IN THE FIJI COURT OF APPEAL
Criminal Appeal No. 27 of 1985.

Between:

KESHO LAL — Appellant

- and -

REGINAM — Respondent

Mr. V. Parmanandam for the Appellant.
Mr. G.E. Leung for the Respondent.

Date of Hearing : 22nd October, 1985

Delivery of Judgment: 8th November, 1985

JUDGMENT OF THE COURT

SPEIGHT, VP

The appellant was tried in the Supreme Court at Labasa before Mr. Justice Scott sitting with three assessors. He was convicted on the only charge against him, namely of causing the death of one Rai Chand by dangerous driving of a motor vehicle.

The facts in the case were in small compass. Appellant and deceased had been travelling on a motor cycle, owned by the appellant, along Nasekula Road when they came into collision with a Mazda van travelling in the opposite direction. That van was driven by one Mahendra Gounder and had a front seat passenger - one Ramesh Chand.

These two were prosecution witnesses, and apart from appellant they were the only eye witnesses to the accident. Their evidence was that the motor cycle approached in an erratic manner, crossed over to its incorrect side of the road and collided with the van.

Both persons in the motor cycle fell to the ground with fatal consequences for the deceased, and the appellant too suffered injury - one in particular to the forehead. The deceased died of internal injuries but had sustained no really substantial head injury. It was common ground that the motor cycle had been ridden in a dangerous manner and the consequent injuries had caused the death of the deceased. The only matter in issue was the identity of the rider. Both Chand (PW4) and Gounder (PW9) identified the accused as the man who had been riding the motor cycle and said that after the accident they saw him on the ground, underneath the motor cycle and he was wearing a motor cyclist's safety helmet. They said the other man was lying clear of the motor cycle and had no helmet on at that time, but there was a workman's "hard hat" nearby. They each said that the first man was thin and the second man fat. That was a correct description of appellant and deceased respectively.

The appellant was severely injured and hospitalised and it is probably for this reason that there was no evidence of him being interviewed by the police. However at trial he made an unsworn statement. He said simply that he had little knowledge of the accident, but was emphatic that the deceased was the rider of the cycle, and he was merely a pillion rider.

The sole question in issue therefore was the identification of the appellant as the rider by PW4 and PW9.

PW4 had said that:

"One of the people who was on the motor cycle was thin. The pillion rider was fat...The man in the box was sitting in front on the motor cycle. They were both wearing helmets.

Accused was wearing Exhibit 5 (cycle helmet). He was still wearing it when we found him. We tried to get it off as it was pushing into the neck. The other man was without a helmet after the accident but had been wearing one before."

"It was raining and a dark night. I saw accused driving just before the accident. I saw him in the light of the street lights."

He was cross-examined as to relevant matters - distance away - speed of cycle - colour of clothing - build of the two men - and the helmet situation after the accident.

In particular he was forced to concede that he had wrongly told the court that he had told the police of the fat/thin descriptions on the night of the accident.

In re-examination he repeated that he had seen the accused as the rider pre-accident and that after the accident he was lying "in the riders position".

PW9 said that the thin man was lying tangled in the fallen motor cycle "in the rider's seat" - and was wearing the cycle helmet. And he identified accused as "in the front seat" and "wearing the helmet". He

too agreed that in his post accident statement he did not give the fat/thin description.

He again claimed the thin man wore the helmet.

The first ground of appeal as advanced before the Court was :

> "1. THAT the Learned Trial Judge mis-directed himself and Gentlemen Assessors in failing to put to the Assessors the question of a possible Defence based on the medical evidence in that he failed to draw the attention of himself and Gentlemen Assessors to the fact that according to the evidence, Ex. 5 viz the helmet was worn by the Appellant and Ex. 6 the hard hat by the deceased and yet the deceased had no head injuries. Hence there has been a substantial miscarriage of justice."

In developing Ground 1 Mr. Parmanandam pointed out that according to the two medical reports:- the deceased had severe internal injuries (which caused death) but no serious head injuries - merely a two inches wound on right ear, a laceration on the chin and an abrasion below the nose. The appellant had a lacerated wound to the scalp at the temple and a depressed fracture of the frontal bone.

The submission is that as the appellant suffered a fracture of the forehead it is more likely that he was the man who had lost his helmet, for, says Mr. Parmanandam, a man wearing a helmet has his forehead protected. If so, then he submits this is material which would suggest that the helmet wearer, found in the rider's position was not

the accused but the deceased and would indicate that PW4 and PW9 were mistaken. Mr. Parmanandam had some support for this, for in cross-examination the pathologist had agreed that:

> "Head injury is quite negligible if the helmet remained after the accident..."
>
> "The helmets would probably protect the upper parts of the head. There would be a greater likelihood of damages to the ears as they are uncovered.
>
> If the helmet came off beforehand then there would be likely to be injuries to the head if it hit the ground with force."

Later however, having read the report on the appellant (whom he had not examined in person), he said:

> "Looking at Exhibit 5 (the cycle helmet) - and I am not a forensic doctor - I see a dent which could have been in contact with the forehead. A person might have had the injuries described in the report even wearing this helmet."

The complaint made is that on this aspect the learned trial Judge misdirected the assessors by not referring to this possibility as relevant to the reliability or otherwise of the identification evidence.

Certainly the Judge did not so refer, but the summing up did stress, and stress frequently, that the whole issue turned on identification, and on whether the assessors could be confident that Chand and Gounder were correct. References were made to the challenge to that evidence by counsel, the mistake or omission in not describing to the police the fat man/thin man distinction was discussed by the Judge, and the

accused's unsworn challenge to the evidence was referred to.

This is a complaint of non-direction on fact amounting to misdirection.

We think only one reference to authority is needed to show the duty of a Judge in this respect. The position is admirably summarised in the following passage from Attfield (1961) 45 Cr. App. Rep. 309 @ 311-313.

> "It is convenient to deal first with the point that the summing-up was defective on the ground that the evidence was not dealt with at all except in regard to the appellant's character. No doubt, it is right to say that probably in nine cases out of ten that come before the courts, the trial judge, whether he be a judge or recorder or Chairman of Quarter Sessions, in summing-up goes through the evidence. It would be quite wrong to suggest that it is the trial judge's duty to read out the whole of the evidence, and that is not suggested. Indeed, many would take the view that a mere recitation of evidence which the jury themselves have heard does not assist them at all. In most cases what the trial judge endeavours to do is by reference to the evidence to direct the jury's attention to what may be called the salient features for and against the accused man. No case has laid down, so far as we are aware, that it is essential for the validity of a summing-up that there should be a reference to the evidence, but equally there is no case that, so to speak, absolves a court from what is normally its functions of assisting the jury by dealing with the evidence. Some assistance is to be gained from a passage cited in Stoddart (1909) 2 Cr. App. R. 217. In that case a trial had taken place over a period of twenty days, and there was an omission to direct the jury upon many of the no doubt complex issues which had been considered in the course of it, but this court at p. 246 cited Lord Esher's words in Abrath v. North Eastern Ry. (1883) 11 Q.B.D. 440, at p. 452, as follows: "It is no misdirection not to tell the jury everything which might have been told them. Again, there is no misdirection unless the judge has told them something wrong or unless what he has told them would make wrong that which he has left them to understand. Non-direction merely is not misdirection, and those who allege misdirection must show that something wrong was

> said or that something was said which would make wrong that which was left to be understood." That is the end of the quotation, and this court then went on: "Every summing-up must be regarded in the light of the conduct of the trial and the questions which have been raised by the counsel for the prosecution and for the defence respectively. This court does not sit to consider whether this or that phrase was the best that might have been chosen, or whether a direction which has been attacked might have been fuller or more conveniently expressed, or whether other topics which might have been dealt with on other occasions should be introduced. This court sits here to administer justice and to deal with valid objections to matters which may have led to a miscarriage of justice."
>
> Nothing that this court is saying today is intended to put forward the suggestion that a judge is entitled to refrain from discussing the evidence if the circumstances of the case and the conduct of the trial demand that he should. The words that are important in Stoddart's case (supra) are that each case must depend on its own facts. Clearly, in a complicated and lengthy case it is incumbent on the court to deal with the evidence. Conversely, in a case which has not occupied a great deal of time and in which the issue, guilt or innocence, can be simply and clearly stated, this court is not prepared to hold that it is a fatal defect to the summing-up that the evidence has not been discussed."

Now this case was short and the issue was straight forward. The trial commenced at 9.30a.m. on Tuesday 12th March, 1985.

The learned Judge commenced his summing-up at 2.30p.m. the following day.

There is a note of Counsel's address on behalf of the accused. It is apparent from that note that he developed the question of the unreliability of the identification. He dealt with the helmet/no injury question. He characterized that aspect as "amazing".

We are sure Mr. Parmanandam would have done that with vigour and the assessors would have had the point clearly in their minds when they retired at 3p.m. They may also have recalled that, according to PW4, the helmet had been "pushing into his neck" - indicating partial dislodgement.

Taken with the pattern and content of the summing up which stressed the same need to scrutinise the identification with care, we see no validity in the suggestion that to have failed to refer to this aspect of the evidence constituted a misdirection in the circumstances of this case.

Ground 2 reads as follows:

> "2. THAT the Learned Trial Judge misdirected himself and the Gentlemen Assessors on this issue of identification in that he did not sufficiently comply with the requirements of law on this issue. Hence there has been a substantial miscarriage of justice."

This is a complaint that the summing-up did not deal with identity in a case where the type of directions discussed in Turnbull (1976) 3 WLR 445 (1976) 3 All E.R. 549 were called for.

We agree this was a Turnbull type case. The witnesses and the people on the motor cycle were strangers to each other, it was at night time and visibility was by no means good. Although there was ample opportunity afterwards to see and thereafter recognise the injured men, the pre-impact opportunity was brief.

The learned trial judge obviously recognised this. He said:-

" Now this is a case where the case against the Defendant depends wholly or substantially on the correctness of one or more identifications of the defendant which the Defence allege to be mistaken. I must therefore warn you of the special need for caution before convicting in reliance on the correctness of the identification. The reason for this is that it is quite possible for an honest witness to make a mistaken identification and notorious miscarriages of justice have sometimes occurred as a result. You must examine carefully the circumstances in which the identification of the two witnesses Ramesh Chand and Mahendra Goundar were made. How long did they have the accused under observation? At what distance? In what light? Was their observation impeded in any way? How long elapsed between the original observation and the subsequent identification to the Police?

Mr. Chand, who was the passenger in the van, told you that he had seen a motor cycle with two persons on it approaching the van. After the collision he had seen a man underneath the front part, the driver's part of the motor cycle. He had removed a pale green helmet from his head. He identified the Accused in the dock as the man he had seen driving the motor cycle. He had seen him in the street lights.

The driver of the van Mr. Goundar, gave similar evidence of what had occurred that night and both men referred to a thin man driving and a fatter man."

Having discussed the shortcomings of the statements made to the police the Judge then said:

" Fundamentally, you may think that this case comes down to your assessment of the truth and reliability of the two principal prosecution witnesses, the driver and the passenger in the van - as I have already advised you, you must examine their evidence with great care."

Mr. Parmanandam submits that although this is a standard Turnhull warning the Judge failed to proceed

to discuss the evidence in detail, and to relate each piece to one or other of the Turnbull tests. We think we need only refer to what has already been recited from Attfield and Stoddart.

Every summing up must be related to what had happened at the trial. This had been brief and with but one issue. Attention had been concentrated on the opportunity for and reliability of observation. The classical questions were posed. In this case the Judge was not obliged, in our view, to traverse the individual items of evidence relevant to those questions. They would be fresh in the minds of the assessors.

Consequently neither ground succeeds and the appeal is dismissed.

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Vice-President

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Judge of Appeal

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Judge of Appeal