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

CRIMINAL APPEAL NO.AAU0008 OF 1999S
(High Court Criminal Appeal No.HAA 0105 of 1198/L)

BETWEEN:

VICKY RAM F/N MANI RAM

Appellant

AND:

THE STATE

Respondent

Coram: **The Hon. Sir Moti Tikaram, President**
The Rt. Hon. Sir Maurice Casey, Justice of Appeal
The Rt. Hon. Sir Thomas Eichelbaum, Justice of Appeal

Hearing: **Wednesday, 11 August 1999, Suva**

Counsel: **Mr. M. Raza for the Appellant**
Ms. R. Olutimayin for the Respondent

Date of Judgment: **Friday, 13 August 1999**

JUDGMENT OF THE COURT

The appellant was convicted in the Magistrates' Court at Rakiraki on a charge of arson and sentenced to 18 months imprisonment. The State appealed to the High Court against the sentence, while the appellant appealed against his conviction. The High Court allowed the State's appeal, increasing the sentence to one of 4 years imprisonment, but dismissed the appeal against conviction. He now appeals to this Court against that decision, which in terms of s.22(1) of the Court of Appeal Act (cap 12) must be on a ground involving a question of law only. The ground relied on is that the appellate Judge erred in law in failing to adequately consider the issue of identification.

The charge arose out of a fire at a police station in Vaileka Town discovered by a special constable working as a watchman in the early hours of 21 November 1996. He gave

evidence of seeing a fat man running from the building, wearing only shorts and carrying a gallon [container] in his hand. The Magistrate took notice that the accused was a fat person, and there was evidence that petrol had been used as an accelerant. The witness chased him and said he shone a torch on his face when he looked back, and recognised him as the accused, whom he had known for a year. He ran towards a van which the witness also knew belonged to the accused, and he saw it being driven away.

A second prosecution witness (also a watchman) said he saw a fat man without a shirt running and carrying something in his hand. He did not identify him and reported the fire while the first witness was chasing the man. Another witness saw a van similar to that seen earlier being driven away from the scene at high speed. A second thinner man had also been seen in the vicinity by the first two witnesses.

The next prosecution witness was a family connection of the appellant and had been staying with him at the time. He said he drove the appellant's van by himself to the site of the fire and claimed to be solely responsible for lighting it. He was declared hostile and the magistrate said he placed little weight on his evidence. He had previously been convicted and sentenced for this offence. The accused did not give evidence and the Magistrate did not accept the truth of the caution statement made by him to the police, to the effect that he was at home asleep at the relevant time and that his van was there also.

In his decision the Magistrate summarised the evidence, dwelling at some length on the truthfulness of the first witness's identification of the accused, which he accepted in spite

of the suspicion of embellishment in successive statements this witness made to the police. However, he made no reference to the accuracy or reliability of that identification, nor did he indicate that he had in mind the warning required by R v Turnbull [1977] QB 224, applicable with equal force to the present case, where the truthfulness of the identifying witness was the main issue at the trial, and the accused was a person known to him - see Beckford v R (1993) 97 Cr.App R 409 (PC).

In the High Court decision on appeal, Madraiwiwi J. made no reference to the failure by the Magistrate to warn himself about identification evidence. He simply agreed with his assessment of the evidence and dismissed the conviction appeal. In fairness to His Lordship we should point out that the appellant appeared in person, and that the question of the reliability of the identification evidence (as distinct from its truthfulness) may not have been raised with him.

The directions spelt out in R v Turnbull apply especially to cases like the present where identification was made as a result of a "fleeting glimpse" of the suspect and the case depended wholly or substantially on the correctness of that identification, which is challenged by the defence. In his police statement admitted in evidence the accused denied that he was at the scene. In such circumstances the Judge must warn a jury or assessors of the special need for caution before convicting in reliance on the correctness of the identification, and in addition should instruct them as to the need for such a warning and refer to the possibility that a mistaken witness may be convincing and a number of such witnesses can all be mistaken. No particular form of words is necessary so long as the direction is given in clear terms.

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In a trial without assessors or jury the presiding judge or magistrate is still obliged to direct himself or herself in accordance with the requirements of R v Turnbull, and this should be demonstrated in the judgment or decision. However, detailed exposition is not necessary. In Vatuabete v The State (CA 18/98; 26 February 1999) this Court said:-

> ***"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."***

There was no reference at all in either the High Court or the Magistrates' Court to the special need for caution in dealing with the evidence of identification, and we are satisfied that this omission amounted to an error of law by the High Court, rendering the conviction liable to be quashed if on all the evidence it was either unsatisfactory or unsafe. Other evidence which could implicate the accused was the sighting of his van at the scene, but this is equivocal, having regard to its alleged connection with the offender already convicted, and it cannot be safely inferred that the accused was also there with it. The description of the man seen running as fat and wearing shorts adds nothing of significance against the accused, nor does the evidence of finding a container of petrol at his home. Many people keep petrol at home for innocent purposes. The fact that his brother had been arrested earlier that day and was at the police station could provide a motive for the arson, but this cannot be a substitute for evidence, or strengthen inferences which cannot properly be drawn.

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In addition to these matters we have some reservations about the credibility of the identification by the first prosecution witness, notwithstanding its acceptance by the Magistrate. We refrain from further comment, since there will have to be a new trial where this issue will need to be fully explored.

For these reasons we are left with doubts over the safety of the conviction in the absence of properly-considered identification evidence, and they preclude the application of the proviso in s.22(6) of the Court of Appeal Act, as we cannot be satisfied that no substantial miscarriage of justice has occurred.

Result

Appeal allowed. Pursuant to s.22(3) of the Court of Appeal Act the decision of the Magistrates' Court is set aside and the conviction and sentence are quashed. The case is remitted with this judgment to that Court for trial de novo, before another Magistrate..

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Sir Moti Tikaram
President

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Sir Maurice Casey
Justice of Appeal

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Sir Thomas Eichelbaum
Justice of Appeal

Solicitors:
Messrs. M. Raza and Associates, Suva for the Appellant
Office of the Director of Public Prosecutions, Suva for the Respondent

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