IN THE FIJI COURT OF APPEAL

Appellate Jurisdiction

Criminal Appeal No. 58 of 1984

Between:

PAULA ARUSUSU — APPELLANT

- and -

R E G I N A M — RESPONDENT

Mrs. A. Hoffman for the Appellant
E. Tavai and Miss N. Saheem for the Respondent

Date of Hearing: 29th October, 1984
Delivery of Judgment: 15th November, 1984

JUDGMENT OF THE COURT

SPEIGHT V.P.

This is an appeal against conviction entered in the Supreme Court against the above named appellant. He was charged with manslaughter of Mohammed Gafoor at Nasinu on the 10th July, 1983, and after a lengthy trial, two of the assessors gave their opinions that he was guilty and the third said not guilty. The trial Judge said that he had directed himself in accordance with the summing up and that he was satisfied that the majority opinion should be accepted. He convicted the appellant and subsequently sentenced him to six years imprisonment. He has appealed both against conviction and severity of sentence.

Put briefly the facts, which will be expanded later, showed that appellant was one of a group of young men who lived at Manikoso. They were on unfriendly terms

with another group of young Fijian men who lived at Tutalevu - colloquially referred during the trial as the "Tutalevu boys" although their ages varied from 18s to well into the 20s. Both groups comprised apparently active young men much given to fighting. The grudge had lasted for several years and it arose over the actions of a Manikoso girl eloping with a young man from Tutaleva. There were periodic outbursts of fighting between the two groups including one about a week before the fatality. That event took place at a road junction at Narere, Nasinu, a plan and photographs of which were produced at the trial. There is a road leading down towards the Manikoso village which passes a supermarket and reaches the intersection with another road referred to as the transformer road. At that intersection there is a clearing on the far side where the "supermarket road" continues on through the intersection for a few yards and then stops at a gully which has only a foot bridge across it. Where this portion of the road is closed, there is a row of wooden posts presumably to prevent traffic carrying on and running into the gully. Across the other side of the gully and apparently the first house in the Manikoso settlement is the property of a man named Manasa Delana. On the side of Manasa's house nearest to the gully and hence nearest to the wooden posts end of the area of the intersection there was at the relevant time an outside electric light believed to be of 75 watt and it was said that the purpose of that light was to shine across the gully on to the dead end area of the road somewhere near the posts because Manasa left his car parked at that spot; presumably he wanted it illuminated for security reasons. If one was proceeding from the supermarket to the intersection one could not of course take a vehicle past the wooden posts but by turning to the left the motorists or pedestrian would be on the transformer road - so referred to because there is a concrete block structure housing a transformer. This road apparently led to the Tutalevu settlement where the "boys" came from.

On the the afternoon in question the appellant along with about six of his Manikoso friends had been drinking first beer and then Methylated spirits in considerable quantities and it seems that some at least if not all were substantially affected by this. At about 7 p.m. in the evening they were sitting in the area near the wooden posts at the intersection. Shortly after their arrival a number of people came down the supermarket road towards them. The first of these was an Indian gentleman, the unfortunate Mr. Gafoor, a man of middle age and diminutive build. He was apparently walking home and it is clear that he had nothing to do with the Manikoso or Tutalevu youths or with the quarrels between them. It was cruel fate that placed him in that place at that time. Close behind him were some of the Tutalevu boys. It is not certain if there were 3 or 4 or 5 or more of them. One of them was named Dona. The names of the others are unknown and immaterial. One or other of the appellant's friends commented that he could hear the Tutalevu boys approaching and it was said in evidence that shortly after that they came into sight. By this time presumably they were close to the intersection if not at it and they had caught up with Gafoor. Two of the youths who were at the wooden posts, Viromu and Vikatore, stood up and made towards the approaching Tutalevu youths, some or all of whom scattered. In particular Dona ran up the transformer road. According to three prosecution witnesses, P.W.3 Senivalati Narogo, P.W.4 Benidito Bule and P.W.5 Mateo Taridonu, the appellant then stood up, went across the intersection and struck the unfortunate Mr. Gafoor who fell to the ground. P.W.3, Velati as he was called, said that he then saw appellant kick the Indian man and jump on him. Almost immmediately afterwards so it seems P.W.5 Mateo chased Dona up the transformer road and caught him and started to fight with him. Then according to some of the evidence the accused followed up and tried to join in the fight with Dona but this somehow petered out.

The other Tutalevu boys seemed to have disappeared. Mateo and the others resumed their drinking for a little while up near the transformer and then made their way back to the intersection. They there found some Fijian people gathered around the prostrate Gafoor who was obviously gravely injured, and amongst those was Gafoor's son. Medical assistance and the police were sent for and Gafoor was taken to hospital but he was already dead. His primary injury was a break in the trachea as a result of which he had choked to death.

As already set out the appellant has appealed against conviction. The initial grounds of appeal were based on alleged misdirections by the learned trial Judge but contained some grounds which are not matters provided for in the Court of Appeal Act, such as :

> "(1) That the learned trial Judge erred in fact and in law in that his summing up to the assessors was against the weight of evidence."

Other grounds were of a more orthodox nature complaining of failure to give correct directions concerning the evidence of accomplices and failure to direct an inspection of the site during the trial. The Court pointed out to counsel for the appellant that the inappropriate wording of the notice of appeal would hinder a proper consideration of the merits of the matter and the court was adjourned to allow redrafting of the notice. This was done and an amended notice of appeal set out the following grounds :

> "1. THAT the Learned Trial Judge erred in fact and in law in that he failed in his summing up adequately to present the Defence to the Assessors in the following items :
>
> (i) That the evidence of PW3, PW4 and PW5 was individually internally contradictory.
>
> (ii) That the evidence of PW3, PW4 and PW5 as to the alleged assault on the deceased by the Appellant was incompatible with the medical evidence on the injuries received by the deceased.

(iii) The evidence of PW6, PW7, PW8 and PW9 as to visibility at the time was wholly ignored.

(iv) That the relevant evidence of DW1 was wholly ignored.

(v) That the evidence of DW2 was misrepresented by joining this witness' testimony to that of DW3.

(vi) That he wholly failed to point out the significance of Exhibit 8.

(vii) That he characterised the injuries to the deceased as being 'those which must have been done by a person....well soaked with methylated spirit', without pointing out that PW3, PW4 and PW5 could jointly and severally fit this category.

(viii) That he directed the assessors as fact that the deceased 'was clearly mistaken for one of the Tutalevu boys', when it was the Defence contention that the deceased had not been present when the 'Tutalevu boys' were at the scene.

(ix) That the perjury of PW7 was ignored.

(x) That he charged that the evidence of DW1 was 'obviously' unable to 'be regarded as coming from an....untainted source'.

2. THAT the Learned Trial Judge erred in fact and in law in refusing your Appellant's Counsel's repeated pleas for an inspection by the said Judge and by the Assessors of the scene of the crime alleged to have been committed by our Appellant.

3. THAT the Learned Trial Judge erred in fact and in law in that although he warned the assessors of the dangers of convicting on the uncorroborated evidence of accomplices, he did not bring to their attention the extent and detail of the discrepancies and inconsistencies in that evidence to be taken into consideration when evaluating the credibility of it.

4. THAT the Learned Trial Judge erred in fact and in law in that by directing himself according to his summing up he misdirected himself.

5. THAT the Learned Trial Judge erred in law and in fact sentencing the Appellant to 6 years in custody

in that in all the circumstances this sentence was both harsh and excessive. Consequently there has been a substantial miscarriage of justice."

We will deal with these in sequence and ground 1 appears to be that which requires the greatest attention concerning as it does questions of the identity of the assailant in the difficult visibility conditions applying at the time. It seems clear that there was no moon on the evening in question. There was no evidence as to the presence or absence of cloud. Nothing was said about starlight or otherwise, and there was no suggestion of any artificial illumination other than the electric bulb shining from the side of Manasa's house. According to the evidence the distance from this light to the wooden posts where the young men were originally sitting was 27 yards and from those posts across to the other side of the intersection where the deceased fell (marked 'X') was a further 18 yards. Evidence which will be referred to in more detail was to the effect that reasonable lighting was available at the site of the posts but position 'X' was (a) at the limit, (b) nearly at the limit, or (c) beyond the limit of illumination. Evidence varied as to whether persons at 'X' could be identified as to who they were or whether the observer could merely see that there was a figure there - depending of course on how far away the particular viewer might be. Much reliance of course was placed on the case of Turnbull 1976 63 Crim. App. R. 132. That case is well known, expressing as it does, guidelines for the assistance of judges in summing up in cases of disputed identification. It stresses the need for the judge in such cases to warn the jury (or assessors) of the need for caution before convicting in reliance on challenged identification and examples are given of the need to discuss such questions as time, distances, light, familiarity and the like. We will return to this later.

Before we examine the individual grounds of appeal and examine the summing up, it is perhaps helpful to narrow down the issue which arose in this area. This is not the normal identification case in the Turnbull context. Generally the

danger being adverted to is of a witness wrongly attributing identity of an otherwise unknown person to a given accused. Here the identifying witnesses P.W.3, P.W.4, P.W.5 and indeed D.W.3 Viromu and D.W.4 Vikatore all knew each other and the accused very well. Similarly all knew the deceased Indian man well, and there is no doubt that he was seen and recognised by these young men as he approached with the Tutalevu boys behind him. It is to be noted that he was of diminutive build and most Fijian youths are generally substantially taller and heavier.

It was not disputed that the appellant was sitting with his friends as the deceased and the others approached. Viromu, (D.W.3) and Vikatore, (D.W.4) were members of the Manikoso group, and it is common ground that they were the first to stand up and advance towards the approaching people - Mr. Gafoor in front and the Fijian youths immediately behind. Their motive in approaching that group, as everyone knew, was to confront their adversaries and this they did, causing them to scatter. Similarly the prosecution witnesses P.W.3 and P.W.4 were well acquainted with Mateo (P.W.5) who, after the Indian gentleman had been struck down by somebody, ran off to fight Dona who had run away.

The problem which emerged was not the more common situation of the observation, fleeting or insubstantial, of an unknown or little known person. It was this:- the Indian man was well known to the witnesses and they had recognised him as he came into their sight (at whatever distance). Obviously he was different in appearance from the approaching Fijians. There is no argument but that initially three of the Manikoso youths stood up, left the area of the wooden posts and moved across the road. The first two were Viromu and Vikatore who in fact, as defence witnesses, agree that that is what they had done. Then it is said that the accused moved forward as the third man. Because of the knowledge they each had

of the others, there could be no question of misidentification. The question is this. How reliable was the evidence of P.W.3, P.W.4 and P.W.5 when they said :

(a) Viromu and Vikatore confronted the Tutalevu boys who scattered and were pursued.

(b) Paula and no one else left the group, walked across to the Indian man who was 'still coming' and assaulted him.

It is not a question of possible error as to who was there but possible error as to who amongst the three persons known to be on their feet committed the assault. Put another way - is there a possibility that in the circumstances Viromu or Vikatore may have been the Indian's assailant and the prosecution witnesses have wrongly identified Paula as that person. The Turnbull type tests are in part applicable as they are in all eye witness cases; namely, the question of opportunity to observe, the need to observe, distance and, most importantly, lighting. More of this later.

We now propose to take the grounds of appeal individually, together with relevant passages from the evidence and to examine the summing up.

Ground 1.(i):

It was submitted that the evidence of P.W.3, P.W.4 and P.W.5 was contradictory. This was based on the claim by P.W.3 that he had seen one punch, that the victim had fallen to the ground and then was kicked and jumped upon; whereas P.W.4 and P.W.5 only spoke of one punch and said they did not see anything further. In our view the answer is simple. They did not say, nor indeed were they asked, whether they could exclude a kick or jumping. Indeed after speaking of the punch P.W.4 said (page 63) that "then we went up because there was another Fijian boy that had been punched. We ran towards him." P.W.5 Mateo said that he did not see Paula do anything else, but

immediately after the punch, "we came down" - apparently down the transformer road; and it is known that at that time Dona had run away and Mateo pursued him. There was therefore no contradiction - merely that P.W.3 seems to have remained watching the entire assault whereas P.W.4 and P.W.5 had turned their attention to the pursuit of those who were running away. In the absence of any such contradiction there was no need for comment in the summing up.

Ground 1.(ii):

It is alleged that the evidence of the same three witnesses is incompatible with the medical evidence concerning the injuries. The submission is that all three witnesses spoke of only one punch, whereas the Pathologist said that there may have been two punches causing a broken jaw and a fractured trachea. He was, however, only discussing this as a hypothesis, and he said that one of those injuries could have been caused by a kick. Again we see no inconsistency and hence no call for comment.

Ground 1.(iii):

The complaint of "ignoring" the evidence of P.W.6 and P.W.8 as to visibility was expanded to include that of P.W.7 and P.W.9.

P.W.6 Constable Prasad, on receipt of the complaint, had driven a police landrover to the scene. He found Gafoor lying at the spot 'X' on the plan. His evidence on visibility was - there was no street light - there was no nearby light in surrounding areas - there was a light coming from a house (presumably Manasa's) 80 - 100 metres. (The survey plan shows 42 yards). "How far was the light penetrating? - It was not visible at the spot". The area of the road might have been partly illuminated by that light but he could not say, because he had the landrover lights on - directed on to the spot.

In cross-examination he said he would not be able to say if the (Manasa) light reached or not, because the landrover lights were brighter. Lights were on from other houses but he could not say whether their rays would reach this spot.

P.W.7 Inspector Chandra was at the site at 9.35 p.m. He said (three times) it was a moonlit night. This was incorrect. He used a torch - without it you could see people, but needed the torch for visibility. We will postpone discussing this evidence until ground (vi).

P.W.8 Mohammed Aiyub (son of deceased) went to the scene where the man was lying on the ground. It was a dark night. He saw that the man lying on ground was covered with blood. He did not then recognise him as his father because it was dark and his face was covered with blood. He recognised his father when the landrover lights shone on him.

P.W.9 Inspector Naveikata went to the scene in daylight. Manasa's light was "quite a big electric bulb" mounted on a white wall facing out towards the path to the road.

Now before we refer to the Chief Justice's summing up on the question of visibility or lack of it, as referred to in the foregoing references, it will probably save later duplication by including the earlier evidence from other witnesses on this lighting question. For a challenge to a summing up based on an alleged failure to deal with the evidence on the question can only be properly considered if all the visibility evidence, and the Judge's remarks thereon, are considered together. And for a reason which we think convenient we propose to consider the evidence of D.W.1 Mr. Maxwell Hoffman (ground 1.(iv) separately) for it deserves individual attention, and the Chief Justice made especial reference to it.

P.W.3 had said (p.28) that the outside light from Manasa's house "came through" and "gave light" to the scene where the Indian man was punched. In cross-examination: the only light where they were drinking was from the house "30 yards away". "How far could you see? About 30 yards."

When they (Tutalevu boys) were near, he saw them - from witness box to end of court room away - 30 yards. They were 60 yards from the light - a vehicle also came showing lights.

P.W.4 said - the light from Manasa's house reached where he was sitting. In cross-examination : Manasa's light made it possible to see what had happened. It lighted the whole road. It shone past the posts. Not up to the supermarket. 10 yards past the posts. The spot (marked 'X') was just at the edge of visibility. He could see an incident at 'X' when sitting at the wooden posts. He first saw the Indian man when the length of the court room away (30 yards) - within the range of Manasa's light. There were other houses with lights on - not shown on the photographs - (presumably further towards the supermarket).

P.W.5 (Mateo): There was the light outside Manasa's house. In cross-examination: the area by posts was lighted from Manasa's light.

Perhaps it would be fair to summarize the evidence of all the prosecution witnesses - and we will refer to D.W.1 separately - as having varying views as to whether a person at the spot 'X', being towards the edge of illumination or beyond it would be visible and distinguishable.

We turn to the summing up.

At page 253 the record shows that the learned Chief Justice was discussing the prosecution evidence concerning the striking of Gafoor:.

"Senivalati (P.W.3) said it was about 15 yards away when he saw the accused assaulted the deceased.

He said when the accused (sic - deceased) was on the ground, Senivalati (sic - accused) kicked him and stepped on his chest. He said he was able to see the assault on the deceased by the accused from the outside light coming from Manasa's residence, which was close by. He said from there he ran after Mateo and Tomu to stop them from assaulting Dona who is closely related to him.

Now, Senivalati was cross-examined at length by Defence Counsel on his evidence and strong suggestions were put to him that because of poor visibility and bad lighting in the area of the roundabout, beyond the marker posts, he could not possibly see what he claimed he saw. However, you heard Senivalati in the witness box. He was adamant that he saw the accused walked up to the Indian man and punched him and kicked him and stepped on his chest."

And at page 254 he said :

"He (P.W.4) said the illumination from the outside light at Manasa's house came as far as where they were sitting drinking before the fight and there was enough visibility for him to see the accused walked up and punched the deceased.

Benedito was also strongly cross-examined on his evidence, but he insisted he saw the accused punched the Indian man on the road."

And a little further on:

" Mateo (P.W.5) said he was able to see what the accused did to the Indian man by the light that came from Manasa's house and Manasa had his light on that night outside his house. Mateo said no one else punched the Indian man, only the accused."

There was no reference in the summing up to the evidence of P.Ws 6,7,8 and 9 already referred to. That evidence had been that the lighting conditions were poor, but it must be remembered that it mainly concerned illumination

of "the spot" - whereas P.W.3, P.W.4 and P.W.5 spoke of their observation of accused (who is a tall young man) moving from beside them, walking a distance of 18 yards and performing some very dramatic actions. At a later stage in the summing up it was said that the evidence of P.W.3, P.W.4 and P.W.5 "must be scrutinised obviously with the greatest care", - the reason given at that passage was that as accomplices they had reasons to give false evidence - the dangers of uncorroborated evidence from such person was discussed in some detail.

No mention was made at that point of the possibility that they were honest witnesses who had made a mistake, due to one of the possibilities specified in Turnbull's case and affirmatively advanced by defence counsel in her cross-examination and in her submissions. The Chief Justice, however, returned to the visibility question again at the end of the summing up at p.261.

> " As I have said, gentlemen assessors, you will no doubt by now appreciate that this case in so far as the Prosecution is concerned, depends entirely on how you regard Senivalati, Benedito and Mateo as witnesses. For that reason and other reasons I have stated, you will need to give their evidence the closest scrutiny, particularly as regards their ability to see the accused in whatever state of visibility was available, to go up to the deceased on the road from the posts where they were drinking and punched the deceased.
>
> On that night, the light was shining brightly from Manasa's house, the beam of which came as far as the posts where these youths were drinking. Senivalati's evidence was that he saw the accused walked from their drinking group right up to the Indian man and punched him, kicked him and stepped on him. This was before he ran off to protect Dona from being assaulted by the other youths from his own gang.
>
> The question for you really is whether on that night Senivalati was, in fact, able to see and follow the accused's movements from the posts, across the road to where the Indian man was walking, and assaulted him."

And finally at p.262 :

> " When all is said and done, gentlemen assessors, do bear in mind my warning concerning the danger of convicting the accused person on the evidence of Senivalati, Benedito and Mateo unless corroborated. But if, after having warned yourself of such a danger of acting on uncorroborated evidence, you are completely satisfied from their evidence that it was the accused and nobody else who assaulted and caused those injuries on the deceased, then in such a case, it will be your duty to advise me that the accused is guilty as charged. However, if, on the whole of the evidence, you have any reasonable doubt about the matter, or do not feel sure whether or not it was in fact the accused who caused the deceased's death, then in such a situation it will be your duty to say that the accused is not guilty as charged."

Before discussing the significance of the foregoing, we turn to the evidence already alluded to, that of D.W.1 Mr. Maxwell Hoffman. He is the husband of defence counsel, and described himself as a retired food technologist with qualifications appropriate to that profession.

He had visited the scene three times. First in a casual way in day time, presumably out of interest arising from his wife's involvement in the case. On the second and third occasions he went at night, deliberately to observe the lighting and visibility situation. The first two visits were a long time before the trial. The third visit was part way through the trial.

He said that on the third occasion the light at Manasa's house was dead, but it had been shining on the second occasion - a 75 watt bulb at that date. He then spent about 20 minutes making observations.

He also produced the Fiji Nautical Almanac which showed that there was a new moon the night after the fatality, so that on the relevant evening there was

no moon. Other evidence said there was some rain that night, but there was no evidence as to cloud or star conditions at the time of the fatality.

On his second visit, when the light was on, Mr. Hoffman said that light "illuminated the turnabout - just about to the posts". He said he could see no shadow where he was standing. He did not say where he was standing but presumably he was at the posts throughout.

He described his attempts to identify people passing - he said he counted 17 - they were on the far side of the road from him (as was spot 'X') - presumably these people had come down from the supermarket and turned into the transformer road or the reverse way.

He could see if they were in twos or threes. He could not see their faces as they came towards him (prior to the corner it would seem), he tried to identify their sex and age, and when they were closer (presumably as they turned the corner - and hence close to spot 'X') he would realize he had often erred. But he was accurate to the extent that they were human beings. He said that had there been a scuffle between these people he would have been unable to observe the details. Asked specifically about spot 'X' he said that with Manasa's light on he would have been able to see action at that spot but would not have been able to identify who was involved.

Unfortunately there is a contradiction in the record as when the observations of the seventeen people were made. At page 156 it is recorded as being the second occasion, but at page 158 it is said as being "last night". We think the later was a slip of the tongue by counsel and in fairness to the defence take it that Mr. Hoffman was describing his observations on the second night - when the light was on.

Counsel for appellant has made much of the

unfavourable view that the Chief Justice apparently took of this witness's usefulness. Before we examine that it may be said that perhaps counsel took an unduly optimistic view of how helpful this evidence might have been to her case had it been taken at full value.

For ourselves we do not think it varies a great deal from some of the prosecution evidence - namely that spot 'X', as a piece of ground, was probably beyond the range of illumination. But according to Mr. Hoffman "action", or "a scuffle", which would be by persons standing up, would be observable, although recognition of identity as from the posts would not be possible. P.W.3, P.W.4 and P.W.5 said they saw what the accused did there. P.W.7 said people could be seen.

The Chief Justice was certainly critical of Mr. Hoffman's evidence - but he did not "ignore" it as ground 1.(iv) complains. He said there were "difficulties" about the nature of it. He said that when he went there the light was dead - that was erroneous - it was dead at the third visit but not at the second. He said that because he was defence counsel's husband his evidence could not be regarded as from an independent or untainted source - with respect we think that comment a little harsh. Then he said that as there had been further housing development in the area, conditions had changed. Mr. Hoffman had acknowledged that.

Finally he noted that Mr. Hoffman was shortsighted and needed spectacles. Again Mr. Hoffman had conceded that, but claimed they were totally corrective.

The Learned Chief Justice concluded on this aspect by saying :

> "So all in all you may think Mr. Hoffman's evidence was very negligible and cannot possibly help you one way or another. However this is a matter entirely for you Gentlemen Assessors to decide what weight you give to his evidence."

He certainly treated this witness unfavourably, but it has frequently been said that a judge is entitled to express his own view of evidence, and strongly, provided he leaves it fairly to the jury to decide the issue on the facts of the case on a proper direction - O'Donnell (1917) 12 Cr.App.R. 219 and Mitchell & Jones (1960) Crim.L.R. 211. We have cited passages showing that the assessors were masters of the cause. Additionally at the commencement of the summing up the following passage appears.

> " Gentlemen assessors, it is now my duty to sum up to you in this case. In doing so, I shall direct you on matters of law, and this you must accept and act upon as you are duty-bound. However, as far as the facts of this case are concerned, what you think really happened, what view you take of the various witnesses, whether they are reliable and so on, and whether they are telling the truth or not, these are matters entirely for you to decide for yourselves. So, if I express any opinion on the facts or if I appear to express my opinions on the facts then it is a matter entirely for you whether you accept what I say or form your own opinions. You are your own masters where the facts of this case are concerned. You will not be asked to give reasons for your opinions, but merely your opinion itself, and your opinions need not be unanimous although it would be desirable if that was so. Your opinions are not binding on me, but I can tell you now that they will carry very great weight with me when I come to prepare the judgment of this court."

As we have already noted, Mr. Hoffman's evidence did not in any event differ greatly from the overall effect of the prosecution evidence.

Ground 1(vi) and (ix):

It is submitted that the learned Chief Justice did not refer to Exhibit 8. This was the Nautical Almanac which showed that there was no moon so that P.W.7 Inspector Chandra was quite wrong on that. But it was abundantly demonstrated, particularly in

Mrs. Hoffman's handling of the evidence that there was no noon - and the assessors could have been in no doubt about that.

We have now set out the various ground cited which criticised the summing up for the way in which the question of visibility was dealt with; we have summarised all the evidence on the point; and we have set out the quotations from the summing up.

In her submission to this Court, Mrs. Hoffman based her argument on Turnbull's case (supra). She used the well known phraseology that whenever a case depends wholly or substantially on the correctness of identification of an accused person, the trial judge should warn the jury of the special need for caution before convicting in reliance on the correctness of the identification. In particular stress was placed in that case of the mistakes which even honest persons may make based on shortness of time, impeded observation, poor light, distance, lack of previous knowledge of the accused, - in other words the errors inherent in seeing an offender and subsequently saying of the accused - "that is the person".

It is well to bear in mind, however, that as some subsequent cases (e.g. Keane (1977) 65 Crim.App.R.247) have said, one should not become ritualistic by applying a fixed formula regardless of circumstances.

We have said already that this is not really a Turnbull type case of identification as such, but an observation case - apart from credibility - how reliable was the eye witness account, given the difficult circumstances?

It is interesting in examining the ambit of Turnbull's case to observe that it had its genesis in Lord Devlin's Committee on Evidence of Identification in Criminal Cases. (26th April, 1976 H.M.S.O. 338.) The

Committee studied a great number of summings up in such cases, and recommended that there should be a general rule that juries should be told of the risks inherent in identification evidence and the reasons for care. It was then said (paragraph 4.55):

> " That the judge should after reviewing the evidence direct the jury's attention to any exceptional circumstances which might make the rule inapplicable in the particular case".

If the judge finds himself unable to point to any exceptional circumstances he would have to direct the jury that it would be unsafe to convict. Four circumstances which might be regarded as exceptional were given :

(i) Credible evidence of familiarity.

(ii) Where the defendant does not deny his presence as a member of a group but denies that he was the one who committed the criminal act.

(iii)&(iv) are not relevant to the present consideration.

Summarising the Report concerning paragraph (ii) Fallon: Crown Court Practice says :

> "It is pointed out in paragraph 4.63 of the Report, that in such a case visual identification is mixed up, in proportions which will vary with the circumstances, with 'ordinary observation' of actions: Did the witness observe the blow and did he attribute it to the right person? If the group is small and composed of dissimilar members, and the action is distinctive then a capacity to memorise a face will play little part. If the group is large and composed of persons who are similar in appearance, then visual identification as opposed to ordinary observation may be very important."

Now for reasons which are discussed in Archbold:

Criminal Evidence Pleading & Practice (40th Ed.) paragraph 1349, Lord Widgery C.J. and the other distinguished judges who comprised the powerful Court in Turnbull did not use the "exceptional circumstances" phrase, but the report itself at p.139 recognises that there can be situations where the risk of mistaken identification is reduced. "Quality is what matters in the end".

We have already pointed out that in this case there was ample evidence that the three witnesses know the accused well and it is clear he was sitting beside them. They also knew the Indian man well and it is clear he was approaching. Their evidence is that accused stood up and walked the distance, measured at 18 yards, and struck the Indian - and we have suggested that in those circumstances, the care with which that evidence needed to be examined, and the need for there to be comment in a summing up concerning it, arose not so much from identification perils, but from the need for the ordinary scrutiny of eye witness evidence.

It is interesting to note that in R. v. Oakwell (Court of App. Criminal Division) 1978 1 All E.R. 1223 Lord Widgery C.J. said at 1227(d):

> "Then one comes to the third point. The third point is a point on identification. It is alleged that the directions given in the recent case of R. v. Turnbull were not applied to the identification problem which it is said arose in this case. To start with, it was something of a surprise to the court to realise that any identification problem arose in this case at all. But further investigation shows that it amounts to this. There was a period when Pc Tapson was on the ground when he had not got Oakwell in his sight, and the suggestion is that there may have been confusion in Pc Tapson's mind between the man who knocked him down and the man Oakwell, who was standing up beside him when he got up again.
>
> This is not the sort of identity problem which R. v. Turnbull is really intended to cope with. R. v. Turnbull is intended primarily to deal

> with the ghastly risk run in cases of fleeting encounters. This certainly was not that kind of case."

We have seen that the Chief Justice referred to much of the evidence concerning visibility - not to all of it, but there is no obligation to canvass every part, if the essential are covered. And he said, in a number of the passages, that the problem was whether or not the witnesses could see what they claimed, in view of the state of visibility such as the assessors found it to be.

It is true that in one or two minor respects the summing up was not entirely accurate - such as his mistake as to the night Mr. Hoffman was referring to - but we are satisfied that read as a whole it sufficiently referred to the evidence, drew attention to the problem and correctly advised the assessors as to their approach. We do not find grounds 1.(iii),(iv),(vi),(ix) or (x) to be made out.

Ground 1.(v):

This relates to a quite separate matter. D.W.2 Mrs. Lavenia Pal was an aunt of the accused. D.W.3 was Viromu, one of the Manikoso youths - it was he, along with Vikatore who was first to make a move at the crucial time on the night in question.

D.W.2 and D.W.3 gave evidence that at about the time of the preliminary hearing, Mateo, together with Viromu and others had come to the house of the accused's family, and brought a gift and apologised for falsely accusing Paula of hitting the Indian. This evidence of course was relevant to Mateo's credibility. Both witnesses were cross-examined at some length by counsel for the prosecution as to this gift bringing - sevusevu.

D.W.3 was also of course pressed vigorously about a statement he had made to the police implicating Paula, and

which he now retracted. He obviously had a difficult time in the witness box.

The complaint now made is that in his summing up the learned Chief Justice said, concerning this evidence :-

> " You have seen both Lavenia Pal and Virony cross-examined in this court and you may think (and this is a matter entirely for you) that they both displayed much prevarication and uneasiness when asked why they did not disclose the subject of their alleged Fijian ceremony and what was discussed in it..... It is for you gentlemen assessors again to give what weight you think to that evidence."

The submission is that in the summing up the evidence of D.W.2.was misrepresented by joining it to that of D.W.3. All we can say is that each witness was talking of the sevu-sevu and each witness was, as the Chief Justice said, taxed as to delay in disclosing the alleged ceremony and Mateo's allege apology. Whether they, or either of them, were prevaricating we are quite unable to say. The assessors saw and heard them - they could judge. We see nothing in this ground.

We digress to say that examining the defence evidence, we note with interest that another of the Manikoso youths Vikatore was called as D.W.4. The purport of his evidence was that Paula did not hit the Indian. But he did say that he saw Mateo run up the road to chase Dona and he saw him punch Dona; and at a later stage he said that the lights from the house on the other side of the embankment was "very bright" - which seems to be the source of the learned Chief Justice's remark in summing up already referred to that the light was shining brightly from Manasa's house.

Ground 1.(vii):

Complaints that the summing up said injuries were obviously done by a drunken person - without listing how many people were in that category. Well the evidence shows that all the Manikoso youths were drunk to a greater or less

degree, and this remark could not possibly have been interpreted as tending to identify the accused as against the others.

Ground 1.(viii):

Submits that the summing up erred in saying that the deceased was mistaken for one of the Tutalevu boys "when it was the Defence contention that the deceased had not been present when the Tutalevu boys were at the scene". We fail to understand this submission, for it is quite contrary to the overwhelming evidence that that was what brought the unfortunate Gafoor to his death - his arrival, as the Tutalevu boys were waylaid by their enemies.

We turn to Ground 2.

This is a submission that the learned Chief Justice refused a number of applications from Defence counsel that the Court should visit the scene of the alleged crime - either in the day time - or preferably at night.

These applications were refused on the basis that conditions may well have changed since the night in question.

The power to order a view is well recognised, and sometimes exercised, but it is discretionary. It is sometimes very useful in enabling a jury or assessors to weigh evidence concerning static and finite facts - lines of sight, dimensions of buildings, angle of gradient and the like. But for such visits the standard warning is that the temptation of retrying the case on the spot must be resisted. A view is to enable the fact finding tribunal to evaluate evidence which has been given, or is to be given. The result of a view, had it been ordered, in the present case would be to show the assessors atmospheric conditions rendering visibility better or worse according to the conditions they encountered - and in circumstances which may have varied substantially,

and in unknown ways from those applicable earlier. Just to take one example - the evidence from Mr. Hoffman was that when he viewed the site on the second occasion, Manasa's light bulb was of 75 watt. Who knows what it was on the relevant evening? Similarly he said that there was a new light on another house. Nor can one classify such variables as cloud cover - mist - or other factors - yet the temptation to try the issue on the basis of atmospherics of July 1984 might be difficult to avoid.

We think the discretion was properly exercised by refusing, and confining this question to the evidence given.

Ground 3:

Is a submission that although the learned trial Judge gave a warning on the danger of convicting on the uncorroborated evidence of accomplices, he failed to enlarge on that warning by detailing discrepancies and inconsistencies in that evidence. There can be no doubt that the witnesses here referred to, P.W.3, P.W.4 and P.W.5 were jointly engaged in an unlawful enterprise - it is very obvious they were preparing to fight in a public place - to assault the Tutalevu boys. The warning which was given as to the danger of convicting on uncorroborated evidence from such persons was undoubtedly called for, and it was most forcefully given in the summing up, in traditional terms. But the submission under this heading is that the warning should have gone further to demonstrate contradictions inter se. Counsel did not elaborate on this, so we are driven back to the matters raised in grounds 1.(i) and (ii). We have already said that we do not see that there were inconsistencies or contradictions. Accordingly, in that respect, the submission restates grounds 1(i) and (ii) and suffers their fate.

Ground 4:

Submits that in so far as the summing up to the assessors was erroneous, the learned Chief Justice also

misdirected himself in his fact finding role. This submission of course stands or fails according to the fate of the earlier complaints concerning the summing up. For the reasons we have endeavoured to express, we have not accepted those submissions, so this ground also fails.

Ground 5:

Is a submission that the sentence of 6 years' imprisonment was harsh and excessive. We cannot accept this, for unprovoked violence on innocent persons has become common place in Fiji of recent years and condign punishment is called for. In our respectful view the sentence imposed was entirely appropriate.

Appeal against conviction and sentence dismissed.

Sgd. G. Speight
Vice President

Sgd. B. O'Regan
Judge of Appeal

Sgd. M.E. Casey
Judge of Appeal