

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 47 OF 2014

STATE

-v-

1. PENI YALIBULA
2. MIKAELE TURAGANIVALU
3. RUSIATE TEMO ULUIBAU
4. ULAIASI QALOMAI
5. TEVITA QAQANIVALU

Counsel: Mr. J. Niudamu for the Prosecution
Ms. V. Narara for 1st Accused
Ms. S. Nasedra for 2nd Accused
Ms. P. Chand for 3rd Accused
4th Accused *in absentia*
5th Accused in Person

Date of Ruling: 25th May, 2016

RULING

1. Mr. Tevita Qaqanivalu, the 5th accused, and four others are charged with two counts of Act with Intent to Cause Grievous Harm, one count of Aggravated Robbery and one count of Damaging Property.

2. Prosecution seeks to adduce into evidence a CCTV camera footage that allegedly contains the contemporaneous video recording of the robbery. They also seek to prove the 5th accused's identity through the recognition evidence of a police officer (DC Leone Vurukania) who has watched the CCTV footage.
3. The 5th accused, appearing in person, objects to the CCTV camera footage being shown to the assessors at the trial. He also objects to the police officer being called as a witness to adduce recognition evidence.
4. Basis of the 5th accused's objection is not that clear. As far as I can understand, his objection, made orally, is based on two grounds.
 - a. CCTV footage is not clear enough to identify the people depicted in it and therefore not admissible in evidence.
 - b. Police officer had not been present at the crime scene and therefore his recognition evidence based on CCTV footage is not admissible.
5. The 5th accused is not challenging the authenticity of the footage. Only challenge is to the quality of the film. There is no basis for the 1st objection raised by the 5th accused. As a matter of course, Courts have allowed the prosecution to establish identity of persons involved in crimes through CCTV video recordings obtained from cameras installed at the crime scene without it first being tested for quality. Whether it is clear enough to identify the perpetrators to be seen in it is a matter for the assessors to decide. In the summing up, assessors can be properly warned about the dangers involved in identification through a video recording.
6. In ATTORNEY-GENERAL'S REFERENCE NO 2 OF 2002
<http://www.bailii.org/ew/cases/EWCA/Crim/2002/2373.html> Cite as: [2003] Crim LR 192, [2003] 1 Cr App Rep 21, [2003] 1 Cr App R 21, [2002] EWCA Crim 2373 Lord

Justices, considering a reference made by the Attorney General under Section 36 of the Criminal Justice Act 1972 did not see any objection to a CCTV footage of which 'quality was not of the best' being shown to the jury where a witness knows the defendant sufficiently well to recognise him as the offender depicted in the photographic image.

7. The 5th accused's 1st objection has no merit and therefore refused.
8. To find the answer to the second objection, I turn again to the Lord Justices judgment in **ATTORNEY-GENERAL'S REFERENCE NO 2 OF 2002** (*supra*)
9. In that case defendant (G) was tried on indictment on one count of riot, contrary to section 1(1) of the Public Order Act 1986. A video film was taken. The quality was not of the best. It was the Crown's case that G was one of those to be seen in the film. The Crown sought to prove his identity through the evidence of two police constables.
10. The first was D, who was a member of the police video viewing team set up after the riot. He spent a considerable number of hours viewing the film and, in consequence, became familiar with the appearance of persons to be seen in it. In consequence, he was put forward as a witness with specialist knowledge. He did not know G. By chance, after he had viewed the film many times, D saw G and, because of his study of the films, he recognised him as being one of those depicted. His identification was proffered in evidence, in accordance with *Clare & Peach* [1995] 2 Cr App R 333. No objection was taken to the admissibility of that evidence and the witness was cross-examined on the basis that he was mistaken.
11. The second police officer was Police Constable G. He was an uniformed community constable, who had, over a period of time, had a number of dealings with G, whom he had known for about 5 years reasonably well. Because of his local knowledge, Police Constable G was asked to look at the film. When he saw it, under controlled conditions, he identified from his own knowledge of him, G as being one of the rioters. Just before Police Constable G was called to give evidence, the trial judge, His Honour Judge Woodward, invited submissions as to the admissibility of his evidence. Having heard

submissions, he ruled that the identification, through recognition, was, in principle, inadmissible. He said that where a witness:

"has no specific skills, has no abilities and has no experience other than that which the jury themselves have," caution should be exercised in allowing evidence from such a witness to go before the jury. The judge described such evidence as being of "very light weight" and questioned the extent to which it might help the jury. He ruled that because in the case before him the original evidence upon which the recognition had been made was available to the jury, that is to say the video film taken at the scene, Police Constable G's evidence should not be admitted. He added that the jury was in a better position than Police Constable G if the man on the film was the defendant because, unlike Police Constable G, the jury could view the film and at the same time compare the images on the screen with the defendant in the dock. The judge went on to rule that the prosecution could call Police Constable G to describe any peculiarities about the defendant, which the jury could not glean from looking at or listening to him, such as his gait and any changes in his appearance since the officer had last seen him.

12. Accordingly, Police Constable G's identification, through recognition, not having been admitted, at the close of the prosecution case, the judge directed that the jury return a verdict of not guilty because of the insufficiency of the evidence on the question of identity.
13. The Attorney General referred the judgment to the Court of Appeal of England and Wales (Criminal Division) under Section 36 of the Criminal Justice Act 1972 seeking the answer to three questions in relation to evidence where there are photographic images from at the scene of the crime.

14. Answering the questions posed by the Attorney General, Lord Justices held:

“In our judgment, on the authorities, there are, as it seems to us (at least four circumstances in which, subject to the judicial discretion to exclude, evidence is admissible to show and, subject to appropriate directions in the summing-up) a jury can be invited to conclude, that the defendant committed the offence on the basis of a photographic image from the scene of the crime:

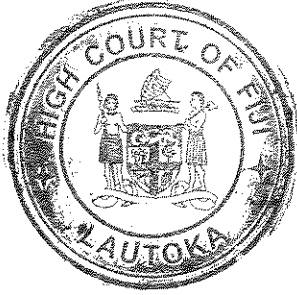
(i) where the photographic image is sufficiently clear, the jury can compare it with the defendant sitting in the dock (Dodson & Williams);


(ii) where a witness knows the defendant sufficiently well to recognise him as the offender depicted in the photographic image, he can give evidence of this (Fowden & White [1982] Crim LR 588, Kajalave v Noble 75 Cr App R 149, Grimer [1982] Crim LR 674 , Caldwell & Dixon and Blenkinsop 99 Cr App R(S) 73); and this may be so even if the photographic image is no longer available for the jury (Taylor v The Chief Constable of Chester);

(iii) where a witness who does not know the defendant spends substantial time viewing and analysing photographic images from the scene, thereby acquiring special knowledge which the jury does not have, he can give evidence of identification based on a comparison between those images and a reasonably contemporary photograph of the defendant, provided that the images and the photograph are available to the jury (Clare & Peach);

(iv) a suitably qualified expert with facial mapping skills can give opinion evidence of identification based on a comparison between images from the scene, (whether expertly enhanced or not and a reasonably contemporary photograph of the defendant, provided the images and the photograph are available for the jury (Stockwell 97 Cr App R 260, Clarke [1995] 2 Cr App R 425 and Hookway.

15. Considering No.(ii) above which directly answers the question at hand, I overrule the objection taken by the 5th accused and allow the Prosecution to Call DC Leone as a witness to adduce recognition evidence.




Aruna Aluthge
JUDGE

AT LAUTOKA

On 25th May, 2016

**Counsel: Office of the Director of Public Prosecution for State
Office of the Legal Aid Commission for 1st, 2nd and 3rd Accused
5th Accused in Person**