's evidence on the pawning of rugby boots by the Appellant and he states that this ground is connected to the above ground on identification discussed earlier. Therefore, no further discussion is necessary on this sixth ground of appeal separately.

[54] Before parting with this judgment I am inclined to quote from **Rahiman v State** CAV0002 of 2011: 24 October 2012 [2012] FJSC 24, which I think is applicable to the present case.

'(21) In Director of Public Prosecutions v Ping Lin 1976 AC575 Lord Salmon made the following observations regarding the Judge's task when considering the evidence before him, to assess its implications as follows:

'The Court of Appeal should not disturb the judge's findings merely because difficulties in reconciling them with different findings of fact, on apparently similar evidence, in other reported cases but only if it is completely satisfied that the judge made a wrong assessment of the evidence before him or failed to apply the correct principle-always remembering that usually the trial judge has better opportunities of assessing the evidence than those enjoyed by an appellate tribunal.' (emphasis added)

[55] I am of the view that on the totality of evidence the conviction is neither unsatisfactory nor unsafe and there is no reason to interfere with the conviction of the Appellant on any of the grounds set out in section 23 of the Court of Appeal Act.

[56] Therefore, I conclude that the appeal should stand dismissed and the conviction should be affirmed.

Bandara, JA

[57] I have read in draft the judgment of Prematilaka, JA and agree with the reasons and conclusions.

The Orders of the Court are:

1. *Appeal is dismissed.*
2. *Conviction is affirmed.*



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.....
Hon. Mr. Justice S. Gamalath
JUSTICE OF APPEAL

A handwritten signature in blue ink, appearing to be "C. Prematilaka".

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

A handwritten signature in blue ink, appearing to be "W. Bandara".

.....
Hon. Mr. Justice W. Bandara
JUSTICE OF APPEAL