IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

Criminal Appeal No. 78 of 1984

Between:

EMOSI QALOMAI — Appellant

and

R E G I N A M — Respondent

Mr. J. Reddy for the Appellant
Mr. J. Sabharwal for the Respondent

Date of Hearing: 14th March, 1985

Delivery of Judgment: 22.3.85

JUDGMENT OF THE COURT

Mishra, J.A.

The appellant was tried by the Supreme Court, Lautoka, on a charge of robbery with violence. At the end of the summing-up two of the three assessors advised the learned Judge that the accused was not guilty; the third found him guilty. The learned Judge rejected the majority opinion, convicted the accused and sentenced him to 3 years' imprisonment. In his judgment he said :-

> "In view of the overwhelming evidence on behalf of the Crown I find it difficult to describe the majority opinion as other than perverse. "

The appellant appeals against his conviction on the following grounds :-

"1. THAT the learned trial Judge disagreed with the majority opinion of the Assessors and convicted, the Appellant without giving sufficient and or cogent, reasons for the said disagreement and conviction.

2. THAT the learned trial Judge erred in not considering the contradictory nature of Prosecution evidence and failed to properly take into account the alibi of the appellant.

3. THAT the learned trial Judge failed to properly direct himself on the questionable evidence of the identification of the appellant by the complainant. "

Some facts of the case were not in dispute. Abdul Razak, a shop-keeper near the village of Momi, on 18th January, 1984, at about 10 p.m. heard a noise and went out to inspect the area where he kept several drums of diesel oil. A man sitting next to a drum stood up and attacked him with a knife. A struggle followed during which Razak received a few injuries. Another man came to the intruder's help and the two then ran away. Near the 44 gallon drum was a smaller drum into which a few gallons of oil had been syphoned through a hose which was still in place connecting the two drums. In addition, Razak found a pair of pliers, a knife sheath and a woolen cap which had fallen off his assailant's head during the struggle.

The sole issue at the trial was the identity of the assailant.

In disagreeing with the majority opinion of the assessors the learned Judge said :-

" Abdul Razak's evidence was completely unshaken. He had ample opportunity to identify the accused whom he had known well before. In

my opinion he did not in any way try to exaggerate in his evidence, he did not try to implicate anyone else, just because his wife thought she recognised the man who came to help the accused. Even on its own Abdul Razak's evidence would have constituted good grounds for considering convicting the accused. Together with it there was the evidence of Peniasi Naqau. Peniasi may not have been a good witness, his story may well have understated his own part in the affair, but his evidence was not negligible, certainly not when taken with the other evidence.

Then there was the overwhelming evidence of the confessions in both the interview record and the charge and caution statement. I totally reject the accused's statement that he never said the things recorded. I totally reject the suggestion that these statements were merely written down and he was asked to sign and did sign without knowing or being told what he was signing.

The injuries found on the accused of course were entirely consistent with the account given by Abdul Razak. "

The learned Judge would appear to have placed complete reliance on Razak's evidence who had known the appellant well and who had resisted the assault at close quarters. According to his evidence he first saw his assailant in the flash light of his torch. The latter then had the woolen cap pulled down partly covering his eyes. Within seconds the intruder attacked him and he lost his torch. During the ensuing struggle the intruder's cap fell off. It is not clear how good the light from the electric bulbs was where the struggle took place, but Razak's evidence indicates that his wife who had watched the episode from the shop verandah had named as one of the assailants a person who was not involved at all. Razak, however, insisted that he was not mistaken as far as the appellant was concerned. During the struggle, he said,

he had bitten him twice, once on the left index finger and again on the chest. He was certain it was "left index finger" and "chest on the right-hand side". The medical examination found no mark whatsoever on the appellant's chest. There was injury to his left index finger which the appellant said he had received from a hammer while repairing his iron roof. There was no medical evidence to show that the injury was caused by teeth and not by edges of corrugated iron. The medical report merely said "sharp object".

According to Cpl. Prasad, the investigating officer, he and Constable Sairusi went to Momi village early that morning and visited several houses looking for the appellant. The appellant's evidence is that he was asleep in his uncle's house, also named Emosi. At any rate, no attempt would appear to have been made to arrest or locate him all day on 19th January, 1984 or on 20th. Appellant came to the police station of his own accord in response to a message left with his father on the night of 18th/19th January. Learned Counsel submits, with some force, that at that stage the appellant must have been one of several persons the police wished routinely to interview. If so, he submits, the police could not have been certain of the assailant's identity from the information furnished by Razak.

As for the injuries on which the learned Judge placed reliance in his judgment the evidence does not bear out his statement that they were "entirely consistent" with the account given by Razak. There was nothing in the medical report to support his positive and repeated assertion that he had bitten his assailant on the chest.

As for Peniasi Naqau the learned Judge did regard him a witness of doubtful reliability but still accepted his evidence as "not negligible" when treated in the light of the other evidence. We say no more about him except to

point out that if he was the person who had allegedly freed the assailant from Razak's grip, as the learned Judge would appear to have accepted, he, apart from being uncreditworthy, was also an accomplice.

There was then the alleged confession made by the appellant during the interview with Constable Sairusi. The record contains two pages of denials ending abruptly in three brief answers amounting to a complete admission of guilt. The appellant alleged at the trial that he did not give those three answers and nothing of the sort was read back to him when he signed the papers placed before him. Const. Sairusi agreed that he interviewed the appellant alone without the presence of a witnessing officer which, he admitted, was contrary to police practice. Learned Crown Counsel, at the hearing of the appeal, conceded that this was so. More irregular was his taking of the charge statement, again without a witnessing officer. Crown Counsel concedes that, according to the practice almost universally followed by investigating officers, a person arrested for an offence is handed to an officer completely unconnected with the investigation for laying the formal charge and recording any statement that the accused then might make. This, equally universally, is done in the presence of another witnessing officer. Though not a legal requirement, we consider this to be a salutary practice which does much to persuade the courts of procedural propriety on the part of the police where admissibility or authenticity of the statement becomes an issue. There was no explanation why this procedure could not be adhered to at a large police station such as that at Nadi. In the present case authenticity was seriously challenged and evidence of unexplained procedural impropriety was before the court.

We recognise that our law makes the Judge the final arbiter both of law and of fact and that he is not

bound to conform to the opinions of the assessors. This court, as a rule, will not disturb his finding if he complies with the proviso to section 299(2) of the Criminal Procedure Code which provides that -

> "..... when the judge does not agree with the majority opinion of the assessors he shall give reasons, ...for differing with such majority opinion. "

The learned Judge in this case has given reasons. He considered the evidence against the appellant overwhelming, and the majority opinion perverse. The passage quoted earlier in this judgment gives his analysis of the evidence. In Damodar Naidu s/o Ranga Sami Naidu & Anor. v. R. (Criminal Appeal 4 of 1978 at 21) this court said :-

> "Where the basic reason for the judge's differing is based on the evidence and upon his own emphatic conclusion thereon ..... that is a reason complying with the requirements of the section. Whether it can be challenged on appeal as being an inadequate reason may be another question, depending on all the circumstances of the case. "

The appellant in his grounds 2 and 3 urges that the learned Judge, in giving his reasons failed to advert to certain serious and uncontradicted aspects of the evidence which, to say the least, were bound to cast serious doubt upon the sufficiency of the prosecution case.

These he submits, were :

(1) Completely uncreditworthy character of Jeniasi Naqau requiring his evidence to be rejected entirely.

(2) Unexplained procedural impropriety attending the taking of statements by Constable Cairusi which, together with their unusual contents, must make the confessions suspect.

(3) Razak's admission that his wife who had seen the struggle from the verandah in identical visibility conditions had named a wrong person to have been one of the assailants.

(4) Razak's positive and emphatic assertion that he had bitten his assailant on the chest, an assertion completely unsupported by the medical report.

We find considerable substance in the appellant's submission and have, with some reluctance, come to the conclusion that the learned Judge, had he adverted to these short-comings in the prosecution evidence, would have formed the view that a panel of intelligent and conscientious assessors may well, at the end of it all, have remained beset with serious doubt as to the guilt of the appellant. If so, he may have preferred their view to his own.

The appeal is consequently allowed and the appellant's conviction quashed.

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VICE PRESIDENT

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JUDGE OF APPEAL

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JUDGE OF APPEAL