IN THE COURT OF APPEAL, FIJI ISLANDS
APPELLATE JURISDICTION

CRIMINAL APPEAL NO: AAU0058/08

BETWEEN:

ESALA TABALOA

Appellant

AND:

THE STATE

Respondent

Coram: Goundar JA
Calanchini JA

Hearing: 27th May 2010

Counsel: Appellant in person
Mr. S. Vodokisolomone for State

Date of Judgment: 15th July 2010

JUDGMENT OF THE COURT

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[1] Following a trial in the High Court at Lautoka the appellant was convicted of robbery with violence and unlawful use of motor vehicle. He was sentenced to 7 years imprisonment for robbery with violence and 6 months imprisonment for the unlawful use of motor vehicle, the sentences to be served concurrently.

[2] He appeals against his conviction on several grounds. He also applied for leave to call fresh evidence but that application was withdrawn at the hearing of the appeal.

Legal Representation

[3] In his first ground, the appellant contends that the trial judge violated his right to counsel by proceeding to trial without him being represented. He submits that he was incapable of conducting his defence due to the seriousness of the charge and therefore his trial was unfair.

[4] It is well established that the right to counsel is not an absolute right ***(Eliki Mototabua v. The State*** *CAV 004 of 2005S)* and the absence of counsel is not necessarily fatal to a conviction which is obtained after a trial which is fairly conducted ***(Seremaia Balelala v. The State*** *Criminal Appeal No. AAU0003 of 2004)*. The question is whether the trial miscarried as a result of the appellant being unrepresented ***(Samuela Ledua v The State*** *Criminal Appeal CAV004 of 2007)*.

[5] From the outset, no question arises regarding the appellant being ignorant of his right to legal representation. When he first appeared in the Magistrates' Court, the learned Magistrate advised him of right to counsel of choice or to apply to legal aid. The appellant informed the court that he would engage a private counsel. The appellant was remanded in custody and his case was transferred to the High Court.

[6] When the appellant appeared in the High Court he informed the judge that he wished to apply for legal aid. On 25 May 2007, the appellant was granted bail so that he could apply for legal aid. He did apply for legal aid, but his application was refused, and he was informed of the decision on 17 August 2007. The case was then adjourned on four different occasions to ensure the appellant engaged counsel before trial.

[7] On 22 February 2008, the appellant appeared before Govind J for mention. He informed the court that he would defend himself. From what he told the court, we conclude the appellant waived his right to counsel and that the waiver was competently made after the court had given him ample opportunity to engage counsel. The learned judge stood down the case to allow the appellant to receive legal advice from a legal aid counsel. It was made plain to the appellant that he was not bound by the advice but it was given to him by way of assistance. The case was recalled and the appellant confirmed to the court that he had received legal advice and that he was not obliged to follow the advice but make his own decision. The learned judge asked him whether he needed any assistance in getting his witnesses to court, to which he replied that he would make the arrangements himself. The case was set for hearing on 21 April 2008.

[8] On 21 April 2008, the appellant failed to appear for hearing and a bench warrant was issued for his arrest. The following day he voluntarily appeared and informed the court that he was mistaken about the trial date. His bench warrant was cancelled and a new trial date of 13 May 2008 was set. His bail was extended.

[9] On 13 May 2008, the trial commenced before Shameem J. The appellant did not seek any further adjournment to engage counsel. He did not complain that he was incapable of conducting his own defence without assistance from counsel. In opening remarks to the assessors the learned judge highlighted the appellant was unrepresented and that the court had a duty to assist him. We discern from the court record that the trial was conducted fairly. The trial judge was an experienced judicial officer. The trial procedures were explained to the appellant. The appellant was given an opportunity to cross examine the prosecution witnesses and call his own witnesses in his defence. Wherever possible the learned judge assisted the appellant in cross examination of the prosecution witnesses and with his defence. The appellant, of course, may have advanced his defence better, if he was

represented. However, from the manner the trial was conducted and having regard to the evidence against the appellant which we will highlight later in our judgment, we are satisfied that the trial did not miscarry due to the appellant being unrepresented. This ground of appeal fails.

Identification evidence

[10] Under this ground, the appellant contends that the identification evidence relied on by the prosecution to convict him was unreliable.

[11] At trial, there was no dispute that the alleged robbery took place. What was in dispute was the involvement of the appellant in the robbery. The main evidence against the appellant's involvement came from Iosefo Samu, an eye witness. According to Iosefo Samu the appellant was the driver of the getaway vehicle that was used in the robbery.

[12] The witness said he was standing 10 feet away from the car that was used in the robbery. The appellant was sitting at the driver's seat. He observed the appellant for about two minutes. He said the appellant was not masked. He described the appellant by his hair and skin colour. He said the appellant had short hair and was not very dark. The identification was made in broad daylight at 10am. After three days, the witness identified the appellant in a police identification parade.

[13] In cross-examination, the appellant challenged the witness's evidence and suggested to him his evidence was false and that on the day in question he was home. Since the appellant was unrepresented and did not ask many questions, the following evidence was elicited following questions from the trial judge:

> "This was the first time I saw Accused. At the identification parade I was kept in a room until I was brought out. I had seen the others before, some of them were shoeshine boys. Only two of them and

> the rest of them were students at Natabua. I know all the persons at the parade. I only recognized them by face. But the accused I recognized him because I had seen him on the 8th of January. I am sure it was him because he was not wearing any mask."

[14] Constable Simione gave evidence of the identification parade in which Iosefo Samu identified the appellant. Constable Simione said since the appellant had a plaster on his face, he went and bought plasters for all the men before proceeding with the parade.

[15] We have no difficulty to accept the proposition that identification evidence has inherent risks and that the assessors must be given careful directions when an accused disputes his or her identity. In ***R v Turnbull*** *[1976] 3 ALL ER 549*, the English Court of Appeal established clear guidelines aimed at assessing the quality of identification evidence and removing the risks, which are contained in the following passage by Widgery LCJ and has been approved by the Court of Appeal in ***Semisi Wainiqolo v State*** *Criminal Appeal No.AAU0027 of 2006*:

> "First, whenever the case against an accused depends wholly or substantially on one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convicting one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms, the judge need not use any particular form of words. Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as, for example, by passing traffic or a press of people? Has the witness seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent observation to the police?

> Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? ... Finally he should remind the jury of any specific weakness which had appeared in the identification evidence."

[16] In this case, the learned judge left the issue of identification to the assessors as a question of fact and gave careful direction in accordance with the guidelines in ***Turnbull***. The assessors were directed that the evidence against the appellant came substantially from the identification evidence of Iosefo Samu. After directing on the ***Turnbull*** guidelines, the learned judge retuned to the issue in her summing up and reminded the assessors to consider carefully the circumstances in which the identification was made along the following lines:

> "Remember what I told you earlier about identification. Before you can accept evidence of identification, consider carefully the circumstances in which it was made. The time over which Iosefo saw the driver, the lighting and any special description of him. Consider also the identification parade. Did Iosefo identify the Accused because he was sure that he was the driver? Could he had been influenced by the fact that he recognized all the others on the parade? Remember also that Lautoka has a relatively small population and I suppose that everyone is known to everyone else. Was the Accused at a disadvantage because his face was swollen?"

[17] We see no reason to criticize the direction of the learned judge. Ultimately the identity of the appellant was a question of fact for the assessors after careful consideration to the circumstances under which the identification was made. In this case, the assessors accepted the identification evidence and we see no reason to disturb that finding. This ground of appeal fails.

Circumstantial evidence

[18] Under this ground, the appellant contends that the trial judge erred in relying on circumstantial evidence to convict him.

[19] The circumstantial evidence came from Jonacani Biau, a friend of the appellant. Jonacani Biau said on the evening of 8 January 2007 (the date the robbery took place), he was invited by the appellant to join a group of men who were drinking. He said in the course of the conversation the appellant told him that the liquor was bought from stolen money. In cross-examination, the appellant suggested to the witness that it was not him who said the liquor was bought from stolen money and that the witness was already drunk when he joined the group. The witness maintained that it was the appellant who made the statement about the liquor being bought from stolen money and that he was not drunk but sober.

[20] Another circumstantial evidence was the evidence of the appellant evading the police on the day after the robbery. In his caution interview, the appellant said he evaded the police because he was drunk.

[21] Although the learned judge gave full direction on circumstantial evidence, it was common ground that circumstantial evidence alone was insufficient to convict the appellant. This was also made clear to the assessors when the learned judge directed them in the analysis of issues that the question for them was the reliability of identification evidence. Thus, the appellant's contention that he was convicted on circumstantial evidence cannot be sustained.

Burden and Standard of Proof

[22] It is contended by the appellant that the learned judge misdirected on the burden and standard of proof. We find no substance in this ground of appeal. The learned judge directed the assessors that the burden of proof was on the prosecution and that they must prove guilt beyond a reasonable doubt. The direction was correct in law and we see no reason to criticize it.

Alibi

[23] In his final ground of appeal, the appellant contends that his alibi was not taken into account.

[24] There was evidence before the trial judge and the assessors that at the time of the offences the appellant was at his plantation near his home. The appellant's wife, sister and neighbour gave evidence confirming the appellant's alibi. The assessors were directed to consider the alibi evidence as the appellant's defence and acquit him if they accepted his alibi. Clearly, his defence of alibi was considered, but was rejected by the assessors and the trial judge.

Conclusion

[25] For the reasons we have given, the appeal against conviction is dismissed.

Hon. Mr. Justice Daniel Goundar
Judge of Appeal

Hon. Mr. Justice William Calanchini
Judge of Appeal

Solicitors:
Appellant in person
Office of the Director of Public Prosecutions for State