IN THE HIGH COURT OF FIJI

AT SUVA

MISCELLANEOUS JURISDICATION

MISCELLANEOUS CASE NO. HAM 184 OF 2016S

BETWEEN **JULIAN HEINRICH**

APPLICANT

AND **THE STATE**

RESPONDENT

Counsels	:	Mr. S. Valenitabua for Applicant
		Ms. J. Fatiaki for Respondent
Hearing	:	18 November, 2016
Ruling	:	17 February, 2017
Written Reasons	:	13 March, 2017

WRITTEN REASONS FOR DENYING DEFENCE'S APPLICATION FOR A VOIR DIRE ON THE POLICE IDENTIFICATION PARADE EVIDENCE

1. On 16 March 2015, the applicant (accused) faced the following information:

Statement of Offence

MANSLAUGHTER: Contrary to section 239 of the Crimes Decree No. 44 of 2009.

Particulars of Offence

JULIAN HEINRICH with other persons unknown on the 21st of June, 2014 at Suva in the Central Division, assaulted **SIONE TUFUI** which caused the

death of **SIONE TUFUI** and at the time of such assault was reckless as to causing serious harm to **SIONE TUFUI**.

2. On 5 October 2015, in the presence of his counsel, he pleaded not guilty to the information.

3. In the course of police investigation, a police identification parade was held at the Totogo Police Station, in which the applicant attended. According to the applicants affidavit in support, the police identification parade was held on 25 June 2014.

4. On 21 October 2016, the applicant applied for leave to hold a voir dire on the admissibility of the evidence arising out of the police identification parade held at Totogo Police Station, involving the applicant, on 25 June 2014. They submitted that the identification parade was unlawful and unfair, and thus had to be declared inadmissible evidence, in the interest of a fair trial to the accused. The applicant filed and served a notice of motion and an affidavit in support, in pursuance of the above application.

5. On 7 November 2016, the State replied with an affidavit in reply. They also filed a written submission. In their submission, they opposed the applicant's application for a voir dire on the admissibility of the evidence arising out of the 25 June 2014 police identification parade at Totogo Police Station. The State argued that, based on the authority of **Barry Robert Walshe** (1980) 74 Crim App R. 85, an English Court of Appeal decision, a voir dire on the admissibility of police identification parade evidence was totally inappropriate.

6. The applicant replied to the above with an affidavit in reply on 11 November 2016. They also filed a submission in reply on 15 November 2016. This was in addition to their amended submission they filed on 24 October 2016. The applicant also filed a bundle of authorities on 11 November 2016. I am thankful to the parties for the authorities submitted.

7. I had carefully read and considered the papers filed by the parties. No Fiji Court of Appeal or Supreme Court of Fiji decision was submitted by the parties in support of their position. In the 22 years I had served in the Fiji Judiciary, 15 years as a Resident Magistrate and 7 years as a High Court Judge, I had not come across an application for a voir dire on a police identification parade.

8. Evidence arising out of a police identification parade at a police station are often used as a means of testing the quality of a witness's identification evidence as it applied to the **R v Turnbull** [1977] QB 224 test, especially its second limp. For the above reasons, I accept the respondent's submission that the English Court of Appeal authority in **Barry Robert Walshe** (supra) should be accepted in this court, as it accords with what had been previously practised in our courts.

9. I would go further and say that, subject to any Fiji Court of Appeal and/or Supreme Court of Fiji decision on the matter, His Lordship The Lord Chief Justice Boreham's view in **Walshe** (supra) that a voir dire on the admissibility of police identification evidence was inappropriate, appear to reflect the law of Fiji. I agree with His Lordship's view as stated then:

> **"...In our judgment, that is not a procedure which a judge at a trial ought to adopt. It is, so far as this Court is concerned, a novel procedure, and it is not to be encouraged. Indeed, it is to be discouraged. The reason is this: It seems that before the learned recorder, as in this Court, those representing the applicant drew some close analogy between the admissibility or evidence of an identification parade and the admissibility of a voluntary statement. But those are very different matters. As soon as a statement is challenged the law places on the Crown the burden of showing that it is admissible by proving that it was voluntarily made. That is a separate and different matter. Here there was no burden on the Crown to prove the admissibility of the evidence relating to the identification parade and what flowed from it. It was clearly admissible evidence and should have been admitted. Its quality is, of course, another matter, to be considered by the jury. This Court holds strongly to the view that a trial-within-a-trial is an entirely inappropriate procedure in the circumstances which obtained in this case..."**

10. For the above reasons, I dismissed the applicant's application on 17 February 2017.

HIGH COURT OF FIJI

Salesi Temo
JUDGE

Solicitor for Applicant : **S. Valenitabua, Barrister and Solicitor, Fiji and Nauru**
Solicitor for Respondent : **Office of the Director of Public Prosecution, Suva.**