

IN THE HIGH COURT OF FIJI

AT SUVA

MISCELLANEOUS JURISDICTION

MISCELLANEOUS CASE NO. HAM 130 OF 2012S

ROPATE NAISUA

VS

THE STATE

Counsels : Mr. J. Savou for Applicant
Mr. J. Niudamu for State

Hearing : 5th April, 2013

Ruling : 31st May, 2013

Written Reasons: 20th September, 2013

WRITTEN REASONS FOR ALLOWING THE APPEAL

1. Ropate Naisua told the court that he was already serving a sentence of 13 years imprisonment, with a non-parole period of 11 years imprisonment, in Suva High Court Criminal Case No. HAC 091 of 2010S, from 9th September 2011. On this case, I allowed his appeal on 31st May 2013, and said I would give my reasons later. Below are my reasons. His victory, in any event, does not alter his abovementioned 13 years imprisonment.
2. On 11th November 2008, Mr. Naisua appeared in the Suva Magistrate Court, on the following charge:

Statement of Offence

CRIMINAL TRESPASS: Contrary to Section 197 (2) of the Penal Code, Chapter 17.

Particulars of Offence

ROPATE NAISUA with 4 others on the 6th day of November 2008, at Lami in the Central Division, by night entered the compound of **KAYLELE SHAW** without lawful excuse.

3. He appeared with counsel. The charge was read and explained to him. He said, he understood the same. He pleaded not guilty to the offence. The matter went through various pre-trial proceedings before various Magistrates until 6th June 2011, when the trial started. The prosecution only called one witness, that is, the complainant herself. She was examined by the prosecutor, cross-examined by defence and then re-examined by the prosecution. The learned Resident Magistrate found a case to answer. The accused gave sworn evidence. He was not cross-examined. He then closed his case.
4. On 3rd April 2012, the court delivered judgment. It found the accused guilty as charged. On 23rd July 2012, the court sentenced Mr. Naisua to 10 months imprisonment. He did not appeal within 28 days. Consequently, he lost his right to appeal. On 14th August 2012, he filed an application to appeal out of time. He must show “good cause” for permission to appeal out of time. “Good cause” is sometimes taken to mean he had merit in his appeal.
5. I have carefully read the papers he sent to the court. I have also carefully read the court record, the court’s judgment and the court’s sentence, to find out whether or not Mr. Naisua had merit in his application to appeal out of time. The case really centred on the application of the **R v Turnbull** (1976) 63 Cr. App. R 132 test, as it applied to evidence of visual identification of the suspect, at the crime scene. The **R v Turnbull** (supra) test is law in Fiji, and its application when the prosecution’s case is based fundamentally on a visual identification of the suspect at the crime scene, is mandatory, especially so when the defence claim it was mistaken identification: see

Suliasi Sivaro v The State, Criminal Appeal No. AAU 0048 of 2002; Semisi Wainiqolo v The State, Criminal Appeal No. AAU 0027 of 2006; Saula Lalagavesi v The State, Criminal Appeal No. AAU 0045 of 2007 – all Fiji Court of Appeal authorities.

6. In this case, the learned Magistrate, in writing his judgment, failed to warn himself of the special need for caution before convicting the accused, when relying on the correctness of the complainant's identification evidence, because an honest and convincing witness may be mistaken. The learned Magistrate, being judge of law and fact, must still comply with the first limb of the R v Turnbull test.
7. The learned Magistrate correctly noted the second limb of the R v Turnbull test by posing the necessary questions, that is: 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 ever 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 identification 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?
8. However, when examining the complainant's sworn evidence, it appeared the prosecution had not properly elicit the required evidence from the witness to properly answer the above questions. It is the duty of the court, in the interest of justice, in a case such as the present, especially so with inexperienced and/or new prosecutors, to prod them, to ask the relevant questions to answer the questions posed in paragraph 7 hereof. In my reading of the complainant's evidence, there was not enough evidence to make you sure that it was the accused, who was at the crime scene, at the material time.
9. Furthermore, the learned Magistrate did not cover the third limb of the R v Turnbull test, that is, he should have reminded himself of any weaknesses in the complainant's identification evidence. In this case, the evidence revealed that no proper police identification parade was held, at the police

station. Nevertheless, the learned Magistrate relied on this improper police identification parade as one of the grounds to convict the accused.

10. In my view, given the above, it was not safe to accept the complainant's identification evidence, although I accept her evidence that people criminally trespassed into her property, at the material time. For the above reasons, I granted Mr. Naisua's leave to appeal out of time, and quashed his conviction and sentence in the Suva Magistrate Court. I ordered so accordingly.

Salesi Temo
JUDGE

Solicitor for Appellant	:	Legal Aid Commission, Suva.
Solicitor for State	:	Office of the Director of Public Prosecution, Suva.