

IN THE SUPREME COURT OF FIJI  
[CRIMINAL APPELLATE JURISDICTION]

CRIMINAL PETITION No: CAV 7.2017  
(On Appeal from Court of Appeal No: CAV0012.2017)

BETWEEN : ISOA KOROIVUKI

TILA WILLIAMS

Petitioner

AND : THE STATE

Respondent

Coram : Hon. Mr. Justice Saleem Marsoof, Judge of Supreme Court  
Hon. Mr. Justice Sathya Hettige, Judge of the Supreme Court  
Hon. Mr. Justice Brian Keith, Judge of the Supreme Court

Counsel : 1<sup>st</sup> Petitioner In Person  
Mr. S. Waqainabete for the 2<sup>nd</sup> Petitioner  
Ms. P. Madanavosa for the Respondent

Date of Hearing: 13 October 2017

Date of Judgment: 26 October 2017

JUDGMENT

Saleem Marsoof, J

- [1] The 1<sup>st</sup> Petitioner, who appears in person, has made a timely application for leave to appeal against his conviction which was affirmed by the Court of Appeal [Chandra JA, Fernando JA and Rajasinghe JA] by its impugned judgment dated 26<sup>th</sup> May 2017.
- [2] The 2<sup>nd</sup> Petitioner who is represented by counsel, has also sought leave to appeal against his conviction, which was affirmed by the said judgment of the Court of Appeal.

However, his application is a few days out of time, and most significantly, in the application filed by the 2<sup>nd</sup> Petitioner, there was no prayer for enlargement of time to seek leave to appeal.

- [3] When the Court questioned Mr. Waqainabete, who represented the 2<sup>nd</sup> Petitioner in this regard, he appeared not to have realized that it was out of time. He therefore, made an oral application on behalf of his client for the indulgence of the Court, and moved for enlargement of time.

*The factual matrix*

- [4] The Petitioners were jointly charged with one count of Aggravated Robbery contrary to Section 311(1)(a) of the Crimes Act No. 44 of 2009. On 15<sup>th</sup> August 2012 both Petitioners were found guilty after trial in the Magistrates Court acting under extended jurisdiction, and both Petitioners were convicted accordingly.
- [5] The Petitioners were sentenced on 27<sup>th</sup> August 2012, the sentence imposed on the 1<sup>st</sup> Petitioner, Isoa Koroivuki being imprisonment for a term of 9 years and 1 month, while the 2<sup>nd</sup> Petitioner, Tila Williams was sentenced to 9 years and 7 months imprisonment. The Court fixed a non-parole period of 7 years for each of the Petitioners.
- [6] The Petitioners jointly moved the Court of Appeal for leave to appeal against conviction and sentence. Their amended grounds against conviction that were considered initially by a single judge of the Court of Appeal [Chandra J] in his Ruling dated 2<sup>nd</sup> March 2016 were as follows:-
- (i) The learned trial Magistrate erred in law and in fact when he did not direct his mind to the offence of receiving stolen property which was available on the evidence adduced;
  - (ii) The learned trial Magistrate erred in law and in fact when he did not disregard the answers contained in the caution interview of the 1<sup>st</sup> Petitioner implicating the 2<sup>nd</sup> Petitioner which was not evidence against the 2<sup>nd</sup> Petitioner;

- (iii) The learned trial Magistrate erred in law and in fact when he did not caution himself about the disputed confession contained in the interview statement of the 1<sup>st</sup> Petitioner;
- (iv) The learned trial Magistrate erred in law and in fact when he did not consider that the circumstantial evidence against the 2<sup>nd</sup> Petitioner was too weak to prove the charge beyond reasonable doubt;
- (v) That the learned trial Magistrate erred in law and in fact when he allowed dock identification in the absence of compliance with the Turnbull guidelines which was prejudicial to the Petitioners; and
- (vi) That Petitioners were prejudiced due to lack of legal representation.

[7] With respect to their sentence, the main grounds urged by the Petitioners were that the learned trial Magistrate erred in principle, and also failed to take into account the following relevant considerations:-

- a) Further reduction in sentence was not given considering the following mitigating factors:
  - (i) recovery of items
  - (ii) no weapons used
  - (iii) complainants were not harmed
- b) The trial Magistrate erred in only considering 11 months as remand period which was less than the actual remand period. Remand period of about 1 year 16 days in the case of the 1<sup>st</sup> Petitioner and 1 year and 13 days in the case of the 2<sup>nd</sup> Petitioner were not taken into account as separate mitigating factors in reducing the sentence.

[8] In his Ruling dated 2<sup>nd</sup> March 2016, Chandra J granted leave to appeal on ground (v) out of the grounds urged by the Petitioners against conviction and ground (b) of the grounds pleaded against sentence.



[9] The grounds on the basis of which leave was granted by the single judge of the Court of Appeal were considered by the Court of Appeal [Chandra JA, Fernando JA and Rajasinghe JA] in the impugned judgment of that court dated 26<sup>th</sup> May 2017.

[10] Since the Court of Appeal had by its judgment of 26<sup>th</sup> May 2017 partially allowed the appeal against sentence varying the terms of imprisonment of the Petitioners, the present applications of the Petitioners are against the decision of the Court of Appeal to dismiss their appeal against conviction, which was based on a single ground of appeal, namely that “the learned trial Magistrate erred in law and in fact when he *allowed dock identification in the absence of compliance of the Turnbull guidelines* which was prejudicial to the Petitioners”.

*The application of the 1<sup>st</sup> Petitioner for leave to appeal*

[11] The First Petitioner, in his petition of appeal lodged in this Court dated 1<sup>st</sup> June 2017 notified the Court of the following grounds of appeal:-

(i) That the Court of Appeal erred in law in holding that no miscarriage of justice occurred in the circumstances when there was *no compliance with the Turnbull guidelines*.

(ii) That the Court of Appeal erred in law in not holding that the *identification in the dock* for the first time and non-mention of the Petitioner’s name on the police witness statement is a miscarriage of justice.

(iii) The Court of Appeal erred in law in failing to make an *independent assessment on the evidence* (caution interview and charge statements) of its admissibility in affirming the decision of the Magistrates Court.

[12] However, when this application was taken up for hearing on 13<sup>th</sup> October 2017, the 1<sup>st</sup> Petitioner handed over in open Court his hand written submissions in which he confined his appeal to the following two grounds:-

(1) That the learned Magistrate erred in law by convicting your humble appellant for an evidence of *identification on dock* for the first time *without the compliance of Turnbull guidelines and the procedure outlined in the Identification Evidence Act*.

- (2) That the learned Magistrate and the Court of Appeal erred in law in failing to make an *independent assessment* of the evidence (Caution Interview and Charge Interview Statements) of its admissibility in affirming the decision of the Magistrate Court.

[13] With respect to ground (1) raised by the 1<sup>st</sup> Petitioner, it is noteworthy that the only ground on which leave to appeal had been granted and which has been comprehensively considered by the Court of Appeal in paragraphs [8] to [24] of the judgment of the Court of Appeal related to the identification of the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners at the scene of the crime.

[14] While the 1<sup>st</sup> Petitioner was unrepresented before this Court, he stated that he entirely relies on his written submissions handed over to the Court on the day of the hearing. From a perusal of his written submissions it is clear that the essence of his submission is that in the absence of an identification parade, the failure to comply with the *Turnbull guidelines* caused a grave miscarriage of justice.

[15] In *R v Turnbull* (1977) Q.B.224, [1976] 3 WLR 445, [1976] 3 All ER 549, at 551 to 552, Lord Widgery CJ articulated special guidance on visual identification in the following words:

“First, whenever 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 or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words. Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. *How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the*



*original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance. If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence. Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made. All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger."*(Emphasis added)

- [16] The guidelines enunciated by Lord Widgery CJ have been consistently recognised and applied in Fiji, subject of course to the qualification that in Fiji cases of serious crime come up before assessors and not a jury. For the purpose of this judgment I do not have to traverse that distinction, but what is important in this case was that the trial was before a Magistrate who was exercising extended jurisdiction, and there was neither jury nor assessors to assist him.
- [17] Unfortunately, the learned Magistrate has not adverted to the Turnbull guidelines in the course of his judgment dated 15<sup>th</sup> August 2012, and as already noted, the only ground on which leave to appeal was granted by the single Judge of the Court of Appeal against the conviction of the Petitioners related to the dock identification and the alleged non-compliance with the Turnbull guidelines.
- [18] The 1<sup>st</sup> Petitioner had been identified by two witnesses, Sireli Watiroko, the security guard at Solander Pacific where the robbery in question took place, who had known the 1<sup>st</sup> Petitioner earlier when he himself was working at Solander Pacific. The other witness was Mareta Tuisawau, to whom the 1<sup>st</sup> Petitioner had handed over a black bag which contained some of the items taken from the victim of the aggravated robbery. In

paragraphs [16] to [18] of his impugned judgment of the Court of Appeal, His Lordship Chandra JA has specifically dealt with this aspect of the matter in the following manner:-

“[16] The learned Magistrate in the present case did not refer to the Turnbull guidelines in his judgment nor did he say that it was inappropriate to apply the guidelines. Therefore, it would be necessary to see whether any material prejudice was caused to the Appellants by the manner in which the learned Magistrate was satisfied as to their identification.

[17] It is clear from the evidence of witness Sireli, that he had known the 1<sup>st</sup> Appellant [1<sup>st</sup> Petitioner before this Court] well as he was working for Solander and that on the day in question he had come up to him at about 11am and wanted to go in to see Joe Pita at Solander. He further stated that the weather was fine and that the 2<sup>nd</sup> Appellant [2<sup>nd</sup> Petitioner before this Court] was with him at that time and that they were about 1 metre away from him. It was therefore possible for him to have identified the 2<sup>nd</sup> Appellant as he had recognized him as the person who had come to his house once. He had also seen the two of them when they were going out although they were about 3 metres away. The witness went on to say that when they went in they did not have a bag but that the 1<sup>st</sup> Appellant was carrying a bag on the way out. The witness also stated that the 1<sup>st</sup> Appellant was wearing a cap on the way in but was without it on the way out. *The learned Magistrate referred to these matters in arriving at his conclusion. These items of evidence contained matters that would have been necessary, In respect of identification even according to the Turnbull Guidelines.* The learned Magistrate has considered these items of evidence regarding his conclusion on recognition.

[18] In his judgment the learned Magistrate also stated that he noted the evidence of the 1<sup>st</sup> Appellant [1<sup>st</sup> Petitioner before this Court] in Court and that *he does not believe his evidence but was accepting his version as detailed in his caution interview.* The caution interview statement of



the 1<sup>st</sup> Appellant was admitted after the *voir dire* inquiry wherein he had confessed to the commission of the robbery.”

- [19] I have no reason to disagree with the reasoning of his Lordship Chandra JA with whom Fernando JA and Rajasinghe JA have concurred. This was not a case of a “fleeting glance” but clearly a case of recognition of a person who was well known. Even in such a case, it is still necessary to apply the Turnbull guidelines as Chandra JA acknowledged in paragraph [14] of his judgment. In any event, even without reference to the guidelines, the learned Magistrate has dealt with the question of identification fairly causing no prejudice to the Petitioner. In the circumstances, in my considered view, ground (1) raised by the 1<sup>st</sup> Petitioner does not meet the stringent threshold criteria laid down in section 7(2) of the Supreme Court Act, No. 14 of 1998 for granting leave to appeal.
- [20] This brings me to ground (2) which is the 1<sup>st</sup> Petitioner’s only other ground of appeal set out in paragraph [10] of this judgment. Under this ground, the 1<sup>st</sup> Petitioner complains that the learned Magistrate and the Court of Appeal erred in law in failing to make an *independent assessment of the evidence* (Caution Interview and Charge Interview Statements) of its admissibility in affirming the decision of the Magistrate Court.
- [21] This is a new ground which was never taken up by the 1<sup>st</sup> Petitioner or argued during the leave stage or even before the full bench of the Court of Appeal. In *Tuwai v State* [2016][2016] FJSC 35; CAV0013.2015 (26 August 2016), this Court held that where new grounds of appeal are raised for the first time which were not raised in the court below, this Court may only allow it in the most exceptional circumstances. At paragraph [89] of the said judgment, her Ladyship Wati J, with whom Chandra J and Ekanayake J concurred, made the following pertinent observation:-

“Due to the volume of cases in which fresh grounds are sought to be argued in the Supreme Court, it is now timely that the Court takes a strict approach in deciding whether new grounds should be permitted to be argued. It must not be a routine in this Court to allow every petitioner to argue new grounds. I feel that it is proper that those grounds should only be allowed if the petitioner can establish that:



- (a) there are sufficient *evidentiary record* to resolve the issue;
- (b) it is not an instance in which the petitioner for *tactical reasons* failed to raise the issue at trial and/or the appellate court below, and
- (c) the significance of the new grounds on the *special leave criteria* is compelling making it a most exceptional case to grant leave.”(*Emphasis added*)

[22] While in my considered opinion, the 1<sup>st</sup> Petitioner would not have any difficulty on the basis of the matters set out in sub-paragraphs (a) and (b) of the above quoted *dictum*, the special leave criteria adverted to in sub-paragraph (c) of the *dictum*, by which her Ladyship was referring to the stringent criteria that need to be satisfied for the grant of leave to appeal in terms of section 7(2) of the Supreme Court Act, No. 14 of 1998.

[23] For the foregoing reasons, I am of the opinion this ground (2) urged by the 1<sup>st</sup> Petitioner is devoid of merit, and in any event do not satisfy the criteria for grant of leave to appeal contained in section 7(2) of the Supreme Court. I find no basis for granting leave to appeal to the 1<sup>st</sup> Petitioner on this ground.

*The application of the 2<sup>nd</sup> Petitioner for enlargement of time for seeking leave to appeal*

[24] The exclusive jurisdiction of the Supreme Court of Fiji to hear and determine appeals from all final judgments of the Court of Appeal is derived from section 98(3)(b) of the Constitution of the Republic of Fiji, 2013. Section 98(4) of the Constitution of the Republic of Fiji provides that an appeal may not be brought to the Supreme Court from a final judgment of the Court of Appeal unless the Supreme Court grants leave to appeal.

[25] While there is no provision in the Constitution or any other law setting out the procedure and time limits for lodging an application seeking special leave to appeal from this Court, Rule 4 of the Supreme Court Rules 2016 (Legal Notice No. 84) published in the Extraordinary Government of Fiji Gazette Supplement bearing No. 34 dated 31<sup>st</sup> October 2016, provides that an application for leave to appeal “must be by way of Petition” and also prescribes the requisites and format of such Petition, in particular that it “shall be supported by an affidavit verifying the allegations made in the Petition.”

[26] Rule 5 (a) of the said Supreme Court Rules also provides that such an application must “be lodged at the Court registry within 42 days of the date of the decision from which special leave to appeal is sought.” It is noteworthy that the said procedure and time limits are substantially the same as those prescribed in the Supreme Court Rules of 1998, which were applicable previously. This makes it necessary to consider in the first instance, the grant of enlargement of time for this Petitioner.

[27] Despite the absence of any provision in the Constitution of the Republic of Fiji or any other Act or Decree that seek to confer on the Supreme Court the power to enlarge time, this Court has in decisions such as *The State v Ramesh Patel* Criminal Appeal No.AAU0002 of 2002S (15 November 2002), *EneleCama v The State*, [2012] FJSC 4; CAV0003.09 (1 May 2012), *Kamalesh Kumar v State; Sinu v State* [2012] FJSC 17; CAV0001.2009 (21 August 2012), *Native Land Trust Board v Khan* [2013] FJSC 1; CBV0002.2013 (15 March 2013), *Rasaku v State* [2013] FJSC 4; CAV0009, 0013.2009 (24 April 2013), *Volivale v The State* [2015] FJSC 1; CAV0004.2014 (23 April 2015), *Tiritiri v. The State* [2014] FJSC 15 CAV9.2014 (14th November 2014), *Donu v The State* [2015] FJSC 19; CAV0014.2014 (20 August 2015) and *Nabainivalu v State* [2015] FJSC 22; CAV027.2014 (22 October 2015), *Tukana v State* [2016] FJSC 23; CAV 0024.2015 (22 June 2016) and *Lal v State* [2017] FJSC 20; CAV0036-0037 and 0039.2016 (20 July 2017) assumed that it possessed jurisdiction to grant enlargement of time in appropriate cases.

[28] In paragraph 4 of his judgment in *Kamalesh Kumar v State; Sinu v State*, *supra*, Chief Justice Anthony Gates enumerated the factors that will be considered by a court in Fiji for granting enlargement of time as follows:-

- (i) The reason for the failure to file within time.
- (ii) The length of the delay.
- (iii) Whether there is a ground of merit justifying the appellate court’s consideration.
- (iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?



(v) If time is enlarged, will the Respondent be unfairly prejudiced?

[29] As his Lordship the Chief Justice went on to observe in paragraph 4 of the said judgment, the abovementioned factors “may not be necessarily exhaustive, but they are certainly convenient yardsticks to assess the merit of an application for enlargement of time. Ultimately, it is for the court to uphold its own rules, while always endeavouring to avoid or redress any grave injustice that might result from the strict application of the rules of court”.

[30] Factors (i) and (ii) outlined in the *Kamalesh Kumar* case may be conveniently dealt with together. The application seeking leave to appeal filed by the 2<sup>nd</sup> Petitioner, Tila Williams, is undated but it is date stamped as having been received in the Registry of this Court on 10th July 2017, which is 3 days beyond the period of 42 days permitted by law for the filing of an application seeking leave to appeal from the Supreme Court. On page 5 of the petition of the 2<sup>nd</sup> Petitioner, provision has been made for it to be sworn before a Commissioner of Oaths, but the petition is unsworn and left in blank.

[31] The 2<sup>nd</sup> Petitioner’s application did not pray for enlargement of time to seek leave to appeal, and as noted in paragraph [3] of this judgment, when the Court questioned Mr. Waqainabete, who represented the 2<sup>nd</sup> Petitioner in this regard, he appeared not to have realized that it was out of time, and Mr Waqainabete made an oral application for enlargement of time to seek leave to appeal from this Court. However, it is significant that neither the 2<sup>nd</sup> Petitioner nor his learned Counsel, were able to offer an explanation for the delay which could be regarded as plausible, and though the delay was slight, that by itself is not an excuse. The 2<sup>nd</sup> Petitioner was an incarcerated prisoner, but represented by Counsel provided by the Legal Aid Commission, and ironically as it is, his co-accused who is unrepresented and was also serving his sentence in prison, had presented his application for leave to appeal within 5 days from the impugned judgment. These factors may be taken into consideration in conjunction with the other relevant factors outlined in the judgment of his Lordship the Chief Justice in the *Kamalesh Kumar* case in deciding the question of enlargement of time.

[32] Factor (iii) outlined in the *Kamalesh Kumar* case deals with the merit of the case of any person seeking enlargement of time. When embarking on a detailed assessment of the



merits of the applications of the 2<sup>nd</sup> Petitioner, this Court shall be mindful of the following observation of this Court in paragraph 14 of its judgment in *Rasaku v State* [2013] FJSC 4; CAV0009, 0013.2009 (24 April 2013):-

“It is remarkable that this Court has in the generality of cases assumed that it possessed jurisdiction to grant enlargement of time in appropriate cases, *but had shown considerable reluctance to grant relief to petitioners seeking enlargement of time for making belated applications for special leave to appeal*. See, *The State v Ramesh Patel* Criminal Appeal No.AAU0002 of 2002S (15 November 2002); *Enele Cama v The State*, [2012] FJSC 4; CAV0003.09 (1 May 2012); *Kamalesh Kumar v State*; *Sinu v State* [2012] FJSC 17; CAV0001.2009 (21 August 2012); and *Native Land Trust Board v Khan* [2013] FJSC 1; CBV0002.2013 (15 March 2013).” (Emphasis added)

[33] In paragraph 15 of its judgment in *Rasaku v The State*, *supra*, this Court made it clear that a Petitioner seeking a belated appeal in a criminal case, must *at the lowest*, be able to meet the stringent leave criteria of section 7(2) of the Supreme Court Act, No. 14 of 1998, but it is trite law that such a Petitioner must satisfy Court that there is justification on the merits of the case for exercising the extraordinary jurisdiction of this Court to deviate from the time prescribed by rules of this Court for invoking its jurisdiction.

[34] The grounds for seeking leave to appeal against the impugned judgment of the Court of Appeal set out in his belated application received in the Registry of this Court on 10<sup>th</sup> July 2017 may be summarised as follows:-

- (1) The absence of compliance with Turnbull guidelines and the dock identification was prejudicial to the 2<sup>nd</sup> Petitioner;
- (2) The procedure outlined in the identification evidence act were disregarded by the Learned Magistrate and the Court of Appeal Judges;
- (3) The Prosecution witness 1, 2 and 3 did not mention any name to the police and there was no proper evidence of identification of the 2<sup>nd</sup> Petitioner;
- (4) The complainant could not identify the robbers (within the scene of crime).

- (5) The security guard at Solander Pacific, Sireli Watiroko's statement proves that he was outside the crime scene and he never gave any name to the police on the day of robbery.
- (6) That the recorded statement of the security guard Sireli Watiroko on the day of robbery and the sworn evidence on the day of hearing were inconsistent.
- (7) The witness Mareta never saw the 2<sup>nd</sup> Petitioner with the bag.
- (8) That the caution interview of his First Petitioner cannot be used to convict the Second Petitioner.
- (9) The Learned Magistrate and the appeal Judge overlooked the errors committed by the police (ignorance of the procedure outlined in the five principles of Judges Rule).
- (10) From the beginning of the investigation until the laying of the charges were non-compliant of the five principles of Judges Rules.
- (11) The 2<sup>nd</sup> Petitioner was unlawfully arrested and wrongful convicted in this case.
- (12) The conviction of the 2<sup>nd</sup> Petitioner was unsafe and unsatisfactory.
- (13) That under the circumstances the 2<sup>nd</sup> Petitioner does not have any choice and seeking the jurisdiction of the Court to grant his application.

[35] However, the grounds on the basis of which the 2<sup>nd</sup> Petitioner's application was argued before this Court as set out in an amended petition filed by learned Counsel for the 2<sup>nd</sup> Petitioner were the following:-

- [1] The learned Trial Magistrate erred in law and in fact when he did not direct his mind to the offence of receiving stolen property which was available on the evidence adduced.
- [2] The learned Trial Magistrate erred in law and in fact when he did not disregard the answers contained in the caution interview of the 1<sup>st</sup> Petitioner implicating the 2<sup>nd</sup> Petitioner which was not evidence against the 2<sup>nd</sup> Petitioner.



[3] The learned Trial Magistrate erred in law and in fact when he did not caution himself about the disputed confession contained in the interview statement of the 1st Petitioner.

[4] The learned Trial Magistrate erred in law and in fact when he did not consider the circumstantial evidence against the 2nd Petitioner was too weak to prove the charge beyond reasonable doubt.

[5] The learned Trial Magistrate erred in law and in fact when he allowed dock identification in the absence of compliance of Turnbull guidelines which was prejudicial to the Appellants.

[6] The Appellants were prejudiced due to lack of legal representation.

[36] Ms. Madanavosa, who appeared for the Respondent has pointed out in her written submissions that grounds [1], [2], [3], [4] and [6] do not arise from the impugned judgment of the Court of Appeal dated 26<sup>th</sup> May 2017 since they are identical with grounds (i), (ii), (iii), (iv) and (vi) that were included in the joint application for leave to appeal filed by the Petitioners in the Court of Appeal, and were refused leave to appeal by the single judge of the Court of Appeal by his Ruling dated 2<sup>nd</sup> March 2016. There was therefore no occasion for these grounds to be considered in the impugned judgment of the Court of Appeal dated 26<sup>th</sup> May 2017.

[37] Mr. Waqainabete therefore very properly restricted his arguments on the merits to ground (5) which dealt with the dock identification and the alleged non-application of the Turnbull Guidelines, which were adverted to in paragraph[14] of this judgment when dealing with the submissions of the 1<sup>st</sup> Petitioner. Mr. Waqainabete submitted that in the absence of an identification parade, compliance with the Turnbull guidelines was mandatory, and that the evidence of Sireli Watiroko created a reasonable doubt in regard to the identification of the 2<sup>nd</sup> Petitioner.

[38] Mr. Waqainabete has submitted that although Sireli Watiroko had testified that he knew the 2<sup>nd</sup> Petitioner because he stayed in Raiwaqa once where the 2<sup>nd</sup> Petitioner also stayed, and the 2<sup>nd</sup> Petitioner had visited his house once, there was no evidence adduced in Court as to how often Sireli had seen the 2<sup>nd</sup> Petitioner, Tila and when was the last time he had seen him.



[39] The Court of Appeal had noted that unlike the 1<sup>st</sup> Petitioner, the 2<sup>nd</sup> Petitioner did not testify at the trial, and that the evidence led at the trial clearly established the identity of the 2<sup>nd</sup> Petitioner. Since the case was one of recognition of a person known to the witness Sireli, the Court of Appeal after acknowledging that the Turnbull guidelines do apply, went on to observe as follows in paragraph [20] to [22] of its impugned judgment:-

[20] The 2<sup>nd</sup> Appellant [2<sup>nd</sup> Petitioner before this Court] was identified by the same witness as being with the 1<sup>st</sup> Appellant [1<sup>st</sup> Petitioner] on that day while coming in and going out of that place. He also stated that he had known him before as he had come to his father's house. Therefore, *it was a case of recognizing the 2<sup>nd</sup> Appellant when he saw him with the 1<sup>st</sup> Appellant on the day in question. It was not a case of seeing the 2<sup>nd</sup> Appellant for the first time in Court after the commission of the offence nor a situation of a fleeting glance, it was an instance of recognition.*

[21] The 2<sup>nd</sup> Appellant had stated to the Police when questioned that he would answer to Court, unlike the 1<sup>st</sup> Appellant who had confessed. Therefore, it was necessary for the learned Magistrate to consider the evidence that transpired at the trial against the 2<sup>nd</sup> Appellant. The learned Magistrate had in his judgment specifically dealt with the identification of the 2<sup>nd</sup> Appellant. He stated:

*"The 2<sup>nd</sup> accused was positively identified by the 2<sup>nd</sup> prosecution witness who had known him for sometime as being with the 1<sup>st</sup> accused at Solander Pacific, close to the shop where the complainant was. The complainant had stated in Court there were 2 persons who had robbed her. The Court also notes that the 2<sup>nd</sup> accused was with the 1<sup>st</sup> accused at the drinking party when the bag was passed to Mareta. She identified the 2<sup>nd</sup> accused in Court. The 2<sup>nd</sup> accused had stated to the police he will give evidence in Court. He remained silent in Court. The Court draws no adverse inference from the exercise of this right by the 2<sup>nd</sup> accused person."*

[22] It would be seen therefore that the learned Magistrate had used not only the evidence of the 2<sup>nd</sup> prosecution witness but also the evidence of the 3<sup>rd</sup> prosecution witness to justify the identification of the 2<sup>nd</sup> Appellant.

[40] In these circumstances, I see no merit in the submissions made by Mr. Waqainabete on the merits of the case of the 2<sup>nd</sup> Petitioner, and factor (iii) outlined in the *Kamalesh Kumar* case is not favourable to the 2<sup>nd</sup> Petitioner. Factor (iv) would therefore in any event not arise as this is not a case of substantial delay, and in any event, there is absolutely no merit in the arguments advanced on behalf of the 2<sup>nd</sup> Petitioner.

[41] It remains to be seen whether factor (v) would put the 2<sup>nd</sup> Petitioner's case in a better light. I do not think that the Respondent was prejudiced by the relatively slight delay, but

that cannot overcome the other problems the 2<sup>nd</sup> Petitioner faces on his application for enlargement of time.

[42] I am therefore of the view that the application for enlargement of time, as well as the application for leave to appeal made by the 2<sup>nd</sup> Petitioner, must be refused.

### *Conclusions*

[43] In all the circumstances of this case, I would refuse the 1<sup>st</sup> Petitioner's application for leave to appeal. I would also refuse the 2<sup>nd</sup> Petitioner's application for enlargement of time to seek leave to appeal.

### **Sathvaa Hettige, J**

[44] I have read in draft the judgment of Hon. Saleem Marsoof J. as well as the concurring judgment of Hon. Brian Keith J., and I agree with both judgments.

### **Brian Keith, J**

[45] I agree that the First Petitioner's application for leave to appeal and the Second Petitioner's application for an extension of time for filing his petition for leave to appeal should be refused for the reasons given by Marsoof J, whose judgment I have read in draft. I wish to add a few words of my own on what has been called the "dock identification" in this case and on a topic which did not form the basis of any of the grounds of appeal.

[46] In the course of his evidence in chief, Sireli Watiroko, the security guard at Solander Pacific where the robbery took place, said that he saw two men on the day in question who he knew. He did not give their names to the police when they interviewed him, but as I read his evidence, his evidence was that he recognised one of them as someone who had been working at Solander Pacific, and the other as someone who he knew from when he had stayed at Raiwaqa. He was also to say that these were the two men in the dock. The question is whether he was merely saying that the two men in the dock were the two men he knew, or whether he was purporting to identify them for the first time as the two men he had seen on the day in question. Since he was saying that he had recognised them at the time, there was no question of him purporting to identify them for the first time in



the course of his evidence as the men he had seen on the day in question. His identification of them arose as a result of his earlier recognition of them. This was not a dock identification, therefore, in the sense in which that term is usually used, and provided a witness is merely being asked to say whether the persons in the dock are the persons he knew, that is not improper. That can only happen in a recognition case, of course, which this case was. Thinking of this kind informed the decision of the Court of Appeal in *Semisi Wainiqolo v The State* [2006] FJCA 70.

- [47] The charge sheet on which the petitioners were tried was not included in the court record, but it was set out in the petitioners' amended application to the Court of Appeal for leave to appeal against conviction and sentence. It read:

#### STATEMENT OF OFFENCE

**Aggravated robbery:** Contrary to section 311(1)(a) of the Crimes Decree No 44 of 2009

#### PARTICULARS OF OFFENCE

**Isoa Koroivuki and Tila Williams** on the 7th day of August, 2011, Suva in the Central Division, stole cash, 1 x white notebook laptop valued at \$650.00, 1 x ladies brown purse valued at \$10.00, 1 x sky blue ADS Game Boy valued at \$400.00, 20 x \$6.00 Vodafone and Ink Recharge cards valued at \$120.00 all to a total value of \$1,986.00, the property of Yuan Hua Ye.

- [48] There is an obvious mismatch between the statement of the offence and the particulars of the offence: the statement of the offence describes the offence as aggravated robbery, whereas the particulars of the offence describe the offence as theft.
- [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.

[50] I trust that the need for the statement of the offence to be consistent with the particulars of the offence will be taken on board by the prosecuting authorities.

*Orders of the Court*

- (1) *The 1<sup>st</sup> Petitioner's application for leave to appeal is refused;*
- (2) *The 2<sup>nd</sup> Petitioner's application for enlargement of time for seeking leave to appeal is also refused.*



A handwritten signature in blue ink, appearing to be "Saleem Marsoof", written over a dotted line.

Hon. Mr. Justice Saleem Marsoof  
**Justice of the Supreme Court**

A handwritten signature in blue ink, appearing to be "Sathya Hettige", written over a dotted line.

Hon. Mr. Justice Sathya Hettige  
**Justice of the Supreme Court**

A handwritten signature in blue ink, appearing to be "Brian Keith", written over a dotted line.

Hon. Mr. Justice Brian Keith  
**Justice of the Supreme Court**

**Solicitors**

1<sup>st</sup> Petitioner in Person

Legal Aid Commission for the 2<sup>nd</sup> Petitioner

The office of the Director of Public Prosecution for the Respondent