

IN THE COURT OF APPEAL, FIJI AT SUVA
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU0018 OF 1998S
(High Court Criminal Appeal No. 53 of 1998)

BETWEEN:

SEKOVE VATUABETE

Appellant

AND:

THE STATE

Respondent

Coram:

The Rt. Hon. Sir Maurice Casey, Presiding Judge
The Hon. Sir Mari Kapi, Justice of Appeal
The Hon. Justice Ian R. Thompson, Justice of Appeal

Hearing:

Wednesday, 17 February 1999

Counsel:

Mr A. Gates for the Appellant
Mr J. Naigulevu for the Respondent

Date of Judgment:

Friday, 26 February 1999

JUDGMENT OF THE COURT

This appeal is against the decision of Townsley J. in the High Court dismissing an appeal against the appellant's conviction in Suva Magistrates' Court. Section 22 of the Court of Appeal Act (Cap.12) is, therefore, applicable. The appeal can be only on a ground which involves a question of law alone.

At the hearing Mr Gates abandoned one of the three grounds set out in the petition of appeal. The remaining two grounds are:

"The learned appellate judge erred:

- (a) *In finding that the evidence of identification met the tests laid down in Turnbull [1977] QB 224, when none of the tests were applied by the learned Magistrate at all, and no reasons given.*

- (b) *In not considering that an injustice had been caused by not allowing the Appellant to call his alibi witness bearing in mind he was in custody and was unrepresented, and that the evidence might have unsettled the Court's view on identification.*"

The appellant was arrested on 6 April 1998 and brought before the Magistrates' Court on 7 April 1998. He was charged with an offence of robbery with violence alleged to have been committed on 4 April 1998. He elected to be tried in that Court and pleaded "*Not Guilty*". He sought but was refused bail and was remanded in custody until 15 April 1998. According to the record of the proceedings on that day the magistrate told him that, if he wanted to consult a lawyer, he should do that "*from the remand centre where facilities are available.*" The magistrate set the trial date as 27 April 1998 and directed that the prosecution evidence was to be disclosed on 15 April 1998. The appellant appeared before the Court on that date and was remanded in custody until 27 April 1998. There is nothing in the record to suggest that the magistrate informed him that at his trial he would be entitled to call witnesses and that he could obtain summons as to compel the attendance of any witnesses who would not attend otherwise. On 27 April 1998 the trial took place. The appellant was not legally represented.

Evidence was given for the prosecution by the alleged victim of the robbery ("Kumar"), a taxi driver, by a woman with whom the appellant was apparently cohabiting ("Ateca") and by two police officers, P.C. Eroni and Cpl. Luke. The case presented by the prosecution was that on the evening of 4 April 1998 Kumar was driving his taxi in central Suva and at 8.30 p.m. the appellant and a girl got into it and asked to be taken to Wailoku and that at Wailoku the appellant asked him to stop at a place where there was no house and, when he did so, seized hold of his neck, put a knife to his neck and threatened that, if he made a noise, he would kill him. Kumar gave evidence that the appellant and the girl

then robbed him of cash, the taxi meter and a car stereo, and ran off. In cross-examining Kumar the appellant did not suggest that the robbery had not taken place but challenged Kumar's identification of him as one of the robbers.

Kumar and P.C. Eroni gave evidence of the circumstances of the appellant's arrest. Their account of those events was that shortly after the robbery the victim went to Tamavua police post and reported the offence. He gave P.C. Eroni a description of his assailant and of the clothes he was wearing. They then went together to the scene of the robbery. On 6 April 1998 Kumar went to Tamavua police post and saw the appellant working there; he was a prisoner serving his sentence extra murally working at the police post. However, the appellant, thinking that because he was working at the police post he was a police officer, went to Samabula police station and reported that he had seen the man who had robbed him and that he was a police officer working at Tamavua police post. P.C. Eroni then went with him to Tamavua police post; there Kumar pointed out the appellant as the man who had robbed him. P.C. Eroni then arrested the appellant.

P.C. Eroni gave evidence that, after arresting the appellant, he went to a house at Wailoku where "Ateca" showed him a yellow T-shirt and three-quarter length pants which were hanging on a clothes line and he took possession of them.

Subsequently, the appellant was formally cautioned by Cpl. Luke and then answered questions put to him by the corporal. He denied having been in the victim's taxi and having robbed him; but he is recorded as having acknowledged that the T-shirt and the pants were his. At the trial Kumar said that the T-shirt was the same yellow T-shirt that

the person who robbed him had been wearing. The appellant, when asked in cross-examination whether he admitted wearing those clothes "*on the night in question*", made no reply.

Ateca's evidence-in-chief was that the appellant was wearing the T-shirt and pants when he came home to their house in Wailoku on the evening of 4 April. However, when cross-examined by the appellant, she said that she was asleep when he came home and that she had spoken to him at 5.00 p.m.

The appellant elected to give sworn evidence. He said simply that he knew nothing about the robbery and had not been at Wailoku on the night it occurred. He did not give evidence of where he was when the robbery took place. When asked by the magistrate whether he had any witnesses, he replied: "*My witness is the complainant's witness (PW2) [i.e. Ateca]. I have asked questions already. No other witnesses. One witness Eddie, he is at work.*" In answering questions after caution he had said that at about 9.00 p.m. on the evening of 4 April he had travelled from a house at Tamavua-i-wai to the Raiders taxi stand in a taxi driven by Eddie and from there to his home in Wailoku by another taxi.

Giving judgment the magistrate examined Kumar's evidence relevant to his identification of the appellant as the robber. He noted that Kumar had at one stage turned on the interior light in his taxi and had looked back at the person who subsequently robbed him. At the place in Suva where the robber got into the taxi, outside a group of cinemas, the light was, Kumar said, "*not different than day*". He also gave evidence that the robber leaned over from the back of the taxi and grabbed hold of the steering wheel.

The magistrate came to the conclusion that, although the robber was a person not previously known to Kumar, Kumar had several opportunities to see him clearly. He "reminded himself" of the principles in *R. v Turnbull* [1977] 1 QB. 224 and found that the appellant was "*well and truly identified*" by the victim on the night of the robbery.

In the High Court two of the grounds of appeal, although somewhat differently expressed from the remaining grounds of the present appeal, were essentially the same as them. Townsley J. found that there was ample evidence to support the magistrate's findings that the victim had correctly identified the appellant and that he had not misdirected himself in respect of *Turnbull's* case, although the learned judge considered that it would have been better if he had discussed in some detail the principles in that case. On the question whether the magistrate should have adjourned the trial to enable the appellant to call as his witness the person he referred to as Eddie, His Lordship found that, while it was "*something the learned Magistrate maybe could have done*", it had not caused a miscarriage of justice in view of the strength of the evidence of identification.

Appeals to this Court against decisions of the High Court in its appellate jurisdiction are governed by section 22 of the Court of Appeal Act (Cap.12). So far as is relevant for present purpose subsection (1) of that section reads:

"Any party to an appeal from a magistrate's court to the High Court may appeal..... against the decision of the High Court to the Court of Appeal on any ground of appeal which involves only a question of law." (Emphasis added)

In the present appeal, therefore, we have to ascertain whether or not the learned judge erred in law when he dismissed the appellant's appeal to the High Court.

The errors of law alleged by Mr Gates relate to the manner in which he dealt with the appeal to the High Court in respect of the identification of the appellant and in respect of the magistrates' failure to adjourn the hearing to enable the appellant to call Eddie as a witness.

So far as the first of those matters is concerned, we are satisfied that the learned judge did not make any error of law. The issue before him was whether the magistrate had failed to take proper account of the principles applicable when a court is considering evidence of the identification of alleged offenders by persons to whom they were not previously known, stated by the English Court of Appeal in *R. v. Turnbull* [1977] 1 QB 204. His Lordship noted that the magistrate had expressly referred to those principles and had stated that he was applying them. He found that, on the basis of the evidence before him, the magistrate had applied those principles correctly and had been entitled to find that Kumar's evidence identifying the appellant as the person who had robbed him was reliable. In doing so, he was dealing with questions of mixed fact and law; Part X of the Criminal Procedure Act (Cap.21) does not restrict appeals to the High Court to questions of law. As noted above, section 22 of the Court of Appeal Act does impose such a restriction on further appeals to this Court. We are satisfied that Townsley J. made no error of law in stating the principle to be applied. Unless, therefore, the evidence in the Magistrates' Court was such that the learned judge could not have held that, when those principles were applied, the magistrate was entitled to find that the evidence of identification was reliable, he made no error of law. We have set out above the substance of the evidence. Kumar's evidence of identifying the appellant by his appearance when he came upon him at Tamavua police post was corroborated by the finding of the yellow T-shirt at the appellant's residence. We have no doubt that, applying

the correct principles, the magistrate could properly find that Kumar's evidence of identification was reliable. That being so, we are satisfied that the learned judge did not err in law in respect of that matter.

The appeal, therefore, does not succeed on the first of the two remaining grounds of appeal. However, before we proceed to consideration of the second remaining ground, we think it desirable to refer to a comment by Townsley J. on the manner in which magistrates should deal with the principles in *Turnbull's* case. He said:

"It may be valid to say that the learned Magistrate should have given better reasons vis-a-vis Turnbull's case, and I agree he should. And all Magistrates should do so in future cases."

Magistrates' Courts are required to deal with very large numbers of cases and to do so expeditiously. Magistrates cannot, therefore, be expected to write as full judgments as judges of the High Court. In their judgments they must state clearly what findings of fact they have made and the evidentiary basis for those findings. Where legal principles have to be applied in that process, it is sufficient, in our view, if (as the magistrate did in the present case) they expressly acknowledge the principles to be applied and if it is demonstrated that they have then applied them. However, they need not explain in detail how they are applying them. Generally, their statement of their findings of fact and of the evidentiary basis of those findings will demonstrate whether or not they have applied them properly.

We turn now to the second of the remaining grounds of appeal, that is that the learned judge erred in law in not finding that the magistrate's failure to grant an adjournment to enable the appellant, who was unrepresented, to call Eddie as a witness was a breach of his duty to accord the appellant a fair trial.

Section 211 of the Criminal Procedure Code provides:

“211 (1) At the close of the evidence in support of the charge, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any).

(2) If the accused person states that he has witnesses to call but that they are not present in court, and the court is satisfied that the absence of such witnesses is not due to any fault or neglect of the accused person, and that there is a likelihood that they could, if present, give material evidence on behalf of the accused person, the court may adjourn the trial and issue process, or take other steps, to compel the attendance of such witnesses.

We observe also that section 11(1) (e) of the 1990 Constitution (which was in force when the appellant was tried in the Magistrate's Court) read:

“(e) Every person charged with a criminal offence shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before any court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before that court on the same conditions as those applying to witnesses called by the prosecution”.

Provision imposing substantially the same requirement is now made by section 28(1) of the 1997 Constitution. If a Magistrates' Court properly applies section 211 of the Criminal Procedure Code, that will, in our view, usually meet that constitutional requirement.

Subsection (2) of section 211 makes express provision for the situation where, after the accused person has been put on his defence, he tells the magistrate, as the appellant did in this case, that he has witnesses whom he wishes to call but they are not present in court. The magistrate must consider -

- (a) whether the absence of the witnesses is due to the accused person's fault or neglect, and
- (b) whether their evidence, if given, is likely to be material.

If, having considered those questions, he is satisfied both that the absence of the witnesses is not due to the fault or neglect of the accused person *and* that their evidence is likely to be material, he has a discretion whether to adjourn the hearing and whether to take steps to compel the witnesses' attendance. That discretion must, of course, be exercised judicially. Usually that can be done by the magistrate asking the accused person what evidence he expects each of his witnesses to give and, if its materiality is not obvious, to ask him also how he thinks the evidence will help his case. The terms of section 211 (2) are such that it is reasonable, where an accused person is legally represented, for the magistrate to rely on his counsel drawing to his attention facts which will satisfy him in respect of those two matters. But, in our view, the magistrate cannot reasonably expect an accused person who is not represented to be aware of the requirements of the subsection and to address those matters on his own initiative. The magistrate must take the initiative.

In the present case there is nothing in the magistrate's record of the trial to indicate that he considered either of the two matters which section 211(2) required him to consider. Such failure may not necessarily in every case vitiate continuation of the trial. It may be clear from the record that the accused person was at fault in respect of the non-attendance of this witnesses, or that their evidence would not be material. But that is not the situation in the present case.

As we have noted above, there is nothing in the record to indicate that the magistrate at any time before the appellant was put on his defence told him that he would be able to call witnesses and that, if he believed that any might not attend unless ordered to do so by the Court, he could ask for witness summonses to be issued and served. Nor is there anything in the record to indicate that, when the appellant said that Eddie was not present, the magistrate asked him what he had done to ensure that the witness did attend. Finally, there is nothing in the record to show that the magistrate addressed his mind to the question whether Eddie's absence was due to the appellant's fault or neglect.

The second matter which the magistrate was required to consider was whether Eddie's evidence would be material. It appears from the statement made by the appellant to Cpl. Luke that the evidence would probably have been in the nature of alibi evidence. The appellant had not given evidence of alibi but, as Mr Gates

pointed out to us, the statement to Cpl. Luke was in evidence and in those circumstances the magistrate might reasonably have been expected to ascertain from the appellant whether he wished to give evidence to the same effect. He did not do so. So, when the appellant said that he had a witness named Eddie, the magistrate could only have speculated what evidence Eddie would give.

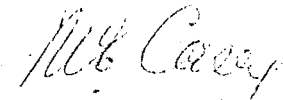
In the High Court the learned judge did not refer to section 211, discuss what obligations it imposed on the trial magistrate or whether he discharged those obligations. That was, we are satisfied, an error of law. As we do not know what evidence Eddie would have given if the trial has been adjourned and he had attended when it was resumed, we are unable to be satisfied that no substantial miscarriage of justice has occurred and to dismiss the appeal under section 22(6) of the Court of Appeal Act. The appeal must be allowed and the conviction and sentence set aside. However, the evidence before the Magistrates' Court was such that the case should be remitted to it for retrial before a different magistrate. If on that retrial the appellant is again convicted, due regard should be paid to the fact that he has already served nine months of the sentence of imprisonment which we have set aside.

Costs cannot be awarded to the appellant in the circumstances of this case (Court of Appeal Act, section 32).

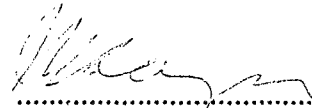
Decision: Appeal allowed.

Conviction quashed and sentence set aside.

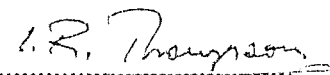
Case remitted to Suva Magistrates' Court for retrial
before a different magistrate



.....
Sir Maurice Casey
Presiding Judge



.....
Sir Mari Kapi
Justice of Appeal



.....
Mr Justice I.R. Thompson
Justice of Appeal

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