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

CRIMINAL APPEAL NO.AAU0014 OF 1998S
(High Court Criminal Case No. HAC003 of 1998)

BETWEEN:

NASONI TAMANI

Appellant

AND:

THE STATE

Respondent

Coram: The Hon. Sir Moti Tikaram, President
The Hon. Justice Sir Ian Barker, Justice of Appeal

Hearing: Tuesday, 2 November 1999, Suva

Counsel: Appellant in Person
Ms. R.Olutimayin and Mr. D. Goundar for the Respondent

Date of Judgment: Friday, 12 November 1999

JUDGMENT OF THE COURT

The appeal was heard by a Court of 2 Judges pursuant to s.6(2) of the Court of Appeal Act Cap. 12.

The appellant appeals against his conviction in the High Court on one count of unlawful use of a motor vehicle (s.292 of Penal Code, Cap. 17) and on one count of armed robbery (s.293(1)(a) of the Penal Code). He also seeks leave to appeal against his total sentence of 8 years' imprisonment.

Along with two others, the appellant faced trial in the High Court in April- May 1998. One of the co-accused was discharged for lack of evidence at the conclusion of the prosecution case. The other was acquitted on a majority opinion of the assessors. The Judge

agreed with the majority opinion. The appellant was found guilty on the unanimous opinion of the assessors with which the Judge agreed. On 21 May 1998, the appellant was sentenced to 8 years imprisonment for the robbery and 4 months imprisonment concurrent for the unlawful taking.

At the trial, none of the accused was represented by counsel. The appellant appeared on his own behalf before this Court. He offered written and oral submissions in support of written grounds of appeal. In his written submissions, the appellant complained that he was never advised by the trial Judge to engage counsel. There is no obligation on a trial Judge so to advise an accused person. The Judge is not responsible for the grant or refusal of legal aid. It certainly makes for a more efficient and more just process if an accused person is legally represented. Therefore, we can understand why some Judges advise an accused persons to instruct counsel on serious charges, but there is no obligation on a Judge. Looking at this appellant's background, one can safely assume that he knew something of the benefits to be had in instructing counsel and of the possibility of applying for legal aid.

First Ground of Appeal

The co-accused who was acquitted elected to make an unsworn statement from the dock. The appellant elected to give evidence himself at the trial. He had earlier given evidence and called witnesses at a voir dire. He acknowledges that he was invited to make an opening submission to the assessors but claims that he was not invited by the Judge to make a closing submission at the conclusion of the evidence.

Counsel for the State acknowledged that, according to the record, there was no invitation to the appellant by the Judge to make a closing address. We therefore proceed on the basis that no invitation had been issued. Counsel for the State indicated that it is the Director of Public Prosecution's policy not to make a closing address when an accused person is unrepresented, despite the clear authority for the prosecution to give such an address, found in s.293 of the Criminal Procedure Code (Cap 21) ('CPC'). Justification for the Director's attitude can be found in the comments of the Full Court of the Supreme Court of Victoria in R. v. Ginies, [1972] V.R. 394, 401-2 on the practice of the prosecution not giving a closing address where the accused is unrepresented.

> ***"Before parting with this appeal we should say that in his report the learned judge invited the Court to consider the extent to which counsel for the Crown is bound to refrain from a final address when an accused person is unrepresented. Whilst we appreciate only too well that an unusual case like the present one presents the trial judge with great difficulties in the absence of professional formulation of the Crown case, we think it would be unwise to attempt to relax the existing practice. It is one of long standing both here and in England and is based on the interests of fairness to accused persons. The longer and the more complex the case, the greater would be the likelihood of unfairness to an accused person from such a professional formulation on behalf of the Crown. We think the very reason for the practice would appear to require that it be not relaxed on the score of complexity, length or difficulty of the trial."***

Section 294 of the CPC provides:

> ***"The accused person or his barrister and solicitor may then open his case, stating the facts or law on which he intends to rely, and making such comments as he thinks necessary on the evidence of the prosecution. The accused person may then give evidence on his own behalf and he or his barrister and solicitor may examine his witnesses (if any), and after their cross-examination and re-examination (if any) may sum up his case."***

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Clearly, therefore, the right, to make a closing address accrues to an accused person in the appellant's situation by virtue of s.294, regardless of whether the prosecution elects to exercise its right to make a closing address. The appellant in his written submission referred to instances where unrepresented defendants had been given the right of final address in the High Court. We have no doubt that the Judge should have invited the appellant to sum up the case at the conclusion of the defence evidence.

The appellant submits that the omission by the Judge to invite him to sum up the case by way of final address was an error which caused a miscarriage of justice and vitiated the verdict. He claims that he was deprived of his statutory right to address the Judge and assessors in the course of which address he might have been able to persuade them to find in his favour.

A similar situation was discussed by the Full Court of the Supreme Court of Victoria in R. v. Nilson [1971] V.R. 853. There, the Court held that the trial Judge had failed to make it clear to an unrepesented accused at the conclusion of the evidence that he might address the jury. The Court held that the accused had been aware of his right to address, but that the Judge had not made it clear to him when the appropriate time to exercise the right had arrived. Relevant authorities were summarised by Lush J. in the following passage in his judgment at 857-8.

> ***"What then are the consequences in law of this view of the facts? We were referred to seven cases. In R. v. Saunders (1898), 63 J.P. 24, the report of which is brief and uninformative, the learned judge had omitted to tell the accused of his right to address the jury. It was held that this omission did not of itself invalidate the proceedings. In R. v. Yeldham (1922), 17 Cr. App. Rep. 18; 128 L.T. 28, the prisoner had not had her attention called to her right to give evidence or to make a statement. The court said that a prisoner's attention should be***

pointedly directed to this right, but after stating that it had not been suggested that the prisoner had suffered in any way, it decided that having regard to the overwhelming nature of the evidence and the clearness and fullness of the judge's charge, there was no reason to interfere with the conviction. In R. v. Graham (1922), 17 Cr. App. Rep. 40, the accused had not been advised of his right to give evidence. The conviction, was quashed, the court indicating that it would not quash the conviction on the ground that he had not been advised of this right alone, but that the trial was in other respects unsatisfactory. In R. v. Gambos, [1965] 1 W.L.R. 575; [1965] 1 All E.R. 229, it was held that the omission of the allocutus is not a ground for appeal if in fact the accused did not want to move in arrest of judgment, but only to put matters in mitigation of sentence. In effect, in this case the omission involved the failure to advise the accused of his right to plead in mitigation, and it was that failure which was held not to constitute, by itself, a ground of appeal. In R. v. Berkeley, [1969] 2 Q.B. 446; [1969] 3 All E.R. 6, the accused had not been informed of his right to challenge jurors. His counsel and solicitor were present in court at the time when the empanelling began. No challenges were in fact made. The court refused to allow an appeal based upon this omission, declining to speculate on whether a different course in the making of challeges might have been followed if the accused had been informed of his right, and drawing a distinction between failure to advise the accused of a right and the denial to the accused of a right. The Court of Appeal said: "This court is satisfied that it would be wrong to say that there is prejudice to the defendant or that there has been any miscarriage of justice as a result of this irregularity, if irregularity it be." This observation was made after referring to the circumstances of the particular case."

The majority of the Victoria Full Court in Nilson's case (Lush and Smith, J.J.) considered that the omission by the Judge to advise the accused that the time had come for him to sum up his case, was sufficient to have constituted a miscarriage of justice. They however considered that the case against the accused was so strong that the proviso ought to be applied because the possibility that an address by the accused would have affected the result of the trial was so remote as to be negligible. A helpful statement of the duty of a Judge faced with an unrepresented accused and of the effect of failure to furnish a procedural right to the accused was given by Smith J. at 864-5 of Nilson's case.

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"Under our adversary system of trial if the accused is unrepresented it is almost always unhappily obvious that he is at a grave disadvantage in the contest, and that the chances of a wrongful conviction occurring are much increased. It is not possible for the trial Judge to remove this unbalance, but the Courts have established rules of practice designed to prevent avoidable injustice to the unrepresented defendant. And among those established rules is one requiring the trial Judge to inform such a defendant in plain terms at each new stage in the trial of the procedural rights which he is then entitled to exercise. This is a rule the due observance of which is essential to the proper administration of criminal justice. Substantial breaches of it are not to be condoned. And where, as here, the breach has resulted in the accused not exercising an importtant procedural right which he desired to exercise there is, in my view, a miscarriage. For there has been a departure from "the long tradition of the English criminal law that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed:" see Mraz v.R. (1955), 93 C.L.R. 493, per Fullagar, J. at p.514.

It is for the Crown, therefore, to show that the case comes within the proviso to s.568(1). And to do so, it must satisfy this Court that even if the applicant had exercised his right to make a final address, the jury, acting reasonably, would nevertheless inevitably have come to the same conclusion, or at least that the possibility that his address would have affected the result is so remote as to be negligible.

This is obviously a formidable burden for the Crown to discharge but upon full consideration I am of opinion that the Crown had done so."

In the present case, we are of the view that the case against this appellant was so strong that a final address, coming immediately after his own sworn testimony, would have had a negligible chance of affecting the result.

The prosecution case was that 3 men, armed with a firearm, a cane-knife and a pinch bar respectively, robbed an ANZ Bank branch and removed some $3,000 in cash. They drove off in a stolen rental car in which incriminating evidence was later found. The appellant was found hiding from the Police in somebody else's house. He claimed that the Police were

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looking for him because of a warrant issued against him.

According to the Police, the appellant told them that the money and gun were in bedroom of his house, which proved to be correct.

The principal evidence against the appellant was his confessional statement which had been admitted by the trial Judge after a lengthy voir dire, in which the appellant elected to give evidence. In his testimony at trial, the appellant repeated most the evidence he gave at his voir dire, including the allegations that:

(a) The statement had been induced by cigarettes given to him by the Police.

(b) He was affected when making the statement, by grog supplied to him by the Police and

(c) He had been assaulted by the Police who had threatened to stick a piece of wood up his anus.

The appellant gave sworn evidence, denying all knowledge of the robbery. He was cross-examined by counsel for the prosecution.

Clearly, the appellant was disbelieved by the assessors and the Judge. The assessors were properly directed by the Judge as to how they were to treat confessional evidence.

Assuming as we do (when considering the Third ground of appeal below) that the confessional evidence was properly admitted, and that the appellant's claim that he had no knowledge of the robbery was rejected, than the prosecution's case against him was unanswerable.

Accordingly, like the Court in Nilson's case, we have no hesitation in applying the proviso (s.22(6) Court of Appeal Act Cap. 12). This ground of appeal is rejected.

Second Ground of Appeal

The second ground is that the Judge erred in his summing up to the assessors by saying that in order to commit they had to be sure of guilt "which was the same thing as being satisfied beyond a reasonable doubt."

We are satisfied there is nothing in this point. The Judge crisply outlined the requirements of the law as to burden and onus of proof. It has been said many times that no particular formula is necessary so long as the essential features are covered. They were in this case. This ground is dismissed.

Third Ground of Appeal

The appellant submits that the Judge erred in admitting in evidence a written confession in which the appellant acknowledged his participation in the robbery. The appellant admitted to a Police Officer (who recorded his words in Fijian) that he had been one of three who

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had entered the bank: that had had carried a cane-knife: that another person had taken and fired the gun: that they had taken money and driven away in the rental-car which they later abandoned; that the gun found in the house had been used in the robbery. The appellant refused to name his associates and claimed he had been forced to participate in the robbery.

The Judge conducted a lengthy voir dire involving all three accused. He admitted the appellant's confessions but rejected some of the statements made by the two other two accused. The Judge clearly was aware of the requirement of proof of the voluntariness of a confessional statement beyond a reasonable doubt. He was also aware of his residual discretion to exclude a voluntary confession on the grounds of unfairness. Having seen and heard the witnesses, the Judge rejected allegations by the accused of police brutality by way of physical assault or threats of violation. He rejected allegations of inducements allegedly provided by the Police in the form of grog and/or cigarettes. He rejected the appellant's claim that he had been under the influence of grog. Whilst the Judge did not give detailed reasons for his voir dire ruling, it is quite clear that

(a) he disbelieved the apppellant

(b) he gained little help from the witnesses called by the appellant.

(c) he believed the Police Officers.

All these findings were clearly open to him on the evidence.

The appellant seeks to point out alleged inconsistencies among witnesses as at the voir dire hearing. It is not necessary to detail these because we are satisfied that the voir dire exercise was conducted properly by the Judge. It was not necessary for him to give detailed reasons for admitting the evidence, given that he was to hear most of the same evidence again from the appellant, this time with the assessors present. The voluntariness of the statement was something the Judge instructed the assessors about in his summing- up. We see no reason to criticise any aspect of the summing-up. The Judge told the assessors that they were at liberty to depart from any view of the facts that they may have perceived as his. We reject this ground of appeal.

Fourth Ground of Appeal

The appellant submitted that the Judge erred in referring the assessors to the wrong place where the car used in the robbery was found. The Judge said that it had been found at Savai Place (near the house where the appellant, some money and a cane knife were found) instead of at Nasinu Advanced College some distance away. He had refer to it being strange "that here is Mr Nasoni in somebody else's house near to the abandoned car that it is suggested was used in the ANZ Bank robbery and now telling the Police where the gun and money is located in the house."

The Judge did err in naming the wrong place where the car was found and in linking the proximity of the abandoned car to the Savai Place address where the appellant was apprehended. We cannot see, given the force of the case against the appellant, already outlined, that this mistake caused a miscarriage of justice. We therefore again apply the proviso under

s.22(6) of the Court of Appeal Act (cap 12).

Fifth Ground of Appeal

The appellant complained about the Judge allowing evidence by the prosecution of appellant's previous contact with the Police. Ignoring matters that emerged through the appellant's own cross-examination, these references come down to:

(a) one officer claiming acquaintance with the appellant because he had come to sign a bail register at a Police Post.

(b) another officer saying he had seen the appellant at the Suva Court.

The references are not sufficiently prejudicial to cause a miscarriage of justice. Indeed the appellant himself alluded to his antecedents in his evidence-in-chief by saying that he was hiding in the particular house when he was apprehended because there had been a Bench Warrant out for his arrest.

We reject this ground of appeal.

General Grounds

There was also some grounds, generally expressed, relating to alleged contradictions and inconsistencies by witnesses and an assertion that the trial was unsatisfactory. We have considered the appellant's submissions in combination with the record.

There is absolutely nothing in this ground. The Judges's summing-up was adequate: the case against the appellant very strong. No doubt there will always be some inconsistencies amongst witnesses otherwise they might stand accused of conspiring to give identical evidence. Overall, then is nothing to justify the appellant's unspecific assertions.

Accordingly, the appeal against conviction fails.

Sentence

We grant leave to the appellant to appeal against sentence, but reject the appeal.

The Judge clearly took into account when sentencing the appellant:

(a) The appellant's long list of previous convictions, including robbery

(b) The sentencing guidelines offered by this Court in *Lui & Others v. State* (Cr App AAU 005/97S) and by the New Zealand Court of Appeal in R. v. Moananui [1983] NZLR 537.

(c) The fact this appellant was not entitled to any 'discount' because he had pleaded 'not guilty'.

(d) The fact that a firearm was used and discharged in the course of the robbery and that the appellant was one of three persons involved in that robbery, was himself armed with a cane-knife.

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The sentence is entirely appropriate. The appeal against sentence is dismissed.

Result

(a) Appeal against conviction dismissed.

(b) Leave to appeal is against sentence is granted.

(c) Appeal against sentence dismissed.

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Sir Moti Tikaram
President

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Sir Ian Barker
Justice of Appeal

Solicitors:

Appellant in Person
Office of the Director of Public Prosecutions, Suva for the Respondent

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