IN THE FIJI COURT OF APPEAL

At Suva

Criminal Jurisdiction

CRIMINAL APPEAL NO. 6 OF 1990

Between

1. JOSESE TOGAVA
2. JONE TUI
3. SEMI TUBUNA — Appellants

v.

THE STATE — Respondent

Appellants in Person
Mr. Isikeli Mataitoga, Director of Public Prosecutions for the Respondent

Date of Hearing : 10th October, 1990
Date of Delivery of Judgment : 27th February, 1991

JUDGMENT OF KERMODE JA

The three appellants were each charged with the offence of Rape and were on the 19th day of January, 1990 convicted by the High Court at Suva and each sentenced to 10 years imprisonment.

The three appellants were originally charged jointly with one Yabaki Kaibati who did not turn up at the trial. I

will throughout this judgment refer to Kaibati as "the second accused" as this was the way he was described throughout the trial by the trial judge and the State Prosecutor.

The trial judge decided to proceed with the trial against the three appellants.

The State Prosecutor filed an amended Information deleting counts of burglary and robbery with which counts all four named accused were charged. He did not, however, delete the name of the second accused, an error, which in my view prejudiced the defence of the three Appellants. This is a matter I will refer to in more detail later in this judgment.

Each of the appellants appeals against his conviction and sentence. Tikaram JA with Jesuratnam JA's approval has included in his (Tikaram JA's) judgment a consolidation of the three Appellants' separate Grounds of Appeal which cover a very large variety of complaints; originally prepared by Jesuratnam JA.

There are five broad Grounds of Appeal but as both Tikaram JA and Jesuratnam JA in their respective Judgments have only dealt with the second ground I will for ease of referene repeat only this ground.

> " Secondly they point out the discrepancy in the statement of the complainant said to have been made to the doctor that only one man raped her and her evidence in Court that all four raped her. "

Tikaram JA has purported to briefly state the prosecution's case. If that purports to be a brief summary of the evidence, of the evidence leading to the prosecution's contentions, I am unable to accept the statement.

I consider, in fairness to the appellants, that a summary of the allegations made by the complainant and her female companion should be made by me. I include all facts which I consider relevant to consideration of their appeals gleaned mainly from the complainant's story and admissions made by her when cross-examined by the appellants. Occasionally I will add my comments because they will be pertinent to remarks I make later in this judgment.

I am not overlooking the views of my two brother judges who consider that if there is to be a retrial the less said about the evidence the better.

They both rely on a remark made by Lord Diplock in the Privy Council case Au Pui-kuen v. Attorney General of Hong Kong (1979) 1 All E.R. 769. Lord Diplock said :

> " In the instant case, their Lordships do not know all the factors that the majority of the Court of Appeal took into account in reaching their decision of 17th February 1977 that there should be a new trial; for neither at that time nor thereafter have they given their reasons for it. If a new trial is to be ordered it is often the case that in the interest of justice at the fresh trial, the less said by the Court of Appeal, the better. "

When I come to discuss the issue of a retrial I will indicate that the instant case is one where it was the duty of the Court to consider all the relevant Grounds of Appeal and the Privy Council case so far as Lord Diplock's comment, which was obiter, is concerned is not relevant. The case was also a second appeal. At this stage I would also point out that the Hong Kong Court of Appeal invited submissions on the question of retrial and after brief argument by Counsel the Hong Kong Chief Justice announced (by a majority) the Court would order a new trial.

In the instant case three young men, unrepresented before us, are denied an opportunity of being heard on the issue of a retrial where they have successfully argued their appeals.

There was only one witness who corroborated, in part, the story told by the complainant. That was a woman called Unaisi who was either the sister or cousin of the complainant. She did not witness the first alleged rape but she stated she witnessed the second of the next 12 instances of alleged rape but none of the remaining 11 because she was frightened and left her bedroom and went upstairs where another family lived and stayed there until about 5.00 a.m.

It is pertinent to state that Unaisi at no time saw any of the three appellants in her house between the hours of 2.30 a.m. and 5.00 a.m. during which hours the alleged rapes were committed. She says she saw them walking away the next morning.

The complainant is a young Fijian woman aged 21 at the time of the trial. She was at the time unmarried and employed by the Union Club in Suva, a club which to public knowledge is multi racial and multi lingual. At the trial during her evidence-in-chief she volunteered the information that she was not a virgin on the day of the alleged offences.

The complainant was apparently a heavily built woman a fact stated by the third appellant in his final address to the Court and Assessors. The record does not indicate any challenge to this statement. It was the main plank in the third appellant's defence.

On the night of 8/9th July, 1988 the complainant went to a dance at the Bali Hai Nightclub. She apparently went

alone. When the dance finished at 2.00 a.m. she had no money for a taxi to get her home. She agreed to go home with a young man called Waisale who was her brother-in-law's younger brother. They went by taxi to Unaisi's home. When they got there Waisale went somewhere to get money for the taxi. Unaisi let the complainant into the house. Although the hour was then about 2.30 a.m. there were a number of youths hanging around and there was at least one group near the house singing.

Shortly after the complainant entered Unaisi's house Waisale arrived. He was in an intoxicated condition. The complainant in evidence stated "He wanted me but after a while he knocked out". The two women persuaded him to go to sleep on the floor of the living room.

Unaisi's premises were apparently a flat in a block of flats. The adjoining flat was empty at the time but the upstairs flat was occupied by a woman and her children. Her husband was away. It was a one roomed flat with two beds in the bedroom. There was a porch at the back.

After Waisale lay down to go to sleep the two women went into the bedroom to sleep. Shortly afterwards there was a knock on the door. There was a Fijian boy at the door asking for matches. He was not one of the appellants. When offered matches by Unaisi the boy refused to take them. He called out to another boy who turned out to be the second accused. The second accused was known to the complainant by sight. She was frightened of him and she went into the bedroom and got under one of the beds.

Already under the bed was a friend of the complainant by name of Meredani, a neighbour. She was sleeping.

It is pertinent to point out at this stage that both Waisale and Meredani were in the house when the second

accused came in. Waisale was in the premises and awake when the complainant was being raped according to her story.

The complainant said in evidence :

> " Waisale then woke up and came into the bedroom and asked the accused what they were doing inside the house and Yabaki fisted him and he knocked out again in the bedroom. "

Meredani and Waisale were not called as witnesses by the prosecution and no explanation appears to have been given for this omission. Waisale in particular could have established whether any of the three appellants were in the bedroom or whether it was only the second accused who was the person who punched him.

When the complainant hid under the bed she was dressed only in a sulu tucked above her breasts and a pair of panties.

The second accused entered the bedroom and pulled the complainant from under the bed and onto the back porch. There according to the complainant he punched her heavily on both thighs, took off her sulu and her panties and began raping her. The complainant said she saw two boys walking around the porch. Neither of them was any of the appellants. The second accused told the boys to go away as the complainant was his wife. The interruption distracted the second accused. She stated "We had sex for nearly one hour but could not discharge". When told by the second accused to get up and dress she did so. She went and knocked on the door which Unaisi opened.

When the complainant and the second accused re-entered the room they went straight to the bedroom. The evidence indicates that the complainant made no complaint to

Unaisi or asked for her help. Nor did Unaisi indicate in her evidence hearing any sounds from the porch. According to her the complainant and the second accused were only away a short time no longer than five minutes.

The second alleged rape occurred in the presence of Unaisi and two young children.

Unaisi did not witness the whole of this rape. The second accused threatened to rape her after he finished raping the complainant. She put the children out a window and took them upstairs to the flat occupied by the woman whose husband was away. She stayed there until 5.00 a.m. at which time she said she saw the three appellants and the second accused walking away from the premises. At no time did she see any of the appellants inside the house that evening after the complainant came home from the Bali Hai.

After the second accused raped her he left her and went to answer a knock on the door. The complainant appears to have got up from the floor where she says she was raped, dressed and was at the bedroom door when she saw the third appellant enter. She also knew him by sight. She said the third appellant pulled her into the bedroom and he was followed by the other two appellants. The second accused apparently also returned to the bedroom. Then followed, according to the plaintiff 12 further instances of rape three times by each of the four youths, the three appellants and the second accused.

During the commission of the 12 further offences the complainant said she struggled, was punched heavily on the thighs and on the jaw. She said that the second accused forced a short iron rod into her vagina which caused her pain and caused bleeding. She said that all

four had marbles on their penises and was sure of this fact.

Mention of these facts and omission of some that the complainant stated is not for the purpose of causing embarrassment. Later it will be seen that when the complainant was medically examined she had no visible injuries or indications of having been raped, except for a love bite on her neck.

After these 12 additional rapes the complainant packed her clothes and went to Vatuwaqa at about 6.00 a.m. It is not clear whether she was living at Vatuwaqa at that time. At the time she gave evidence she was living there.

At Vatuwaqa she washed herself and her clothes and went to bed. She was asleep when the police called with another of her sisters. The complainant had made no report to the police. To the police when asked why not she replied she was ashamed. In court she said she did not because she had been threatened by the appellants.

I have found it necessary to go into some detail as to what happened in fairness to the appellants.

The appellants are entitled to have their Grounds of Appeal properly considered by this Court if they are not to be acquitted. A great many of their grounds on the face of them have merit. Since I am in favour of acquitting the accused it is not necessary for me to deal with all the grounds they have raised.

I am of the view that the trial of the appellants was so irregular and unfair that justice requires that they have

their convictions quashed and that they be acquitted. All three of us agree that the appeals be allowed.

To support my argument later in this judgment I find it necessary to point out the very many irregularities that occurred at and during the trial of the appellants. The totality of them satisfy me that the appellants did not receive a fair trial. I will number the matters that I consider were irregular and/or unfair.

1. DEFECTIVE INFORMATION

Reference was earlier made to the fact that the second accused's name was not deleted from the information when the State Prosecutor filed an amended Information, Yabaki Kaibati was throughout the trial referred to as "the second accused" by the trial judge and the Prosecutor.

His name should have been deleted from the Information. Failure to do so was highly prejudicial to the appellants. The evidence is clear that none of the three were present when the second accused is alleged to have raped the complainant the first two times.

The second accused was not an accused at the trial. The bulk of the evidence adduced by the prosecution was directed to establishing that the complainant was raped twice before any of the appellants were said to have appeared on the scene. That evidence was not admissible against the three appellants unless the prosecution could establish that the appellants were aiding or abetting the second accused. There was no evidence that connected the three appellants so far as the first two alleged rapes were concerned. The evidence was not relevant to the charge against the appellants and should not have been admitted by the trial judge.

A perusal of the Record supports my view that "the second accused" was tried "in absentia". There was evidence that he had sex with the complainant. He was not present to defend himself or give an explanation which might have assisted the appellants or even exonerated them.

Arising out of the defective Information were serious misdirections regarding the second accused. The learned judge in his summing up said :

" Now for the charges. You will have already seen gentlemen assessors from the copies of the information before you that there are 4 persons jointly charged with a single offence of Rape. The particulars of the charge read as follows :

" Josese Togova, Yabaki Kaibati, Jone Ratini Tui and Semi Tubuna, on the 9th day of July, 1988 at Nasinu in the Central Division had carnal knowledge of (name omitted by me) without her consent.

Now in respect of this charge gentlemen assessors you will each be asked your individual opinion as to the guilt or innocence of each accused separately. Similarly I direct you as a matter of law that in spite of the joinder of the accused you must decide the issue of guilt or otherwise of each accused quite independently and separately from that of the other accused.

In other words, you must assess and evaluate the evidence against each accused separately. You must not let the evidence against one accused weigh against or strengthen the prosecution's case against another accused.

It does not in the least follow that because you may find an accused guilty or innocent of the offence therefore the other must be guilty or innocent also. In the particular context of this case you must not use the evidence against the second accused Yabaki Kaibati which you may think is the stronger, to strengthen the prosecution's evidence against the 3 accused who are in court. "

Quite apart from the fact that the second accused was one of the accused and the assessors should have been directed that there was no evidence to connect the appellants with the first two offences, the learned judge misdirected himself when he sentenced the three appellants. For instance he stated :

> " For instance the victim was for all intents and purposes a complete stranger to the accuseds; she was repeatedly raped by them and in one instance an iron rod was used. "

It was the second accused who was alleged to have used the rod. Clearly the learned Judge used evidence against the second accused against the three appellants.

The learned judge went further in his summing up to state the law regarding aiding and abetting to indicate that a person can be charged with rape if he aids or abets a person who actually commits the rape.

Following on the directions given above the learned Judge went on to say the prosecution also relied on the criminal law regarding aiders and abettors. This appears to me to be misdirection. The prosecution while jointly charging 4 persons did not make it any part of their case that any of the appellants merely aided or abetted one of them to commit the offence. Their case was that all the appellants actually raped the complainant.

The directions can only have confused the assessors.

2. MEDICAL EVIDENCE

My main concern is the evidence of the lady doctor who examined the complainant after the rapes, the conduct of the Prosecutor in relation thereto, the cross-examination of the doctor by the assessors and the failure by the

learned judge to refer to such vital evidence in his summing up. I will deal separately with each of these matters.

The prosecution evidence disclosed that the complainant had been punched heavily on both thighs several times. She was punched on the jaw. She had an iron rod forced into her vagina. She was raped at least 13 times in the space of 2 1/2 hours. She struggled.

She further alleged that she was bleeding when the rod was inserted into her vagina.

She said all four appellants had marbles in their penises which caused her pain when they were raping her.

The doctor stated :

> " I cannot remember if she showed signs of recent intercourse. There were no injuries around the vaginal area. I took a swab test. The result was nothing. We found no sperms. "

Later in her evidence she said :

> " Before examining her I asked her what had happened to her. I spoke I think in English. It's part of our job to obtain the history from the patient. I don't know why. Yes she told me : 'Four men came to her house and one of them raped her.'

In her evidence -in-chief the complainant made no mention that she was medically examined.

The trial judge, however, rectified the failure by the Prosecutor to adduce the important evidence that the complainant had been medically examined by questioning her himself. Regretably he questioned her after the appellants had cross-examined her at some length.

This was palpably unfair to the appellants as they had no prior knowledge of what the complainant was to later say to the Prosecutor when he re-examined her. They were given no opportunity to cross-examine her on a most vital piece of evidence.

The Record indicates the following questions and answers between the trial judge and the complainant :

Q: Who was the doctor who examined you?
A: She was a Rabi Islander.

Q: Did she examine your vagina internally and externally?
A: Yes.

Q: Did she tell you the result of the exam?
A: Yes she told me I had received no injuries.

Q: Were you surprised?
A: Yes.

It is no part of a trial judge's duty to take over from the Prosecutor to remedy a failure to adduce evidence for the prosecution. The Prosecutor was quick to get the message and on re-examination of the complainant he remedied the omission.

Notwithstanding that on re-examination the rules clearly provide that his questions were limited to matters raised on cross-examination he was permitted to ask the complainant the following questions and received the following answers :

Q: What time did she examine you?
A: Can't recall but around lunch time.

Q: How long examination take?
A: Some time almost 1/2 hour.

Q: Did she ask what happened to you?
A: Yes and I told her I was raped by four men.

Q: If doctor recorded "Four men came to her house and one of them raped her" would that be correct?
A: No that is not true. I told the doctor four men raped me.

I will now pass to the conduct of the Prosecutor regarding the medical exmaination.

3. CONDUCT OF PROSECUTOR RE MEDICAL EXAMINATION

I have already mentioned part of the conduct of the Prosecutor. The doctor was to be called later as a prosecution witness. When he re-examined the complainant he was intentionally laying the basis for later discrediting the doctor, to destroy a very vital piece of evidence of invaluable assistance to the appellants. He questioned the doctor when she was later called in a manner designed to discredit her. The doctor had made a written record of what transpired when she examined the complainant.

The questions and answers are as follows :

Q: Did you faithfully record what patient told you?
A: Yes I don't work dishonestly.

Q: Could you have made a mistake?
A: I think if four men raped her she would tell me so.

It is trite law that a Prosecutor can not cross-examine

his own witness unless he seeks and obtains permission of the trial judge to treat him as a hostile witness. In the instant case the Prosecutor did not obtain leave to treat the doctor as a hostile witness.

Before the doctor was called the Prosecutor called a sister of the complainant to strengthen the basis already laid of discrediting the doctor. It is perfectly obvious that she was called solely to elicit the fact that she accompanied the complainant to the hospital when the complainant was examined. This witness was permitted to give evidence which was clearly inadmissible as being pure hearsay. She is recorded as saying :

> " When (name omitted) came out she told me that the female doctor said she was only raped by one man but (name omitted) said she told her she was raped by four men. 'Babu' was present at that time. "

Babu was DC2157 Goundar Ranga Sami and he was called to further discredit the doctor. He was also permitted to give evidence which should not have been admitted. he testified as follows :

> " When she came out of the room she told Salote and I she wasn't happy with the manner in which the doctor checked her. She said she kept telling the doctor four boys raped her and the doctor said only one. "

Not content with his strenuous efforts to discredit his own witness he raised the matter again in his final address, an address he was not entitled to make as I shall mention later. This time he also attacked "Babu". The Prosecutor said :

" Police and doctors are not of the same level. Good and bad doctors and indifferent. Citizens have a right to expect that she will be dealt with and investigated properly. Did (name omitted) get that right? Submit she was denied it and police indifferent. Policeman knew of (name omitted) complaint about medical examination but did nothing. Feared he might be told off again. "

4. CROSS-EXAMINATION OF DOCTOR BY ASSESSORS

The assessors were permitted by the trial judge to question the doctor. In fact they were permitted by the trial judge to question or cross-examine prosecution witnesses apparently directly. They also cross-examined the appellants. It is not the function of assessors to directly question witnesses. The nature of their questions were not solely for clarification.

Assessor No. 1 asked the doctor whether she could confirm intercourse 7 hours previously and received a negative answer.

To assessor No. 2 she again confirmed that the complainant had said she was raped by one man.

The third assessor had the doctor confirm that she could not tell how many assailants there were for any rape victim. She also confirmed that the swab test said negative for sperms.

It would appear that even at that early stage of the trial the assessors had lost their impartiality or so it would have appeared to the appellants.

5. SUMMING UP BY TRIAL JUDGE ON MEDICAL EVIDENCE

There is no need to say a great deal about this aspect of

the summing up. The learned trial judge made no mention at all about the medical evidence.

All the foregoing matters were included in the draft Judgment of the Court which I prepared in October, 1990. My conclusion in that draft stated as follows :

> " The matters we have referred to however leaves us in no doubt that the trial was irregular and unfair to such an extent that we have no option but to quash the convictions and set aside the sentences. "

There were, however, a number of other matters that support my view that the trial was unfair and that the appellants should be acquitted. I will continue numbering from where I left off above.

6. TRIAL JUDGE'S QUESTIONING OF WITNESSES

In my view it is no part of a trial judge's duty to take over the Prosecutor's duties or to cross-examine the appellants or their witnesses.

Lord Greene M.R. in Yuill v. Yuill (1944) C.A. Probate Division 15 had this to say :

> " There is one further consideration which is particularly relevant to the present case. A judge who observes the demeanour of the witnesses while they are being examined by counsel has from his detached position a much more favourable opportunity of forming a just appreciation than a judge who himself conducts the examination. If he takes the latter course he, so to speak descends into the arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation. "

There was extensive questioning of witnesses by the

trial judge. I have already mentioned his questioning of the complainant and bringing out evidence for the prosecution which the Prosecutor had omitted to have her produce. There was extensive questioning of the complainant. The Record indicates that the trial judge asked her 48 questions.

When a trial judge asks such questions as :

1. Was Waisale still awake when 1st assailant dragged you out?
2. When Yabaki was having sex with you in the bedroom was Unaisi present?

The appellants and indeed the assessors could believe that the trial judge believed the complainant. Those questions indicate that the trial judge accepted two facts as established.

1. She was dragged out by the second accused and
2. Yabaki had sex with the complainant in the presence of Unaisi.

Only two of the appellants gave evidence on oath. The trial judge asked the second appellant 33 questions and the third appellant 30 questions. These questions could have conveyed to the assessors that the trial judge did not believe the two appellants. That belief would have been confirmed when the trial judge questioned the alibi witness called by the third appellant. He called his de facto wife who merely testified that the third appellant was at home on the night in question between the hours of 2.30 a.m. and 5.00 a.m. She said he was home in bed at midnight.

She was extensively questioned by the Prosecutor and two of the assessors asked her a number of questions.

The trial judge asked her 26 questions. The nature of the questions leaves no doubt in my mind that the trial judge did not believe her. No one sitting in court could have had any doubt that the trial judge considered the alibi was false. His questioning appears designed to destroy her evidence.

7. NO CASE

After the close of the prosecution case the trial judge explained the rights of the three appellants. The Record has the following entry :

(a) Silence
(b) Unsworn statement no xx-exam
(c) Sworn statement will be xx-exam

" May also address court. "

It is the last entry which led in my view to one more instance of unfair treatment of the appellants. All three appellants indicated they wanted to address the court. Then follows the following entry in the Record :

" All accused elect to address the court in the presence of assessors. "
Underlining is mine.

All three appellants addressed the court and the assessors. Then follows in the Record :

" I find a case to answer against each accused. "

I forbear to comment on the procedure followed by the trial judge. The point I wish to make is the assessors if they had not by then made up their minds had a clear indication that the trial judge considered the appellants

had a case to answer. The assessors could be forgiven if they thought the judge already considered the appellants guilty. As for the appellants they could also be forgiven if they thought they had been convicted before they had told their stories. All appellants in their grounds of appeal complained that they had not been treated fairly.

8. SUMMING UP BY PROSECUTOR

Before dealing with this matter I would first state the duty of a Prosecutor as it is apparent to me that in the instant case the Prosecutor had no conception of how to prosecute.

I have already commented earlier on the conduct of the Prosecutor as regards his strenuous efforts to discredit his own witness one whose evidence, if accepted, could have resulted in the acquittal of all threee accused.

Compton J. in R. v. Puddick (1865) 4 F and F 497, 499 said :

> " Prosecuting Counsel should regard themselves as ministers of justice rather than advocates. "

That statement was approved in R. v. Banks (1916) 2 K.B. 621, 12 Cr. App. R. 74.

In the instant case the Prosecutor was determined to get convictions of all appellants even if it meant completely disregarding rules designed to ensure a fair trial.

All three appellants were unrepresented at the trial. Only one called a witness, his wife, to establish an alibi. That witness was not a witness to any of the facts surrounding the perpetration of the alleged rapes.

Archbold Criminal Pleading Evidence and Practice 42nd Edition at page 429 sets out the table of order of speeches.

" 1. When the defendant is not defended by counsel and calls no witnesses to the facts except himself

(1) Counsel for the prosecution opens his case.
(2) Witnesses for the prosecution.
(3) Defendant gives evidence (if he wishes).
(4) Witnesses, if any, as to defendant's good character.
(5) Defendant addresses the jury in his defence. "

It will be noted that the prosecution has no right to sum up or make a closing speech.

Archbold in paragraph 4-421 states.:

" The rule about counsel not addressing the jury a second time is one which ought to be carefully observed : R. v. Harrison (1923) 17 Cr. App. R. (proviso applied) R. v. Baggott (1928) 20 Cr. App. R. (conviction quashed). "

In Baggott's case the conviction was quashed indicating how seriously judges consider a breach of the rule. Baggott's case was similar to the instant case. The defendant was unrepresented and gave evidence. The following comments from Baggott's case are very apposite:

" It was a case the outcome of which depended solely on the view which the jury formed of the conflicting versions given by the crown witness on the one hand and the defendant on the other, the sort of issues of fact upon which the role of the advocate could well play a very big part in determining the nature of the verdict. "

The Prosecutor was allowed a closing address in which he

appears to have fully reviewed the relevant evidence. I have referred earlier to his attacking his own witness and the police in this address. There is one comment however which I consider the most significant in the whole Record which I will refer to shortly.

The three appellants subjected prosecution witnesses to a searching cross-examination as ably as many young qualified lawyers in my experience. Tikaram JA in his Judgment acknowledges their ability.

The Prosecutor also appears to have been aware of their ability and in his address made last efforts to persuade the assessors to disregard the effect of the appellants cross-examination. The complainant appears to have been a woman easily persuaded to go beyond the actual facts or to disclose facts that she did not disclose in her evidence-in-chief.

The appellants' elicited from her a picture of her struggles, screaming, punches, threats and conduct which strained credulity. The appellants appear to have shaken the Prosecutor's faith in his witness. He made the following extraordinary statement when addressing the assessors inviting them to disregard part of the complainant's evidence. He made the positive assertion that indicated the complainant did not act as she had testified. He said :

> " She was terrified didn't struggle or fight. She surrendered to the inevitable. " (emphasis is mine)

That is what is recorded in the Record. Coupled with his attack on his professional witness and the police it appears that the appellants shook the Prosecutor badly.

Their defence was not sufficient, however, to achieve their acquittal. They have achieved partial success.

9. DISCLOSURE OF PREVIOUS ARRESTS

P.W.7 Cpl. Alusio Neori in answer to a question as to whether he recognised the first accused said :

" Yes he has been arrested a lot I know him very well. "

It was an assessor who asked him that question and could have conveyed to the assessor that the first accused had a number of previous convictions as indeed he had.

In one case in which I was personally involved many years ago McDuff CJ immediately terminated the prosecution, berated the police officer and ordered trial de novo. The case was not reported. The police officer had inadvertently disclosed a prior conviction of an accused.

RETRIAL?

Both Tikaram and Jesuratnam JJA, relying on the leading Privy Council case of Au Pui-Kuen v. Attorney-General of Hong Kong state that it is in the public's interest that there be a retrial.

One aspect of public interest is that persons guilty of serious crimes should be brought to justice. Lord Diplock at p. 772 spelt out what that interest is. He said :

" The interests of justice are not confined to the interests of the Prosecutor and the accused in the particular case. They include the interests of the

> Public in Hong Kong that those persons who are guilty of serious crimes should be brought to justice and should not escape it merely because of a technical blunder by the judge in the conduct of the trial or his summing-up to the jury. "

The underlining is mine to emphasis that the ratio decidendi of Au Pui-kuen's case is that the trial judge's directions on self defence were erroneous. The Privy Counsellors were not presented with a case such as the instant one. In that case also there was little doubt on the facts, testified to by a number of witnesses, that if the jury had been properly directed the accused would have been convicted.

The facts of that case are stated by Lord Diplock as follows :

> " The appellant was a detective constable in the Royal Hong Kong Police Force. On 9th January 1976 at a time when he was not on duty he got into a dispute with three young men in a public street. This developed into a fight between the appellant with the three young men. It took place in the presence of a number of eye-witnesses, and in the course of it the appellant drew his revolver and fired three shots. One shot killed Lai Hon-shing, one of the three young men with whom he had been struggling, another shot injured a bystander. "

The appellant in that case appealed to the Court of Appeal. Numerous grounds of appeal were filed. Four of them alleged misdirections of the learned judge on the law relating to such matters as self defence and the defence available to a police officer who kills in the legal exercise of his duty. The Court of Appeal held that the directions as to self defence were erroneous in law.

Unlike the instant case, where the appellants have been denied a hearing on the issue of a retrial, the appellant

who was represented by counsel was allowed to argue that there should be no retrial. Like the instant case after hearing argument Briggs CJ announced (by a majority) that the Court would order a new trial. The similarity I refer to is not the hearing of argument but the fact that retrial was ordered (by a majority).

So far as the Privy Council was concerned it was an appeal against the order for a retrial on the restricted and very narrow ground that the court had erred in law in holding it was not required to be satisfied that conviction would be probable on the retrial before exercising its discretion.

The reliance on Lord Diplock's statement that if a new trial is ordered it is often the case that in the interests of justice at a new trial the less said by the Court of Appeal the better, has no relevance to the instance case where the grounds of appeal go far further than a technical error by the judge. Tikaram and Jesuratnam JJA have considered only one of the many complaints and have not in their judgments considered the very many other grounds of appeal.

Lord Diplock considered at some length the issue of retrial. He said :

> " The strength of the evidence adduced against the accused in the previous trial is clearly one of the factors to be taken into consideration in determining whether or not to order a new trial. "

I have considered the evidence in some detail and it is my view that there is considerable doubt about the appellants' guilt. Over and above this is my conviction that the instant case was so irregular and unfair that

the question of retrial should never have arisen. . The errors went far far beyond mere technical errors by the trial judge.

Lord Diplock quoted with approval a statement of Huggins JA :

> " The true principal is that the court will not order a new trial where a conviction is improbable or where a conviction will, assuming the same evidence is given, be unsafe or unsatisfactory. In any other case the court will consider the strength of the evidence as just one of the factors relevant to the determination of what are the interests of justice. It is a factor which may assume greater importance than in others. "

If my learned brothers have considered anything beyond the issue as to whether the complainant was not understood by the doctor and the trial judge's failure to direct the assessors on the medical evidence it is not apparent in their judgments.

In my view the appellants are entitled to have their complaints considered and they be informed in the judgments as to the fate of such complaints.

Lord Diplock also said :

> " The power to order a new trial must always be exercised judicially. Any criminal trial is to some degree an ordeal for the accused; it goes without saying that no judge exercising his discretion judicially would require a person who has undergone this ordeal once to endure it for a second time unless the interests of justice required it. "

The Flour Mills of Fiji case relied on by Takaram JA can be distinguished from the instant case. Like Au Pui-kuen's case it dealt with technical errors by the trial

judge. There were in that case substantial deficiencies in the general directions on law relating to corroboration.

The appellate judges were not faced with an appeal involving so many irregularities which by no stretch of the imagination could be termed technical. They struck at the very heart of the judicial system which has justice as its base.

I find it necessary to state that this dissenting judgment has caused me some difficulty. That is because consideration of this appeal has not followed the usual procedure adopted by appellate judges.

Where one judge can not agree with his brother judges so that a Judgment of the Court can be delivered it becomes necessary for all appellate judges to write separate judgments. In the instant case the presiding judge has written the main judgment. Jesuratnam JA could have stated in a few words that he agreed with that judgment.

The judgments are usually in draft form and presented to the other two judges. This enables judges to have further discussions and to correct errors.

Where difficulty has arisen in the instant case is that my brother judges wrote their final judgments which they intend to present in court, presented them to me before I had written this judgment. The judgment of Tikaram JA I found most unusual as it purports to contain the order (by majority) of the Court.

The practice to which I am accustomed is that each judge writes his own judgment which he delivers in open court. Following delivery the Presiding Judge then announces the

opinion of the Court (by a majority) and the necessary orders are then made.

It could be stated that in the circumstances this judgment is an exercise in futility but in my view it is the duty of an appellate judge to state his views. It is not only in the interests of justice but it is also in the interests of the appellants and the public. In cases where an appeal may go to a higher Court the views of a dissenting judge is of assistance to that Court.

The Fiji Court of Appeal is for all practical purposes the highest Court in the land. The Supreme Court is beyond the reach of the man in the street and it is certainly beyond the reach of the appellants.

When it comes to a case where retrial is ordered, which is a rare occurrence if all involved perform their duty, the Court of Appeal is not the end of the line.

I refer to the powers of the Director of Public Prosecutions who has the legal power to terminate proceedings notwithstanding an order by this court that there be a retrial.

The appellants should have been given an opportunity of being heard on the issue of a retrial. Had they been given that opportunity the Director of Public Prosecutions would have been given the opportunity of either pressing for a retrial or conceding that the appellants be acquitted. His views would have been of considerable assistance to our Court.

Had this dissenting judgment been written before a final decision had been made I would have concluded by stating my opinion that the appeal be allowed, the convictions quashed and the appellants acquitted.

(Sir Ronald Kermode)
JUDGE OF APPEAL