

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION
CRIMINAL APPEAL CASE NO.: 30 OF 2013

BETWEEN: **SAKEASI RAIKELEKELE**

Appellant

AND: **STATE**

Respondent

Counsels: **Appellant in person**
Mr. Josaia B. Niudamu for the Respondent

Date of Judgment: **6 February 2014**

JUDGMENT

1. The appellant was charged before the Nadi Magistrate under following counts:

First Count

Statement of Offence

BURGLARY: - Contrary to Section 312 (1) of the Crimes Decree No. 44 of 2009.

Particulars of the Offence

Sakeasi Raikelekele, between the 4th and 5th day of April 2012, at Nadi in the Western Division, broke and entered into dwelling house of **Rohit Vikash Deo** as trespasser, with intend to steal.

Second Count

Statement of Offence

THEFT: - Contrary to Section 291 (1) of the Crimes Decree No. 44 of 2009.

Particulars of the Offence

Sakeasi Raikelekele, between the 4th and 5th day of April 2012, at Namotomoto, Nadi in the Western Division, dishonestly appropriated assorted liquor valued at \$ 350.00, assorted jewelleries valued at \$1,000.00, assorted groceries valued at \$100.00, assorted clothes valued at \$1,000.00 all to the total value of \$1,450.00 property of **Rohit Vikash Deo**.

Third Count
Statement of Offence

THEFT: - Contrary to Section 291 (1) of the Crimes Decree No. 44 of 2009.

Particulars of the Offence

Sakeasi Raikelekele, between the 4th and 5th day of April 2012, at Namotomoto, Nadi in the Western Division, dishonestly appropriated assorted lollies valued at \$40.00 and invoice book valued at \$50.00 all to the total value of \$90.00 property of **Rohit Vikash Deo**.

2. The appellant pleaded not guilty, convicted after trial for the third charge and was sentenced for 16 months imprisonment on 26th July 2013.
3. The facts of the case are in the night of 4th April 2012 when complainant was off loading goods from a parked van in front of his shop in the night, the appellant had taken a carton containing some lollies and invoices and ran away.
4. This appeal was filed on 1st August 2013, within time.
5. The ground of appeal are :
 - (i) That the learned trial Magistrate erred in failing to draw his mind to the Turnbull requirements on identification and allowed dock identification.
6. Both parties have filed written submissions. The State in their submissions had stated that it was not safe to accept the complainant's identification evidence, although there was evidence that theft took place at the material time from the complainant. Further State conceded with the appellant that there was a basic error made by the learned Magistrate on ground of appeal when learned Magistrate failed to draw his mind to the Turnbull guidelines on the requirement of identification.

7. In **R v. Turnbull** [1977] QB 224 it was held that:

*“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 reference to the possibility that a mistaken witness can be convincing one and that 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 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 them and his actual appearance?...Finally he should remind the jury of any specific weakness which had appeared in the identification evidence.”

8. This principle was approved by The Court of Appeal in **Wainiqolo v State**[2006] FJCA 70; AAU 0027.2006 (24 November 2006)
9. In **Lalagavesi v State** [2009] 1 LRC 253 it was held by Hon. Madam Justice Nazhat Shameem that:

*“The appeal goes to a particular aspect of identification evidence directly involving the circumstances relating to the identification, the use to which it can be put and care that must be taken by trial courts in ensuring that **Turnbull and Wainiqolo** are applied with rigor. This is fundamental importance in trial process.”*

10. The learned Magistrate had failed to warn and guide himself in accordance with the Turnbull guidelines. Considering the nature of evidence available in this case such failure become crucial. Thus it is unsafe to allow the conviction to stand.
11. The State had prayed for a re-trial. The appellant was in remand for a period of one month before he was granted bail and further period of 6 months in prison after conviction.
12. Although this Court is inclined to grant a re-trial, it is up to the office of DPP to decide whether the appellant should undergo a re-trial.

13. For the reasons given above the appeal against the conviction is allowed. The conviction dated 26.7.2013 quashed and sentence set aside. A re-trial is ordered only in respect of the 3rd charge. The appellant to be produced before the Nadi Magistrate on 11.2.2014 for consideration of bail before a re-trial.

Sudharshana De Silva
JUDGE

At Lautoka
06th February 2014

Solicitors : **Appellant in Person**
 Office of the Director of Public Prosecution for Respondent