IN THE FIJI COURT OF APPEAL

Criminal Appeal Nos. 79 of 1986
and 38 of 1987

Between:

ALIPATE RAIVOLITA
JOSEFA NAIVALURUA — Appellants

- and -

STATE — Respondent

Appellants in person
Mr. I. Mataitoga for the Respondent

Date of Hearing: 4 May 1988
Date of Judgment: 9 May 1988

JUDGMENT OF THE COURT

The first named appellant Alipate Raivolita was accused No. 2 in the Supreme Court (as it was then known) in Criminal Case No. 61/86. He has appealed against both conviction and sentence (Criminal Appeal No. 38/87). The second named appellant Josefa Naivalurua was the first accused in the same trial. The latter has appealed against sentence only (Criminal Appeal No. 79/86). Both were jointly charged with 2 counts namely house breaking, entering and larceny (first count) and criminal intimidation (second count).

We shall deal with the second appellant's appeal first. He had pleaded guilty to the first count and not guilty to the second. Prosecution then decided not to offer any evidence against him on the second count and he therefore was acquitted on that count. He was sentenced to 2½ years imprisonment for the offence of house breaking, entering and larceny contrary to Section 300(a) of the Penal Code, Cap. 17.

The maximum punishment provided for this offence is 14 years imprisonment. In his "Notice of Appeal or Application for Leave to Appeal" he contended amongst other things that the sentence is too harsh and excessive and he also pointed out that although he pleaded guilty his sentence was made consecutive to the 18 months imprisonment he was already serving at the time. He refers to his difficult family circumstances and asks for mercy and reduction of sentence.

The trial judge took into account the appellant's hand-written plea in mitigation which he, the appellant, read out in Court. He however observed that the accused had been convicted of an offence which is not only serious but unfortunately very common. We could not agree more.

This Court notes that out of his eight previous convictions two were for robbery with violence and one was for shop breaking. He has therefore in our view forfeited any claim to further leniency. The sentence of 2½ years only marginally reflects the gravity of the offence. In our view the sentence was neither wrong in principle nor manifestly excessive; if anything it was somewhat on the lenient side.

The second named appellant's appeal against sentence is therefore dismissed.

We now turn to the appeal of Alipate Raivolita the first named appellant. This appellant had pleaded not guilty in the Court below to both counts. The assessors were unanimous in their opinions that the accused was guilty of the first count relating to house breaking, entering and larceny but two out of the three assessors were of the opinion that the accused was not guilty on the second count relating to criminal intimidation. The learned trial judge accepted the unanimous opinion on the first count and convicted the accused accordingly. In respect of the second count he found no reason to differ with the majority of opinion and so acquitted him on that count.

This accused has appealed against his conviction as well as the sentence of 2½ years.

The grounds of appeals filed by appellant's Counsel Dr. Cameron read as follows:

(1) That the conviction is against the weight of evidence in all the circumstances of the case; and

(2) That the sentence was manifestly harsh and excessive in all the circumstances.

No further grounds of appeal were filed after the trial record was delivered. Nor were any particulars filed in support of the contention that the conviction was against the weight of evidence.

At the hearing of this appeal the appellant was unrepresented and we understand that his Counsel Dr. Cameron is no longer in the country. Before us the appellant reiterated his stand that he does 'not know anything about this case'. The case against him therefore turned on the question of identity and so we are not concerned with the other ingredients of the charge, about which there is in fact no dispute.

In R. v. Turnbull and Ors (1976) 3 W.L.R. 450, the English Court of Appeal held inter alia that whenever a case against a defendant depends wholly or substantially on the correctness of one or more identifications of the defendant which the defence alleges to be mistaken, the direction to the jury should include a warning of the special need for caution before convicting the defendant and the reason for that caution (p. 447 B-C). In delivering the judgment of the Court Lord Widgery C.J. also provided some useful guidelines for judges to observe when summing-up in such cases. We need not repeat them here as they are now well-known.

As the appellant was not represented we carefully scrutinised the evidence as well as the summing-up on the vital question of identification.

In his summing-up the trial judge, Govind J. told the assessors:-

"As this case rests solely on identification, I must warn you that mistakes in identification can be made even by honest witnesses. Therefore you must closely examine the circumstances in which identification was made."

He then directed them substantially in conformity with the guidelines suggested in TURNBULL'S case. We might add that the TURNBULL guidelines were not intended to be followed ritualistically or inflexibly irrespective of the peculiar facts of any particular case. See R. v. Keane (1977) 65 Cr. App. R. 247.

The one and only eye witness at the actual scene of the crime was Nagmani Kumar (P.W.3). She was in fact grabbed by the neck and threatened with a knife. She had ample opportunity to see this person and his companion at the scene and also when they were running away. She had no difficulty in identifying this appellant as her assailant in an identification parade which was carried out fairly.

There were two other prosecution witnesses one of whom saw the appellant in the vicinity of the scene of the crime on the day of the offence shortly before the breaking took place and another saw him in the vicinity the same day at about the time the offence took place. Although they identified this appellant, their evidence does not constitute corroboration of the eye witness's account in the technical sense. Nor was their evidence treated as such in the court below. However we are of the view that their testimony viewed in its totality can be regarded as supportive evidence which tended to strengthen the prosecution's case - See R. v. Long (1973) 57 Cr. App. R. 871. We are quite satisfied that the danger of miscarriage of justice which can arise from misidentification did not exist in this case. The learned trial judge having warned and properly directed the assessors was

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fully justified in accepting their unanimous opinion of guilt. We therefore have no hesitation in dismissing this appeal against conviction.

As regards appeal against sentence we find no grounds whatsoever to disturb the punishment imposed. Our observations made in respect of the second named appellant in large measure apply to this appellant also. The appeal against sentence is therefore also dismissed.

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President, Fiji Court of Appeal

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Justice of Appeal

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Justice of Appeal