IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL NO. AAU 90 of 2010
(High Court Criminal Action No. HAC 120 of 2008)

BETWEEN	**:**	**RAYMOND JOHNSON**
		Appellant
AND	**:**	**THE STATE**
		Respondent
Coram	**:**	**Calanchini AP** **Chandra JA** **Lecamwasam JA**
Counsel	**:**	**Ms B Malimali and Ms M Vulisavou for Appellant** **Mr L Fotofili for Respondent**
Date of Hearing	**:**	**15 May 2013**
Date of Judgment	**:**	**30 May 2013**

JUDGMENT

Calanchini AP

[1] I agree with the reasons and the conclusions of Chandra JA.

Chandra JA

[2] The Appellant was convicted on one count of robbery with violence and one of unlawful use of a motor vehicle following trial in the High Court. He was sentenced to a term of ten years imprisonment and four months respectively, both sentences to run concurrently.

[3] On 14th June 2008 six men, all wearing "Pom Pom" head coverings down to the forehead had entered the house of Sanish Kumar Singh at 3.00 a.m. They had gone into the bedroom, turned on the light, one of them, had pointed a dagger to Sanish and spoken to him in English demanding cash and jewellery. They had taken the jewellery from his wife and ransacked the place, removed some items and had made their escape in Sanish's car which was later found abandoned.

[4] The Appellant advanced eight grounds of appeal against his conviction and sentence, in his leave to appeal application, and leave was allowed on two grounds.

(i) That he was tried before three assessors who unanimously found him "not guilty" on the first count of robbery with violence and "not guilty" on the second count of unlawful use of motor vehicle.

(ii) That the finding of the High Court Judge in respect of identification by the complainant was unsafe given that the appellant was sighted by the complainant the day before the identification parade.

[5] An identification parade had been held fourteen days later at Valelevu Police Station at which the complainant had identified the appellant as the intruder who pointed the knife at him. The complainant in his evidence at the trial stated that he identified the appellant in good lighting condition from a distance of about one metre and for a period of ten minutes. The Appellant had stood in front of him and he was wearing a pom pom but the face was not covered and that he could never forget his face. When cross-examined by the Appellant who was unrepresented at the trial, as to what he was doing at the Valelevu Police Station on the 27th of June, the Complainant stated that he had been called to identify the items that were used to break into the house. He admitted having been at the car park when a police vehicle had pulled up in front him and that he had spoken to the driver but denied having looked inside the vehicle and seeing the Appellant.

[6] ASP Suren who conducted the identification parade at Valaelevu Police Station ,stated in his evidence that he had lined up nine persons for the parade with the Appellant. The Appellant had agreed to participate in the parade and had not objected to any of the nine persons in the parade. He had offered the Appellant to take a position anywhere in the parade and he had taken a stand between the 6th and 7th persons in the parade. All nine persons had been indigenous Fijian men of ages ranging from 18 to 38 years. They were wearing t-shirts and trousers. The Appellant was in a red t-shirt. The complainant was invited to view the line up and the complainant had identified the Appellant within about 30 seconds. It was suggested to him that he had been shown to the complainant the previous day which was denied by ASP Suren. When asked whether the persons participating in the identification parade had the same hair cut as his, the witness replied "No, because I was told that the suspects wore pom poms on their heads. You were not identified because of your baldness but physical facial features."

[7] The Appellant gave evidence on his behalf and also led the evidence of his wife to establish an alibi. In his evidence the Appellant denied having committed the office and stated that he was at home that night. He also stated that he was at the Valelevu Police Station on 27th June 2008 when the complainant saw him before the parade on 28th June 2008. Under cross examination he stated that the complainant had walked up to the police vehicle that he was in.

[8] The main ground of appeal that was argued before this Court was on the question relating to identification of the Appellant solely by the complainant. The Assessors had returned a verdict of not guilty on both counts but the learned High Court Judge overturned the verdict and found the Appellant guilty on both counts.

[9] It was argued that the learned trial Judge had failed to follow the guidelines in **R v Turnbull** [1977] QB 224 and that the assessors were not warned of the weaknesses of the identification evidence.

[10] The guidelines in **R v Turnbull** (supra) have been followed in Fiji in **Wainiqolo v The State** [2006] FJCA 70 . AAU 27.2006 (24 November 2006), **Sinu v The State** [2013] FJCA 21; AAU37.2009 913 March 2013. The Court of Appeal in **R v Turnbull** (supra) set out the following guidelines:

> *"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 convincing 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? Had 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.*
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> *Recognition may be more reliable than identification of a stranger but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."*

[11] On the question of identification , the learned trial Judge summed up to the Assessors as follows:

> *"[17] At this stage I must give you a direction on identification.*
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> *[18] Evidence that the accused has been identified by a witness as doing something must, when disputed by the accused, be approached with special caution because experience has demonstrated, even honest witnesses have given identification which have been proved to be unreliable. I give you this warning not because I have formed any view of the evidence, but the law requires that in every case where identification evidence is involved, that the warning be given.*
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> *[19] In assessing the identification evidence, you must take such matters into account :*
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> > *(1) Whether the witness has known the accused before? Sanish Kumar said he had never seen the accused before the incident at his home on 14 June 2008.*
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> > *(2) For how long did the witness have the accused under observation and from what distance? Was it more than a fleeting glance? Sanish Kumar said that he observed the accused for ten minutes from a distance of 1 meter inside his bedroom. His description was that the accused was a medium built Fijian man, who spoke good English. The accused had a pompom on his head but his face was not covered. The accused pointed a knife to the witness and demanded money. The witness said that the accused packed the stolen items in a bag in his presence.*
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> > *(3) Did the witness have any special reason to remember? Sanish Kumar said he would never forget the face of the accused because of the incident.*
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> > *(4) In what light was the observation made? According to Sanish Kumar the bedroom was well lit because the intruders switched on the two feet tube light when they entered the bedroom.*
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> > *(5) Whether there was any obstacle to obstruct the view. Sanish Kumar said he clearly saw the face of the accused because nothing obstructed his view.*

[20] In cross-examination, it was suggested to Sanish Kumar that he saw the accused in a police vehicle at Valelevu Police Station on the day before the identification parade. Sanish Kumar denied seeing the accused at Valelevu Police Station before the identification parade. He said he went to the Station to identify the instruments.

. . .

[25] PC Arvind Lal was the police officer who escorted Sanish Kumar to the identification parade in which the witness identified the accused. PC Lal said Sanish Kumar was kept in the Crime Sgt's Office while the parade was conducted in the Crime Office of Valelevu Police Station.

. . .

[34] The accused says to you that you disbelieve the prosecution witnesses and asks you to believe the defence witnesses, especially his alibi witness. The accused says Sanish Kumar is mistaken about identification of him and that the identification parade was unfair because the witness had seen him on the day before the parade. He therefore says the State has not proved the case beyond a reasonable doubt.

[35] The prosecution says to you that Sanish Kumar is not mistaken about identification of the accused because he had an ample opportunity to see the accused's face from a close distance for a reasonable period of time in good lightening condition. The prosecution says the accused's alibi is unreliable and should be rejected. The prosecution submits that they have proved the case beyond a reasonable doubt."

[12] Were the above directions adequate in the circumstances of the case specially regarding the manner in which the identification parade was held? It was the evidence that the Appellant had been placed with nine other Fijian persons of similar build clad in t-shirts and trousers and that the Appellant was the only bald person in that parade and one wearing a red t-shirt. The Appellant who was a bald person and in a red t-shirt would easily stand out in such a parade. It was the evidence of the officer who arranged the parade that he was informed that the persons who had committed the robbery had worn pom poms and that the Appellant had been identified by his facial features.

[13] Having a parade where the Appellant was the only bald person would be a weakness in such a parade as it would be very easy to single out such a person among the others. In this case the evidence was that the Complainant had seen the Appellant among five others who were all wearing pom poms in good light for about ten minutes on the day that the offence was committed and had thereafter identified the Appellant at the Identification parade, which he had done in about 30 seconds. The complainant had seen the Appellant on the night of the incident wearing a pom pom among five others wearing pom poms and when he identified him at the identification parade he was not wearing a pom pom. The complainant therefore would have identified the Appellant from his facial features, which was apparent when in his evidence he had said that he could never forget his face. Under cross-examination the Appellant had suggested to the Complainant that on the previous day the Appellant was shown to the Complainant when he was inside a police vehicle and that the complainant had spoken to the driver of that vehicle regarding identifying the implements used to commit the robbery. The complainant of course denied such suggestion.

[14] This evidence when analysed would suggest that the complainant actually identified the Appellant as the person who threatened him on the day of robbery as he could remember his face very well though he had seen him for about ten minutes. It is also possible that the Appellant would have been seen by the complainant when he was in the police vehicle the day before the identification parade when the complainant was talking to the driver of that vehicle. It may be that as suggested under cross-examination to the complainant that he was shown to the complainant by the driver in the police vehicle. It could also be on the basis that the Appellant was the odd person out in the line up of the identification parade as being the only bald person in a red t-shirt. These possibilities would throw a doubt as to the proper identification of the Appellant and would weaken the prosecution case which was based entirely on the identification of the Appellant by the complainant. It was a weakness in relation to the identification of the Appellant. Did the learned trial Judge warn the Assessors about this position? The summing up which has been set out above does not deal with this position at all. In such

circumstances identification becomes unsafe and should have been a matter that should have been placed before the Assessors by the learned trial Judge.

[15] Considering the manner in which the learned trial Judge had summed up to the Assessors, although he had dealt with several aspects of the Turnbull guidelines, he had not directed them regarding the weaknesses in the identification evidence. In **Scott and Another v R**, **Barnes and Others v R** [1989] 2 AER 305 the Privy Council in two appeals from Jamaica applying the guidelines in Turnbull, held:

> "*Where the sole evidence of identification connecting the defendant to the crime was uncorroborated, the trial judge should give the jury a clear warning of the danger of a mistaken identification and only in the most exceptional circumstances should a conviction based on uncorroborated identification evidence be upheld in the absence of such a warning. The fact that the defendant had been picked out at an identification parade did not obviate the need for such a warning. In the circumstances the failure of the trial judge in each case to give the jury the appropriate warning vitiated the convictions."*

[16] In the present case as pointed out above, not only was the evidence of identification uncorroborated, there was also the weakness in the holding of the parade where the Appellant was the only bald person. In **Tabaloa v The State** [2010] FJCA 34; AAU0058.2008 (15 July 2010) in a similar situation as the present case where the accused was charged on the same counts, identification was by a sole witness at an identification parade. When holding the parade, as the accused had been wearing a plaster on his face, plasters were put on the faces of the other participants in the parade. In the present case the complainant had seen the Appellant on the day of the robbery wearing a pom pom among six others who were wearing pom poms, and then at the parade he was the only one with a bald head. As in Tabaloa's case it may have been better to get all in the parade to wear pom poms or have a few others who were bald.

[17] As stated above, the learned trial Judge overturned the verdict of the Assessors and convicted the Appellant. In his judgment the learned Judge has stated that he was not satisfied that the identification parade was unfair on the evidence before the court, that he believed and accepted the evidence of the complainant that he had not seen the Appellant the day before the identification parade, that the initial identification of the Appellant by the complainant was not a fleeting glance and that the identification parade was not suggestive but fairly conducted, that the identification evidence is reliable and acceptable and that the opinion of not guilty by the assessors is against the weight of evidence.

[18] In his judgment the learned trial judge has not considered the appropriateness of the parade regarding the fact of having the Appellant as the only bald person in the parade. In that respect as shown above it was unsafe to determine that the identification by the complainant in the circumstances of the case was acceptable. On that basis the argument of the Appellant that it was unsafe to convict the Appellant would succeed.

[19] Another argument that was placed before Court was on the question of alibi. The Appellant had denied his complicity in the commission of the offence and gave evidence to the effect that he was at home on the night of the commission of the offence. He also led the evidence of his wife to that effect.

[20] The evidence on behalf of the accused given by his wife was conflicting regarding the time that the Appellant had returned home and the learned trial Judge in his judgment concluded that the alibi evidence was vague and full of contradictions and not worthy of any credence. However, he went on to state that “it was not open on the evidence for the assessors to believe the alibi of the accused”.

[21] The summing up of the learned trial Judge cannot be faulted on the question of alibi evidence. However, his statement in his judgment that it was not open for the assessors to believe the alibi of the accused was pointed on behalf of the Appellant to be unacceptable. The decision as to whether the alibi evidence was to be accepted or not was a matter for the Assessors and it was not correct for the learned Judge to make a comment on it. This comment by the learned trial Judge would add strength to the reasons as to why he overturned the verdict of not guilty brought in by the Assessors.

[22] It was submitted on behalf of the Appellant that in overturning the verdict of the Assessors, the learned trial Judge did not provide cogent reasons that satisfy the requirement set out by the courts.

[23] The principles relating to the overturning a verdict of the Assessors by the trial Judge as set out in S.299 of the CPC were laid down by the Supreme Court in **Lautabui v State** [2009] FJSC 7; CAV0024.2008 (6 February 2009).

> *"[28] S 299 of the CPC recognizes that a judge has the power and authority to disagree with the majority opinion of the Assessors. When the judge disagrees with the assessors his or her reasons are deemed to be the judgment of the Court. However, the judge's power and authority in this regard is subject to three important qualifications.*
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> *[29] First, the case law makes it clear that the judge must pay careful attention to the opinion of the assessors and must have "cogent reasons" for differing from their opinion. The reasons must be founded on the weight of the evidence and must reflect the judge's views as to the credibility of witnesses : **Ram Bali v. Regina** [1960] FLR 80 at 83 (Fiji CA), affirmed **Ram Bali v. The Queen** (Privy Council Appeal No. 18 of 1961, 6 June 1962); **Shiu Prasad v. Reginam** [1972] 18 FLR 70, at 73 (Fiji CA). As stated by the Court of Appeal in **Setevano v. The State** [1991] FJA 3 at 5, the reasons of a trial judge: "must be cogent and they should be clearly stated. In our view they must also be capable of*

withstanding critical examination in the light of the whole of the evidence presented in the trial."

[30] Secondly, although a judge is entitled to differ from even the unanimous opinion of the assesors, he or she must comply with the requirement of s.299 of the CPC to pronounce his or her reasons in open court. It was not disputed by the State that a failure to comply with the statutory requirement, whether because the reasons are inadequate or because they are not pronounced in open court, is sufficient, of itself, to warrant setting aside a conviction in a case where the judge overrides the opinion of the assessors.

[31] The third point is related to the other two. A person convicted of a criminal offence in the High Court has a right of appeal on any ground which involves a question of law alone : Cap 12, s.21(a)(a). The convicted person may appeal to the Court of Appeal on any question of fact, provided he or she obtains the leave of the Court of Appeal or a certificate from the trial judge: s.21(1)(b). An appeal to the Court of Appeal (whether as of right or after a grant of leave or of a certificate) is by way of rehearing : ***Setevano v State*** *at 14. Thus, a decision by a trial judge to disagree with the assessors' opinion that the accused should be acquitted is subject to an appeal (albeit by leave) in the nature of a rehearing.*

[32] It follows that the reasons of the trial Judge in such a case will be scrutinised closely on appeal. It is important to appreciate that one of the principal rationales for requiring trial courts sitting without juries to give reasons for their decisions is "to enable the case properly and sufficiently to be laid before the ... appellate court" : ***Pettit v. Dunkley*** *at 388. The reasons must be sufficient to fulfil that purpose.*

[33] The qualifications to the power and authority of a trial judge to override the opinion of the assessors are closely related because an appeal by way of rehearing on a question of fact presupposes that the judge's reasons expose the reasoning process by which he or she has concluded that the case against the accused has been proved beyond reasonable doubt. Unless this is done, the Court of Appeal may not be able to determine whether the judge erred in reaching that conclusion, much less whether he or she had "cogent reasons" for depriving the accused on the benefit of the assessors' opinion. Further, in the absence of a cogent reasoning process in the judgment, the accused will not know precisely why the assessors' opinion in his or her favour was not allowed to stand.

> *[34] In order to give judgment containing cogent reasons for disagreeing with the assessors, the judge must therefore do more than state his or her conclusions. At the least, in a case where the accused have given evidence, the reasons must explain why the judge has rejected their evidence on the critical factual issues. The explanation must record findings on the critical factual issues and analyse the evidence supporting those findings and justifying rejection of the accused's account of the relevant events. As the Court of Appeal observed in the present case, the analysis need not be elaborate. Indeed, depending on the nature of the case, it may be short. But the reasons must disclose the key elements in the evidence that led the judge to conclude that the prosecution had established beyond reasonable doubt all the elements of the offence."*

[24] Considering the above principles laid down in Lautabui, there has been compliance with the second and third principles. As regards the second principle as required by s.299 the pronouncing of the reasoning in open court, there is no dispute. As regards the third principle, a person convicted of a criminal offence in the High Court has a right of appeal on any ground which involves a question of law alone, Court of Appeal Act (Cap.12) s.21(1)(a). The application for leave to appeal which was lodged by the Appellant was heard by a single Judge of the Court of Appeal and leave was granted.

[25] As regards the first principle that the judge must have cogent reasons for differing from their opinions. The learned trial Judge in his judgment has arrived at the conclusion that there was sufficient identification to prove the case of the prosecution beyond reasonable doubt. But as stated above, the weaknesses in the identification parade have not been considered by him and there has not been sufficient warning in his summing up to the Assessors. In the light of the whole of the evidence presented at the trial, the reasoning of the learned judge in his judgment does not accord well with the verdict of the Assessors and the conviction of the Appellant was therefore affected by an error of law.

[26] As the Appellant has established that his conviction has been affected by a serious error of law, the appeal is allowed and his conviction is quashed and set aside.

Lecamwasam JA

[27] I also agree with the decisions and the conclusions arrived at by Chandra JA.

Orders of the Court

(1) The appeal of the Appellant is allowed.

(2) The conviction of the Appellant is quashed and set aside.

Hon. Justice W D Calanchini
ACTING PRESIDENT

Hon. Justice S Chandra
JUSTICE OF APPEAL

Hon. Justice S Lecamwasam
JUSTICE OF APPEAL