IN THE FIJI COURT OF APPEAL

Criminal Appeal No. 25 of 1986.

Between:

LUKE TAWAKE — Appellant

- and -

R E G I N A M — Respondent

Appellant in Person.
Director of Public Prosecutions (Mr. M. D. Scott) for the Respondent.

DATE OF HEARING: 26th June, 1986.

DELIVERY OF JUDGMENT: 4th July, 1986.

JUDGMENT OF THE COURT

Speight, VP

The appellant was tried in the Supreme Court before Govind J. and three assessors on four charges of shop or office breaking. Assessor number 1's opinion was that he was guilty on counts 1 and 3 and not guilty on counts 2 and 4. Assessor number 2's opinion was guilty on count 1 and not guilty on counts 2, 3 and 4. Assessor number 3 was of the opinion of not guilty on all four counts.

The learned trial Judge accepted the majority opinions on count 1 and convicted and found appellant not guilty on counts 2, 3 and 4. The appeal is against conviction and sentence in respect of the first count viz. of breaking and entering the office of G. Kaliyan & Co. and theft of clothing, shoes and jewellery therefrom.

The evidence was in two categories. First there was the direct eye-witness evidence of PW1 Paula Baleiwabu who is a watchman at the Garrick Hotel. He claimed that at about midnight he had been walking in the central Suva area and had seen a man, whom he identified as the appellant, running across the roof top of the G. B. Hari building, opposite the Chief Post Office. He says that this person appeared to realize that he had been seen, and was trying to run away, but PW1 was able to alert some police in the area under the command of Corporal Imo. PW1 claimed that he knew the appellant by sight as he had seen him earlier in the evening drinking at the Garrick Hotel.

The other evidence came from the police people at the scene, and some shopkeepers in the G. B. Hari building who, when summonsed by the police, found that their premises had been ransacked and property was missing. Corporal Imo's evidence was that when he had been alerted by Paula, he went into the G. B. Hari building and found signs of burglary and he looked around the vicinity for the intruder. He heard a loud sound and then saw the accused running across

the street towards the Westpac Bank. He stopped the accused and took him into custody and it was found that accused had on him substantial number of coins, a small table clock and most significantly, three cufflinks inside his pompom hat.

When interviewed the accused denied the truth of PW1's evidence of being on the roof, and said that he had been running towards Westpac because he was trying to catch up with a girl who had been with him at the Chequers Night Club. His explanation for the money and cufflinks was that they had been given to him as an appreciation by a tourist whom he had helped with his packages during the afternoon. The summing-up was a succinct review of the evidence. It cast some doubts upon the credibility of the identification evidence and gave the common warning as to the possibility of even honest witnesses being mistaken. We think it can be said that the Judge gave the assessors a very strong indication that the identification by PW1 was unreliable and that the strength of the case, if any, lay in the finding of the cufflinks on the accused at a time when he had been seen running away from the building housing Kaliyan's office whence cufflinks subsequently identified by the proprietor had been stolen.

In respect of his conviction appeal the appellant drew attention to a number of contradictions between PW1's evidence and that of the police witnesses. In particular, contrary

to PW1's denial, it was clear that the police regarded PW1 as being drunk at the time, and their account of his movements shortly after the discovered burglary in no way tallied with his. The criticisms made of this unsatisfactory evidence was well justified, but it was indeed canvassed with care by the trial Judge during the summing up and the assessors were appropriately warned.

The other matters put to this court by the appellant were re statements of the claim made by him at police interview - namely his accounting for possession of the cufflinks. The fatal flaw in this however was that he claimed that the event with the tourist had taken place in the afternoon. On the other hand Kaliyan's proprietor had locked the premises at 6p.m. or 6.15p.m. and had no knowledge of any disturbance of his stock until he was called back to the premises by the police early the following morning. Further, he said that none of the three cufflinks recovered matched i.e. there was no pair, that they were samples, old stock, exclusive to his firm and they had never been sold to a customer. The case amounted to one of recent possession of stolen property in circumstances where the explanation proffered was demonstrated to be untrue. This coupled with the evidence that appellant was seen running from near the scene of the crime at the very time it must have occurred made the charge in respect of that office breaking overwhelming.

The fact that the assessors returned not guilty opinions in respect of some or all of the other three counts in the case showed that they took heed of the warnings given by the learned trial Judge as to the unreliability of PW1 as to the roof-top burglary.

In these circumstances we see no ground upon which the appeal against conviction can succeed in respect of Count 1.

The appellant also submitted that the sentence of 18 months was excessive. We have considered what he has said but can find no reason to differ from the sentence imposed. Burglaries of business premises are very prevalent and the appellant has a number of previous convictions of this class. We think the sentence entirely appropriate so that the appeal is dismissed both as to conviction and as to sentence.

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Vice-President

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Judge of Appeal

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Judge of Appeal