IN THE FIJI COURT OF APPEAL

Criminal Appeal No. 109 of 1985

Between:

1. MATAIASI RADUVA
2. JOHN HEATLEY — Appellants

- and -

R E G I N A M — Respondent

Both Appellants 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, V.P.

Each appellant was convicted on a charge of larceny from the person of one Venkataiya Kadir Ali on 1st May, 1985. The allegation was that the complainant was being served at the counter of Raj's Restaurant in Amy Street when the two appellants came up to him - the second appellant Heatley was said to have held the complainant up against the counter while the first appellant Raduva removed his wallet and ran off.

A restaurant employee Muni Ratnam was the principal witness. He said that after witnessing the offence he was in company with police officers looking for the offenders and saw Raduva whom he knows well, near a neighbourhood church and he pointed him out to the police. Raduva, who, like Heatley, defended himself, cross-examined Muni Ratnam vigorously. He denied that he had been in the restaurant at all and claimed that he was being falsely accused because he was unpopular with the proprietor and staff at that place.

The complainant Ali was not a witness at the trial, having left Fiji. However he had been called at the preliminary hearing, and it must have been known that he would not be available at trial for he was cross-examined at length by counsel who then appeared. His evidence was that Heatley had held him and Raduva had taken the wallet.

At he trial, application was made for the deposition transcript to be used as evidence in the case. Proof was given of the absence of the witness from Fiji and the deposition was admitted. On appeal both appellants complain of the absence of the witness at trial, with their consequent inability to question him in front of the assessors.

The relevant provision of the law in this regard is in Section 290 of the Criminal Procedure Code. The appropriate part reads:-

> "290. Where any person has been committed for trial for any offence, the deposition of any person taken before the committing magistrates' court may, if the conditions hereinafter set out are satisfied, without further proof be read as evidence on the trial of that person, whether for that offence or for any other offence arising out of the same transaction, or set of circumstances, as that offence."

The conditions, which are detailed in the section, were complied with in this instance and the question is whether the evidence should have been admitted.

In other jurisdictions, with similar provisions, it has been argued that once the conditions have been fulfilled the prosecution can have the evidence admitted as of right; but that contention has been widely rejected. For a review of the position in a number of countries see Gera (1978) 2 N.Z.L.R. 500. The admission is a matter of discretion and its exercise must depend on a number of circumstances, including the importance of the evidence, the knowledge at the deposition hearing of the likely departure of the witness and hence the opportunity to cross-examine, the existence of other substantial evidence and other factors.

In the present case the witness was important, but obviously he was cross examined at great length. There was evidence of equal if not greater potency from Muni Ratnam, and the trial Judge prudently instructed the

assessors that although it was said that the complainant had identified Raduva at an identification parade, only limited weight should be given to that as he had not been heard by them in person. We do not think the discretion to admit was wrongly exercised.

The telling evidence against Raduva was that of Muni Ratnam. It was not a case of inadequate opportunity to identify - the so called "fleeting glance". The witness knew Raduva well; the challenge was that Muni Ratnam was lying because of animosity against Raduva arising from other incidents. The learned Judge rightly said that the assessors would have to be sure that Muni Ratnam was telling the truth before they could convict. In the face of this warning all assessors returned opinions of "Not Guilty" - which we take to mean they were not confident. But the trial Judge exercised his power to override the assessors and he found Raduva guilty - which means that in contra-distinction he was convinced of the witness's accuracy and truthfulness.

Now there are cases from time to time in Fiji where a Judge does so convict in the face of contrary assessor opinion. These cases are rare and in our experience are one's where the evidence against an accused is so over-whelming and so affirmatively established that one can say that the assessors' conduct was perverse. With great

respect to the learned trial Judge we do not think that was the situation here. This was a straight out question of seeing and hearing a witness and deciding whether he could be accepted, beyond reasonable doubt, as truthful. Three citizens - a life insurance representative, a villager and a civil servant decided that they could not be so sure. In matters of this sort, where credibility is in issue, we would like to say, from not inconsiderable experience on the bench in criminal proceedings, that the status of being a Judge does not confer any advantage, in the field of assessing truthfulness, over any other man of the world. Indeed the contrary is sometimes suggested. That is why we have assessors or juries. It is true that there was the supporting deposition of the complainant, but the assessors heard that too, and for reasons already discussed there were limitations on its usefulness. In our view this was not an appropriate case for the opinions of the assessors to be disregarded and we think the conviction of appellant 1 is unreasonable and should be quashed.

Appellant 2 - Heatley is in a different position. He admitted he was present with a friend, whom he said was not Raduva. He agreed that he breasted up to the counter alongside the complainant and made physical contact with him. But he claimed that it was for the purpose of pushing him along so that he could get access to the gri . The question of identity did not therefore arise. There was no argument but that someone then stole the wallet and both

the complainant and Muni Ratnam had said it was a deliberate grasping of the complainant to facilitate the taking. Two of the three assessors accepted this view and returned opinions of guilty, and the Judge concurred.

We have also already rejected accused 2's complaint against the admission of the deposition evidence. We see no misdirection of law or fact in the summing up and Heatley's complaint about identification can have no validity, for he admitted being present and pushing the complainant at the relevant time - a pushing which two witnesses said was part of the robbery.

The appeal of appellant 1 is allowed and the conviction and sentence are quashed.

The appeal of appellant 2 is dismissed.

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Vice-President

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Judge of Appeal

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Judge of Appeal