

IN THE FIJI COURT OF APPEAL

Criminal Appeal No. 51 of 1986

Between:

MACIU TIKO

Appellant

- and -

REGINAM

Respondent

In Person - the Appellant
Mrs. Naaz Shameem for the Respondent

Date of Hearing: 23rd October, 1986

Delivery of Judgment: 3/18 ^{October} November, 1986

JUDGMENT OF THE COURT

Roper, J.A.

This is an appeal against conviction and sentence on a charge of robbery with violence.

At about 7 p.m. on the 24th, 1985 a young man entered the shop of Rameshwar Singh in Salato Road and asked for two cartons of beer. Because of the hour Mr. Singh refused to serve him. The man was not a regular customer and all that Mr. Singh could say was that he did not appear to be a full blooded Fijian. Mr. Singh thought that he was of mixed race because of his hair and fair complexion. The man left the shop but soon returned with another man who was a Fijian. There was a further request for beer which was refused. There was some by-play with bottles of soft drink

which ended with the man who had first entered the shop throwing one at the glass door which broke. The men then seized the cash register, struck Mr. Singh and fled taking only the cash drawer of the register which had contained about \$1,200.

The appellant was jointly charged with one Etuate Duana and Mr. Singh said in evidence that because of the lapse of time he could not identify either accused as being involved in the robbery.

At the time of the robbery there was another customer in the shop, Laisani Diani. She had gone there to buy kerosene and observed what passed between Mr. Singh and the two men. She made an in-court identification of the appellant as being one of the men but could not identify Duana. The trial took place more than a year after the robbery but earlier, on the 4th July 1985, Laisani had identified the appellant on a properly constituted identification parade at Samabula Police Station. Her identification was not immediate. She walked along the line of men on three occasions before identifying the appellant. Laisani said she had attended two earlier identification parades before the one when she identified the appellant but it is clear from the appellant's evidence, and enquiry we made of him at the hearing, that he could not have been on those earlier parades. There was a further identification by Laisani in rather unusual circumstances. On the night of the robbery a Constable Yabia attended the scene and interviewed Laisani. He showed her a copy of "The Fiji Sun" in which were 7 photographs of prison escapers including the appellant and asked whether any of them had been involved. She identified the appellant. Neither Mr. Singh nor his wife, who attended an identification parade, could identify either accused as being involved so the prosecution case, at least against the appellant, depended entirely on Laisani's evidence.

It was unfortunate that the appellant had been identified as an escaped prisoner but the Trial Judge gave a careful direction to the assessors concerning that. Nothing more could have been done to allay prejudice.

It is Laisani's evidence and the direction to the assessors upon it that concerns us. The circumstances were such that a careful direction on identification in accordance with Turnbull (1976) 63 Cr. App. R. 132 was called for. We regret to say that it was not given. There was a special circumstance in this case which made it even more essential that it be given and that was the intervention of the Trial Judge in the course of the appellant's cross examination of Laisani. The appellant was challenging Laisani's description of the men she had seen in the shop and her identification of the appellant as one of the men. The Crown Prosecutor objected to the line of questioning for no very apparent cause and the Trial Judge then addressed the appellant as follows:-

"This Witness said that it was you and you answer to the description that she has already described - fair and well built. It was you who was there that night with this tall, dark man. From her evidence that is very clear and there is no room for argument on that."

We doubt whether the most careful Turnbull direction could have overcome the prejudice of that comment which really removed the question of identity from consideration.

We are satisfied that the conviction cannot stand and the appeal is therefore allowed and the conviction set aside.

There will be an order for a retrial, although with the even greater lapse of time the problems involved in identification may be insurmountable. That however is a matter for the Director of Public Prosecutions.

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Vice-President

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Judge of Appeal

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Judge of Appeal