

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

CRIMINAL APPEAL NO.AAU 0083 of 2020
[In the Magistrates Court at Ba Case No. 390 of 2017]
[HAC 160/17]

BETWEEN : **VISHAL PRAKASH**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Appellant in person**
: **Mr. T. Tuenuku for the Respondent**

Date of Hearing : **09 January 2023**

Date of Ruling : **10 January 2023**

RULING

[1] The appellant had been charged in the Magistrates Court at Ba exercising extended jurisdiction on a single count of aggravated robbery to the value of \$5799.00 contrary to section 311(1)(a) and (b) of the Crimes Act, 2009 and Breach of Order Suspending Sentence contrary to section 28(1) of the Sentencing and Penalties Act, 2009 committed on 21 July 2017 at Maururu Ba in the Western Division.

‘FIRST COUNT

Statement of Offence (a)

AGGRAVATED ROBBERY: *Contrary to Section 311 (1)(a) of the Crimes Act No. 44 of 2009.*

Particulars of Offence (b)

VISHAL PRAKASH WITH OTHERS, on the 21st day of July 2017 at Maururu Ba in the Western Division robbed ROHIT VIKASH CHAND of Samsung mobile phone valued at \$1000.00, two gold chain valued at \$3000.00, Nike canvas valued at \$319.00, Adidas canvas valued at \$200.00, laptop with bag valued at \$1200.00 and wallet valued at \$75.00 with cards and cash \$5.00 all to the total value of \$5799.00 the property of ROHIT VIKASH CHAND.

SECOND COUNT

Statement of Offence (a)

BREACH OF ORDER SUSPENDING SENTENCE: Contrary to Section 28(1) of the Sentencing and Penalties Act 2009.

Particulars of Offence (b)

VISHAL PRAKASH, on the 21st day of July 2017 at Maururu Ba in the Western Division whilst being on suspended sentence vide Ba CF 121/16 committed offences of Aggravated Robbery. '

- [2] After trial, the appellant had been found guilty of both charges. He had been sentenced on 13 July 2020 to 05 years and 02 months of imprisonment with a non-parole term of 04 years.
- [3] The appellant's appeal only against conviction is timely. In terms of section 21(1)(b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court unless it is on a question of law alone. 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)].

[4] The appellant urges the following grounds of appeal against conviction:

Ground 1

THAT the Learned Trial Magistrate erred in law and fact at paragraph 13 of the said judgment when evaluating PW3s evidence on identification of the appellant.

Ground 2

THAT the Learned Magistrate had erred in law and fact at paragraph 14 of the said judgment when evaluating PW1 and PW2s evidence in supporting PW3s evidence.

Ground 3

THAT the Learned Magistrate had erred in law and fact at paragraph 17 of the said judgment when he choose to believe PW3 and not considering the alibi of the appellant.

Ground 4

THAT the Learned Magistrate erred in law and fact at paragraph 18 of the said judgment when he did not advise the appellant or give him his right to call witness.

Ground 5

THAT the Learned Magistrate had erred in law and fact at paragraph 20 of the said judgment when there was no reliable or direct evidence in founding the conviction.

Ground 6

THAT the Learned Trial Magistrate had erred in law and fact in failing to analyze the surrounding circumstances of the recognition evidence of PW3 and not follow the Turnbull guidelines on the identification of the appellant.

[5] The Magistrate had set out the summary of evidence of the complainant and the appellant as follows:

'[10] PW3 (Rohit Vikash Chand) stated that he's a bailiff and on 21/7/17 he went to accused house. Accused is his cousin. He went there to serve summons. He had gone there with one Feroz. He went to accused house and there were also three other people there. He told accused that he was working. Accused was drunk and threatening him to strike him with a cane knife. Accused brought cane knife and held it in he's hand. Accused then called the three other boys and they came and assaulted him. They also took his laptop, wallet and other things. They tore his t-shirt and he went and reported the matter to police. Accused is his cousin and he had known him

since being small. He went to accused place in his car and it was between 5pm – 8pm he was at accused's place. They were seated and facing each other and there was a tube light there. More than \$5000.00 worth of items were taken from him. They also threw stones at him when he left.

In cross-examination he stated that accused was at home when he came there. He had come there to serve some documents to accused partner. He had called before he came to accused house and when he came there accused was drunk. Accused partner was also there.

[11] Accused (DWI) in defence stated that he never met PW3 on the day in question as alleged. He stated that on 21/7/17 he went to Ba town and met his friends at around 11am and they started drinking beer. Between 4pm-5.30pm he was drinking beer in town. After that he came home to see his wife. Then he met one Samuel Singh and they stayed together. His wife was not at home and he thought his wife had gone to the hospital for stomach pain. He then caught a bus and went to the hospital to check his wife. After checking his wife between 11pm-12am, he then returned home. He never met his wife and had never met her since that day. He then slept at one Bose's place and the next day he returned home. He went home and no one was there and he doesn't know anything about this case. The story about the noise coming from his home was made up.

In cross-examination he stated that PW3 came and he was not there. He doesn't know anything about this case.

01st and 06th ground of appeal

- [6] There cannot be any serious challenge to the recognition of the appellant by PW3 (the complainant) in as much as PW3 was admittedly the appellant's cousin and well known to him from childhood. There is no need to apply Turnbull guidelines on the facts of this case. The Magistrate had dealt with this aspect in detail at paragraph 13 of the judgment.

02nd ground of appeal

- [7] It is not accurate for the Magistrate to have stated that the evidence of PW1 and PW2 who only heard noises and shouting coming from appellant's house where some people had earlier come in a van, as corroborating the evidence of PW3 that the appellant and the other people were drinking at the latter's house when he came there.

However, their evidence corroborates PW3 to the extent that there was a group of people at the appellant's house at the relevant time probably drinking but not that the appellant was there at that time.

[8] Nevertheless, this error by the Magistrate has not caused a substantial miscarriage of justice so as to vitiate the conviction which stands or falls on the evidence of PW3.

03rd ground of appeal

[9] Having heard the evidence and seen the demeanour and deportment of PW3, the Magistrate had decided to accept PW3's evidence and that conclusion should not be disturbed lightly.

[10] The appellant had not tendered an *alibi* notice to enable the prosecution to ascertain the veracity of his *alibi* that he was elsewhere at the time of the alleged incident and returned home on the next day. Yet, he had been allowed to give evidence on those lines. He did not call Bose with whom he allegedly spent the night on the day in question. Even Samuel Singh whom he had supposedly met somewhere on that day was not called. However, it appears that the appellant had admitted having come home around 4.00 pm to 05.00 pm from the town having had drinks with friends and gone back to hospital searching for his wife.

[11] The law is that when an accused raises *alibi* as a defence, the prosecution must disprove an *alibi* and even if the *alibi* is false, it does not by itself entitle the court to convict the accused (vide **Ram v State** [2015] AAU 87 of 2010 (02 October 2015)). At paragraphs 17 and 18 the Magistrate had considered the appellant's *alibi* and rejected it as he believed the evidence of PW3 as stated at paragraph 16.

[12] The Supreme Court had stated that non-compliance with 21 day statutory period for *alibi* notice is a matter that goes to the weight of an *alibi* [vide **Nute v State** [2014] FJSC 10; CAV0004.2014 (19 August 2014)]. The appellant gave no opportunity to the investigators to check on the *alibi*; nor did he call any witnesses

who could have substantiated his defence. Thus, little weight could be attached to his *alibi* defence.

- [13] The appellant had taken up the position at the trial that PW3 was trying to have some kind of sexual relationship with his wife/partner and attributed that to the alleged false complaint against him. However, his position at the leave to appeal hearing was that PW3's complaint was motivated by his fear of the appellant that he was not safe if the appellant was outside prison.

04th ground of appeal

- [14] There is nothing on record at this stage to believe that the Magistrate had not advised the appellant of his right to call witnesses. The appellant was defended by a counsel from the Legal Aid Commission and obviously he would have been aware of the right to call witnesses. In any event, the appellant did give evidence.

05th ground of appeal

- [15] The appellant submits that the totality of evidence does not support his conviction. I disagree. Once the Magistrate was convinced of the credibility and reliability of PW3, there was ample evidence against the appellant to convict him for the two charges. It was reasonably open for the Magistrate to have convicted the appellant on PW3's evidence alone.

- [16] It was held in **Kaiyum v State** [2014] FJCA 35; AAU0071 of 2012 (14 March 2014) that when a verdict is challenged on the basis that it is unreasonable, the test is whether the trial judge could have reasonably convicted on the evidence before him.

- [17] There is no reasonable prospect of success in any of the appeal grounds.

Order of the Court:

1. Leave to appeal against conviction is refused.




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Hon. Mr Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL