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

CRIMINAL APPEAL NO.AAU0023 OF 2000S
CRIMINAL APPEAL NO. AAU0030 OF 2000S
(High Court Criminal Case No. HAC006/99)

BETWEEN: 1. SIGA LESUMAILAU *Appellants*
2. SIKELI TAMANI

AND: THE STATE *Respondent*

Coram: Sheppard JA, Presiding Judge
Tompkins JA
Smellie JA

Hearing: Friday 16 November 2001, Suva

Counsel: Appellants in Person
Mr P. Ridgway for the Respondent

Date of Judgment: Thursday 22 November, 2001

JUDGMENT OF THE COURT

On the 15th of October 2000 after a trial in the High Court both appellants were found guilty of robbery with violence contrary to section 293(1)(a) of the Penal Code (Cap. 17).

Both appeal against conviction and sentence. The grounds of the conviction appeals are of course different but the common ground on sentence is simply that the terms of imprisonment imposed were excessive.

The factual circumstances giving rise to the trial and conviction of both accused are, however, the same.

The factual background

On the 17th of July 1998 students at the University of the South Pacific with surnames commencing A-D were due to enroll and pay their fees at about 1:30 pm in a lecture room in the School of Development.

University staff were on hand to record the enrolments and collect the fees. For this purpose tills and money boxes had been taken to the designated room. A security guard was also on duty.

Enrolments had barely begun when a group of men wearing balaclavas and armed with cane knives broke into the room and commenced to collect money and tills and make off with them.

One of the men who was armed with a knife was confronted by the security guard while the others were collecting the tills and the money. Both students and staff were shocked and intimated. The raid lasted only a few moments and the group of four or five men then ran to a white van parked nearby and escaped. They were pursued by the security guard and some students but none was apprehended. Approximately $52,000 in cash and cheques was stolen.

The States's case against Lesumailau

The prosecution called evidence to show first that a student who had been a neighbour of Lesumailau for seven years had positively identified him as one of the robbers. While waiting in a queue outside the enrolling room she had observed Lesumailau close to a notice board. At that time he was not wearing a balaclava. She observed what he was wearing and was able to describe accurately his shoes, trousers and shirt. Minutes later she saw him standing on a table in the enrolling room grabbing cash and a till or tills. By then his face was covered by a balaclava but the witness was able to identify him by the clothing he was wearing.

Subsequently when interviewed some two days after the robbery Lesumailau admitted his involvement and that he had participated in the division of the stolen cash.

Lesumailau's grounds of appeal (conviction)

Lesumailau's grounds of appeal in respect of conviction may be summarised as follows:

1. The trial Judge failed to direct the assessors and himself adequately on the standard and burden of proof required. This included a complaint that the following were not mentioned "Provocation, compulsion, coercion, self-defence, necessity, consent, accident of (sic) mistake of fact."

2. Verdict unreasonable and not supported by the evidence.

3. Confession not voluntary and should have been excluded by the trial Judge.

As to the first ground - failure to direct adequately on standard and burden of proof. First, the alleged failure to direct on provocation etc is entirely without substance or merit. The facts of this case did not call for directions on any of those matters.

On the general obligation to direct on the standard and burden of proof we are satisfied on considering the terms of the summing up that the learned trial Judge discharged his obligations fully and fairly in that regard.

The second ground - verdict unreliable and not supported by evidence - has two aspects. First the appellant complains that the evidence of the student who knew him and gave a positive identification of his presence at the scene and involvement in the crime was not corroborated. In law it did not have to be. The assessors and the Judge were fully entitled to accept that identification evidence without other evidence to back it up. Reading the record the evidence has the ring of truth - the witness was not shaken by the accused's cross-examination. In addition, however, there is some confirmation of the witness's evidence in that during the interview with the police Lesumailau described his clothing on the day exactly as the witness recalled it. Further he admitted to waiting outside the room by a notice board immediately before the robbery commenced. That also was confirmed by the student witness. This ground clearly fails.

The final ground is more troublesome. Lesumailau was interviewed from 3.30 pm on the 18th of July 1998 to 5.10 pm on the 19th of July. 135 questions and answers were recorded. Up to question and answer 35 Lesumailau denied involvement, however, at question and answer 36 there was a dramatic change. They read as follows:

"Q36: What can you say about the statement that you have given above?

A36: They are all false."

From then on the appellant admitted his involvement and from about question 73 the interview rather moved away from Lesumailau's personal involvement to a search for information regarding the other offenders. Right at the end the appellant confirmed he had read his statement and then there is recorded question and answer 133

"Q133: Were you forced to give this interview statement?

A133: No."

Lesumailau objected to the statement being adduced in evidence on the ground that it was not voluntary and had been forced out of him by assault. The Judge ran a trial within a trial and declined to exclude it. The principles the Judge applied were impeccable but his analysis of the evidence was, with respect, somewhat limited.

Be that as it may, however, Lesumailau presented his allegations of assault before the assessors and again in the short one line address he delivered to them before they retired to consider their verdict. In his evidence Lesumailau said that he was assaulted by four police officers all of whom he named. Not all were called by the State but the interviewing officer

and the officer who took Lesumailau's charge statement at 5.45 pm on the 19th of July denied any assault, or other improper pressure. Lesumailau said he was punched above the eye sustaining a wound which bled and that he was forced to kneel with his hands behind his head and was kicked and punched about the body.

It appears that after the charge was read the appellant was formally charged before the Magistrate's Court and then taken to prison. On admission at the prison the receiving officer gave instructions he was to be taken to hospital for attention to the cut over his eye. At the hospital the cut was dressed but no stitches were required and no other injuries were seen or complained of.

In the end the point of time, during the 26 hours occupied by the interview, at which the denials ceased and the admissions commenced cannot be ascertained. The cut above the eye which must have occurred while the appellant was in police custody remains unexplained by the State.

All this, however, was before the assessors in evidence and they would have clearly understood Lesumailau's contentions. The Judge of course had heard them twice and drew attention to them in his summing up to the assessors as follows:

> *"Now we come the second accused, Siga Lesumailau. He confessed in his interview as well as in the Charge Statement of taking part in this robbery. Gentlemen assessors you are not required to decide whether the interview and the Charge statement are admissible in evidence or should be admitted in evidence but to decide what weight to be given to the evidence.*

You have to decide whether the confessions are true. The accused had cross-examined police that he was assaulted. The police denied it. Siga Lesumailau had elected to remain silent, as he was quite entitled to do that."

In the end the assessors and the Judge all agreed that Lesumailau was guilty. The inference can be drawn that they were prepared, in whole or in part, to treat the confession as true and reliable. Reviewing the matter on appeal we are satisfied it would not be proper for us to take a different view.

Lesumailau's appeal against conviction is dismissed.

The State's claim against Tamani

Tamani made no admissions. He was, however, identified by the security guard as the man who had confronted him with a cane knife. The guard contended that Tamani's face, unlike that of the other robbers, was not covered. The guard said Tamani was the man he threw his stapler, radio telephone and a chair at. Tamani was also the man the guard said he chased to the white van outside and kicked in the face.

The guard's subsequent identification of Tamani took place first at an identity parade held on the 23rd of July 1988 - 6 days after the robbery. The security guard identified Tamani at the parade apparently without difficulty. The guard again identified Tamani on a second occasion at the Magistrates' Court. On both occasions witnesses swore that Tamani threatened the guard saying "I will see you". Tamani admitted the words but put an innocent

construction upon them.

The State's case rested entirely upon this identification.

Tamani's grounds of appeal (conviction)

Tamani's major ground was that the identity parade was not conducted fairly and properly. He contended that the persons he was lined up with were all students from the University and probably known to the security guard. He put it this way in the submissions that he obtained leave to submit when he appeared in person on this appeal.

> *"The identification parade was unreliable and unfair because all people involved were from the USP Campus, excluding myself. All people in the parade excluding myself were USP students including the Identifying Witness (Nawal Prakash) who is a Security Officer at USP. Your Lordship, there is strong possibility that the Identifying Witness knows everybody at least by face in the parade - I was the only outsider in that parade..... this is not fair Your Lordship....*
>
> *Your Lordship, Police Officers just picked students from USP for the parade whereas the Identifying Witness was also from USP. There is strong possibility that the Identifying Witness (Nawal Prakash) knows all the nine USP students in the parade, at least by face. This is not fair Your Lordship."*

The guard's evidence given at the trial was that he had worked at the University for nine years and that his job was to look after the general security of the complex. He was cross-examined by Tamani but not asked if he recognised any or all of the others in the line up as students. The guard was adamant that he had seen Tamani's face and was able to identify him.

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The appellant called a witness who was a student and whose evidence is to be found at p.72 of the record. The evidence reads:

> *On 23/7/98 I was in identification parade. One Indo-Fijian man conducted the parade. I was at USP. One police asked us to go to Central Police Station for the parade. Police just asked us. So we went to Central Police Station. During the parade I gave Accused 1 (i.e. Tamani) my 'T' shirt. Before the change you were talking to police. Police asked me if I could change clothes with Accused 1."* (emphasis added)

The prosecution did not cross-examine or challenge that evidence and neither did the other two accused. It is clear also that having called him, Tamani did not ask him to elaborate his use of the words "us" and "we" (which we have underlined) in his evidence.

So clearly one person in the line up of nine people plus the accused was a student and the inference may be drawn from the student's evidence that at least one other was also. Whether there were more and whether the guard was able to recognise them as students, however, is mere speculation.

It is well established that identity parades must be conducted with scrupulous fairness - especially in a case such as this where the prosecution case rests almost entirely if not entirely on the evidence of one witness. In the third New Zealand edition of Cross on Evidence at pages 59 and 60 the learned author records that "the police must act with exemplary fairness. It would be wrong, for example, for a parade to be so composed that none of the other men in the parade could possibly be mistaken for the suspect." The authority cited for that

statement is the decision of the Court of Appeal of New Zealand in R.v. Jeffries [1949] NZLR 595. In the headnote the following is recorded.

> *"The only satisfactory method of identification where a suspect or suspects are paraded is where the suspect or suspects are placed amongst a sufficiently large number of persons of similar age, build, clothing, and condition of life, and the witness is then asked, without prompting or assistance, to recognise the offender. Such methods as submitting the prisoner alone for scrutiny after arrest, pointing out the suspect, or otherwise conveying to the witness that the prisoner is the person suspected or charged, permitting the witness to see a photograph of the prisoner after arrest and before scrutiny, and parading the suspect with others not one of whom could possibly be mistaken for him, are not only unsatisfactory but unfair."*

The circumstances giving rise to the Jeffries case are dramatically set out in the judgment of the court delivered by O'Leary CJ at p.602 commencing at line 40.

> *"In the present case, what was termed an "identification parade" consisted of the two accused being placed in a room along with eight other men, all in civilian clothes, but seven of whom were policemen. The two accused had bloodstains on their clothes, and one certainly had blood on his hands, and it was said that their clothes were old. Before being called on to identify, Williams had been informed that the two men had been arrested. All the details of the circumstances of the identification were freely given by the Detective chiefly concerned, and there is no doubt that the method adopted was not in accordance with the recognized practice, but possibly was contributed to by the fact that it took place some time about midnight, when the assembling of suitable personnel would be difficult. The only satisfactory method of identification where suspects are paraded is where the suspect or suspects are placed amongst a sufficiently large number of persons of similar age, build, clothing, and condition of life, and the witness is then asked, without prompting or assistance, to recognise the offender....."*.

The evidence in this appeal falls well short of the situation exposed in the Jeffries case. Furthermore the challenges now made were not advanced during the hearing. Had we been

able to see from the record that more than 2 of the nine people who lined up with the appellant could have been students, we may have been prepared to set the verdict aside. But the record does not so disclose and there was no application to call further evidence to support such a proposition.

In the absence of a challenge during the trial we are satisfied that the learned Judge's direction to the assessors and himself on the care to be taken in respect of identification was adequate. The Judge said:

> *"Gentlemen assessors the vital issue in the case of Accused 1, Sikeli Tamani .... is of identification..... Was the accused, Sikeli Tamani, properly identified by the witness, Nawal Prakash. I must therefore warn you of the special need for caution before convicting in reliance on the correctness of the identification. The reason for this is that it is quite possible for an honest witness to make a mistaken identification and notorious miscarriages of justice have occurred as a result. You must examine carefully the circumstances in which the identification by the witnesses were made. How long the accused was under observation? At what distance? In what light? Was the observation impeded in any way? Had the witness ever seen the accused before? If so, how often, If only occasionally, had the witness any special reason for remembering the accused persons? How long elapsed between the original observation and the subsequent identification to the police.*
>
> *Gentlemen assessors in your opinion has the prosecution proved beyond reasonable doubt that the accused, Sikeli Tamani, was one of the men in this robbery at USP. D id the prosecution witness properly identify him? Nawal Prakash said he was certain Sikeli Tamani was one of the men in this robbery and he drove the van. If you have reached those conclusions as I have stated you should find the accused, Sikeli Tamani, guilty on both the counts as charged. If you are left in any reasonable doubt Sikeli Tamani is entitled to the benefit of the doubt and should be acquitted."*

This limb of the identification aspect of the appeal therefore fails.

The other limb of the appellant's complaint regarding the identification parade was recorded by him in his written submissions as follows:

> *"2. Your Lordship, the Identification Parade was unfair and unreliable:*
>
> *Nawal Prakash who was the Security Officer at USP at the time of the robbery was the Identifying Witness (please see Pon Sami Chetty's statement on page 46-47) Nawal Prakash has been a Security at USP for 9 years (please see his statement page 44). Nawal Prakash didn't say that he had seen me or had known me before the day of the Identification Parade. Nawal Prakash didn't say in his statement before the day of the Identification Parade that he saw me on the day of the robbery.*
>
> *Your Lordship, this clearly shows that Nawal Prakash has no knowledge at all about myself before the day of the Identification Parade.*
>
> *(a) Referring to my caution interview before the Identification Parade on page 91:*
>
> *question 43 states: One witness states that you were seen clearly driving the car registration number 'BD 680' from USP at the time of the robbery. Is it true?*
>
> *question 44 states: Do you want to be put into an 'identification parade' for the wirness who saw you on Friday 17/7/98 to come and see you?*
>
> *Your Lordship, these questions (43 and 44) clearly indicates that the Identifying Witness has already known me or has already seen me before the 'identification parade'. It also clearly indicates that the interviewing Police Officers were quite sure that the Identifying Witness (Nawal Prakash) was gonna point me out at the parade... this is not fair Your Lordship.*
>
> *Your Lordship, based on these two questions (43 & 44) there was no need for an 'identification parade.' I went to the identification parade because I was innocent. If I knew my*

right, I wouldn't have gone to the parade.

Your Lordship, I wasn't cautioned about the Identification Parade, I was denied my right (please check my caution interview on page 91 - 92 and Pon Sami's statement page 46 - 47)"

The officer who conducted the identity parade had been a police officer at that time for 25 years. He arranged a line up of nine people and had Tamani brought to join the panel. In his evidence which is recorded at p.46 of the record he said "I called nine people for the parade. They were in a line at the rear of the Central Police Station. Accused 1, Tamani, was brought to the parade by a police officer. I asked Tamani if he had any objection. Accused said he had no objection. I asked Accused 1 where he wanted to stand in the parade. I had explained the reason for the parade. Accused 1 said he wanted to be No. 8. Accused 1 stood as No. 8 in the parade."

Before the actual identification occurred Tamani was given the opportunity to shift at his request from No. 8 to No. 7 and to exchange his shirt with another person in the parade. As earlier recorded the witness Prakash identified him apparently without difficulty.

The question of running an identity parade was raised with the appellant while he was being interviewed by the same officer who conducted the parade. What was discussed is to be found in the record at p.91 where questions and answers from 43-45 are relevant. They read as follows:

"Q43: One witness stated that you seen clearly driving the car registration number BD680 from USP at the time of the robbery. Is that true?

A43: That witness is lying.

Q44: Do you want to be put into an identification parade for the witness who saw you on Friday, 17/7/98, to come and see you at the time of the robbery?

A44: Yes.

Q45: You are now about to be taken to the Identification Parade. Do you want to change your clothes?

A45: I would like my white jacket to be taken off so I could just wear my white T-shirt with my shoes."

The statement in the appellant's written submission set out earlier that the security officer did not say "that he'd seen me or knew me before the day of the identification parade on the 27th", is of course not correct. The witness's clear evidence was that he had seen Tamani at the scene of the crime and that he had been one of the robbers involved.

We are also of the view that Tamani's complaint that the two questions at 43 and 44 indicated that the officer concerned already knew that Prakash would identify Tamani is not correct. The full record of what occurred as set out above indicates in our view that Tamani was given a fair opportunity to decline to be involved in the identification parade. Furthermore he had the opportunity of seeing the other nine participants before he made his decision of choosing where he wished to stand in the line and what clothing he would wear. In our judgment in relation to the matters discussed under this limb Tamani was treated fairly and his complaint that he was not "cautioned about the identification parade" and "was denied his rights" cannot be sustained.

Mr Tamani's final point was that the Judge did not give adequate weight to his alibi witness.

What the witness said is to be found at p.73 of the record and reads as follows:

> *"There was a robbery at USP. I came to know about this case in 'FIJI TIMES'. I saw Accused 1 in town that day. I was with Accused 1 in town on that particular day till about 2.00 p.m. to 3.00 p.m. I went with Accused 1 to drink at Moti Street. I saw Accused in town before 9 o'clock. You were selling marijuana around town. I had first seen you near fish market. We got pretty drunk. I do not know what happened. I woke up next morning. I was drinking with you in the ground near Moti Street."*

Cross-examined by the State prosecutor the witness said

> *"I drank with the Accused 1 on 17/7/98. The time was 2.00 p.m. or 3.00 p.m. We went after 2.00 p.m. I do not know the exact time.*
>
> *I was also selling marijuana when I met Accused 1. I met again later in the afternoon. Accused 1 was having lunch about 1.00 p.m. I know Accused 1 well. He is my friend. I do not want Accused 1 [Page 72] to go to prison. I do not like to protect Accused 1."*

Of that evidence in his summing up the Judge said (record p.25):

> *"Isikeli Tamani has brought a witness, Vilikesa Buadromo (DW4) to say that he was elsewhere at the time of robbery. Vilikesa said he was in town with Sikeli Tamani selling marijuana. He said he saw Tamani before nine o'clock. Vilikesa was not sure of the time. The evidence of Vilikesa could not be true because Tamani in his interview said he was at home in Verata, Tailevu. Tamani said he left home at nine o'clock. The defence of alibi simply means that the accused says that he was somewhere else at the material time. But the burden of proof is on the prosecution. The accused does not have to prove that he was elsewhere; on the contrary it is for*

the prosecution to disprove alibi. If you conclude that the alibi was false that does not of itself entitle you to convict the accused, the prosecution must establish the guilt."

The Judge's comments were temperate. It was legitimate to draw the assessor's attention to the discrepancy and uncertainty regarding time and it will be observed that the Judge refrained from commenting on the fact that this particular witness on his own evidence had been drinking heavily on the day in question. This ground of appeal also fails.

The sentence appeals

The maximum penalty for the offence of which the appellants were convicted is life imprisonment. This was a well-planned robbery and both appellants have prior convictions for similar offending. Terms of imprisonment of 6 years were well within the range open to the learned Judge. They cannot be described in the circumstances as excessive. The sentence appeals are also dismissed.

Conclusion

Having looked carefully and anxiously at all of the appellants' have had to say the court is unanimous in its view that both the appeals against conviction and sentence fail and they are accordingly dismissed.

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Sheppard JA, Presiding Judge

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Tompkins JA

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Smellie JA

Solicitors:
Appellants in Person
Office of the Director of Public Prosecutions, Suva for the Respondent

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