JONETANI ROKOUA v STATE (AAU0020 of 2005)

COURT OF APPEAL — CRIMINAL JURISDICTION

TOMPKINS, SCOTT and WOOD JJA

8, 10 March 2006

Criminal law — verdicts — miscarriage of justice — whether judge misdirected himself on burden and standard of proof — whether Nizam's evidence was not before court — whether delay in trial breached Appellant's constitutional right — whether judge ought to dismiss Manueli — whether judge biased — Constitution of the Republic of Fiji s 29(3) — Criminal Procedure Code (Cap 21) s 234 — Penal Code (Cap 17) ss 292, 293.

The Appellant and another man went to a motor trader to test drive a brown four-wheel drive together with the sales manager, Ashwin Mani (Mani), as passenger. They threatened Mani, took his money and car and drove off. The matter was reported to the police. In 2001, the Appellant was charged and appeared in the Magistrates Court. He pleaded not guilty and was remanded in custody. The Appellant elected to be tried by the High Court and was granted bail. The Appellant was finally committed for trial in 2002. He was not called before the High Court until 2004. The Appellant was convicted by the High Court of one count each of robbery with violence and unlawful use of a motor vehicle. He pleaded not guilty to both counts and the three assessors, including one Manueli who had greeted him outside the court before the trial started, were sworn in. The Appellant immediately raised a preliminary matter, in the absence of the assessors, alleging his trial would be unfair, as Nizam, who was unable to identify him at an identity parade, was not called to give evidence. The trial proceeded and several prosecution and defence witnesses testified.

The assessors held the Appellant guilty on both counts and he was sentenced to 4 years' imprisonment. The Appellant appealed against the conviction and sentence and applied to adduce further evidence, which was refused. The issues were whether: (1) the judge misdirected himself on the burden and standard of proof; (2) the evidence of Nizam was not before the court; (3) there was delay in bringing the Appellant to trial; (4) the judge ought to have dismissed Manueli; (5) the trial judge was biased against the Appellant and should have disqualified himself by reason of his acquaintance with the husband of one Henry Fong.

Held — (1) The judge did not misdirect himself on the burden and standard of proof since during the comprehensive summing-up, the judge carefully directed the assessors on where the burden of proof laid and the standard of proof required. He also gave the assessors detailed directions on the factors which they ought to take into account when approaching the identification evidence. There was no fault in these directions.

(2) There were a number of reasons why Nizam, who was no longer living in Fiji, did not identify the Appellant. Nizam remained in the office throughout and did not accompany the other three men in the car. The question, however, for the assessors was not why he had not picked out the Appellant, but whether they were satisfied beyond reasonable doubt that the identification by Ashwin Mani and the police officer Maciu were correct. They should acquit if they had any reasonable doubt on that score. The directions given to the assessors were clear and faultless.

(3) During the years 2002–04, the High Court at Lautoka was faced with a large number of trials involving persons remanded in custody facing the most serious charges and priority was given to the disposal of these cases. The Appellant was facing a less serious charge and was remanded on bail that was why 18 months elapsed between his committal and his arraignment.

The Appellant was not prejudiced when Nizam was not called since the judge gave clear directions to the assessors on the relevance or otherwise of Nizam's absence from the trial and his apparent failure to identify the Appellant at the identity parade. The lapse of time between the Appellant's first appearance and his trial was unsatisfactory and at least partly the result of dilatoriness in the Magistrates Court. It was not so inordinate as to be unconstitutional. The Appellant's several failures to appear partly caused the delay.

(4) There was no need to dismiss Manueli since the Appellant first revealed that he knew one of the assessors after all the evidence had been led and immediately before the judge began his summing-up. The Appellant did not mention that he knew any of them when the assessors were empanelled. If Manueli had known that the Appellant had previous convictions, then he would have revealed nothing to the assessors, which the Appellant did not himself tell them. The Appellant's evidence had a number of prior convictions and was picked on by the police. The Appellant's trial was not prejudiced by his acquaintanceship with Manueli.

(5) The trial judge was not biased against the Appellant since he afforded considerable indulgence in allowing him to call several alibi witnesses although none was the subject of the required statutory notice. His refusal to allow the trial to be adjourned again to enable the Appellant to call another unprepared witness was not unreasonable. The fact that he may have been acquainted with the witness's husband did not affect the question of whether the judge's discretion was reasonably exercised and neither did it give rise to a reasonable apprehension of bias.

Appeal dismissed.

Case referred to

Apaitia Seru v State [2003] FJCA 26; *Martin v Tauranga District Court* [1995] 2 NZLR 419; *R v Morin* [1992] 1 SCR 771; (1992) CR (4th) 1, cited.

Appellant in person

K. Tunidau for the Respondent

Tompkins, Scott and Wood JJA.

Introduction

[1] On 22 February 2005 the Appellant was convicted by the High Court at Lautoka of one count of robbery with violence contrary to s 293 of the Penal Code (Cap 17) and one count of unlawful use of a motor vehicle contrary to s 292 of the Code.

[2] The case against the Appellant was that on 20 November 2001 he and another man went to the premises of a well-known motor trader. They asked to test drive a brown four-wheel drive. The sales manager Ashwin Mani took the two men for a drive. After a while one of the men took over the driving while Ashwin Mani moved into the front passenger seat. At Bible College junction the driver stopped the car. One of the men took out a knife and put it to Ashwin Mani's throat. His purse containing $5 was taken from him. He was put out of the car in which the two men then drove off. The matter was reported to the police.

[3] The Appellant was charged on 30 November 2001 and he first appeared in the Lautoka Magistrates Court on the same day. He pleaded not guilty and was remanded in custody until 14 December. On 14 December he elected to be tried by the High Court. He was granted bail. There were four appearances over the next 6 months when the prosecution was not ready with the committal papers. It then took three further appearances over the next 3 months for the paper preliminary enquiry (which might have taken all of 20 minutes to hold) to take place. The Appellant was finally committed for trial on 2 September 2002. He was not called before the High Court until 1 April 2004.

The High Court trial

[4] According to the record the Appellant told the court that he wished to represent himself. The charges were put to him and he pleaded not guilty to both counts. Following the plea the record states:

> Assessors no problem with witnesses.

The three assessors, including one Manueli, were then sworn in.

[5] The Appellant immediately raised a preliminary matter with the court, in the absence of the assessors. He told the court that his trial would be unfair since a man Nizam who had been unable to identify him at an identity parade, was not being called to give evidence. The judge told him that if this was the case then it was not sufficient reason to prevent a fair trial being held; in due course proper and appropriate directions would be given to the assessors. The trial then proceeded.

[6] The prosecution case was very short. The sales manager, Ashwin Mani was the first witness. He told the court what happened on the test drive. He also told the court that a few days later he had taken part in an identity parade and had picked out the Appellant from a group of ten or eleven other men. In cross-examination he "positively" denied picking out two other men from any previous identity parade.

[7] The second prosecution witness, Maciu, was a police officer who told the court that on the afternoon of the day in question he recognised the Appellant, whom he already knew, sitting in a brown four-wheel drive with altered licence plates at the Lautoka hospital.

[8] The third prosecution witness produced the record of a cautioned interview which he had conducted with the Appellant on 28 and 29 November. The Appellant throughout the interview denied knowing anything at all about the incident. He suggested that Maciu was lying. He agreed to take part in an identity parade. After the parade had been held he pointed out to the interviewing officer that only one of the two Indian men who had attended the parade had picked him out.

[9] The last prosecution witness was the investigating officer who arrested the Appellant. In cross-examination he admitted knowing two other men, Josateki Labalaba and Joseph King. He accepted that these two might have been arrested at about the same time for some other offence but denied that they had been arrested in connection with this matter or that they had been identified as being the culprits.

[10] After the court found a case to answer the Appellant asked for the police station diary for Saturday 24 November 2001 to be tendered. The court agreed and the following day the diary was produced. A copy was given to the Appellant. The Appellant then elected to give sworn evidence.

[11] The Appellant denied having anything to do with the theft of the brown four-wheel drive. He was at home on the day in question. Although he accepted that Ashwin Mani had picked him out at the identity parade, Mani was "double minded". The other (Indian) man "said it was not me". He agreed that he had not given notice of an alibi. He claimed that the police were victimising him.

[12] The Appellant called five witnesses, either neighbours or friends. Two of the witnesses were Josateki Labalaba and Joseph King who told the court that they had been arrested in November 2001 and had been taken to the Lautoka

Police Station. There, an Indian salesman had identified them as being the ones who had stolen the four-wheel drive. The next day, however, they were released without charge.

[13] The other three defence witnesses were unable with any certainty to state that the Appellant was at home on the day in question. Each, however, thought that this was the case.

[14] In his closing submissions to the assessors the Appellant claimed that in view of his previous convictions (which he himself revealed) the police were victimising him. He stressed that only one of the two Indians had picked him out at the identity parade and argued that this fact, taken together with what seemed to have been an earlier misidentification of Josateki Labalaba and Joseph King made his own identification doubtful. The police officer who claimed to have seen him in the car was lying and apart from the questionable identification evidence there was nothing else to link him to the crime.

[15] Following the summing-up, the assessors delivered unanimous opinions that the Appellant was guilty of both counts. He was sentenced to 4 years' imprisonment. He now appeals against conviction and sentence.

Preliminary application

[16] The Appellant applied to adduce further evidence. The materials which he wished to place before us are set out in a letter sent to the court on 20 October 2005. They are extracts from the Lautoka Police Station's cell book, station diary and meal book together with extracts from the note book of PW 4, the investigating officer, Levani Tacikalou.

[17] A previous request by the Appellant to have similar evidence adduced was allowed by the trial judge even though the prosecution case had by that time been closed. The materials supplied did not, in the event, advance the Appellant's case. There was nothing before us to suggest either that the additional materials now requested would assist the Appellant or that they were not available at the time of the trial. The request to adduce further evidence at this stage is refused.

Grounds of appeal

[18] Eleven grounds of appeal were filed. The first, fourth and fifth grounds questioned the quality of the evidence which the Appellant described as circumstantial and unclear. The second ground of appeal was that the judge misdirected himself on the burden and standard of proof. During the course of a comprehensive summing-up the judge carefully directed the assessors on where the burden of proof lay and the standard of proof required. He also gave the assessors detailed directions on the factors which they ought to take into account when approaching the identification evidence. We can find no fault in these directions and these grounds of appeal fail.

[19] The sixth ground of appeal was that the evidence of the second Indian man whom the Appellant claimed had been unable to pick him out at the identification parade was not before the court. The judge dealt with this matter at considerable length in his summing-up. He pointed out that there were a number of reasons why the second Indian, Nizam who was no longer living in Fiji, might not have been able to identify the Appellant. These included the fact that Nizam remained in the office throughout and did not accompany the other three men in the car. The question, however, for the assessors was not why he had not picked out the Appellant, but whether they were satisfied beyond reasonable doubt that the

identification by Ashwin Mani and the police officer Maciu were correct. If they had any reasonable doubt on that score they should acquit. In our view the directions given to the assessors were clear and faultless. This ground also fails.

[20] The seventh ground of appeal raised the question of delay. The Appellant suggested that the delay in bringing him to trial breached the right conferred upon him by s 29(3) of the Constitution to have the case against him determined within a reasonable time. The Appellant also suggested that the delay resulted in unfairness to him since, by the time the trial was held, Nizam had emigrated and was not therefore called.

[21] In *Apaitia Seru v State* [2003] FJCA 26 this court explained that whether or not a delay will be held to be unconstitutional depends on a number of different factors including those which were identified by the Supreme Court of Canada in *R v Morin* [1992] 1 SCR 771; (1992) CR (4th) 1 and which were approved by the New Zealand Court of Appeal in *Martin v Tauranga District Court* [1995] 2 NZLR 419.

[22] Mr Tunidau told us that during the years 2002–04 the High Court at Lautoka was faced with a large number of trials involving persons remanded in custody facing the most serious charges. Priority was given to the disposal of those cases. The Appellant was facing a less serious charge and was remanded on bail. That was why 18 months elapsed between his committal and his arraignment.

[23] In view of the clear directions given by the judge to the assessors on the relevance or otherwise of Nizam's absence from the trial and his apparent failure to identify the Appellant at the identity parade, we do not accept that the Appellant was prejudiced by the fact that Nizam was not called. Although in total the lapse of time between the Appellant's first appearance and his trial was unsatisfactory and at least partly the result of dilatoriness in the Magistrates Court, we are not satisfied that it was so inordinate as to be unconstitutional. We note that part of the delay was caused by the Appellant's own several failures to appear.

[24] The ninth ground of appeal was that the judge ought to have dismissed the second assessor, Manueli. According to the Appellant, Manueli greeted him outside the court before the trial started. As appears from the record the Appellant first revealed that he knew one of the assessors after all the evidence had been led and immediately before the judge began his summing-up. When the assessors were empanelled the Appellant did not mention that he knew any of them. Fiji has such a small population that it is not at all unusual for people to meet others with whom they are acquainted. If Manueli had in fact known that the Appellant had previous convictions then he would have revealed nothing to the assessors which the Appellant did not himself tell them since, in his evidence, he made a point of the fact that he had a number of prior convictions, and was been "picked on" by the police. There is nothing to suggest that the Appellant's trial was in anyway prejudiced by his acquaintanceship with Manueli. This ground fails.

[25] The tenth and eleventh grounds were that the trial judge was biased against the Appellant and should have disqualified himself by reason of his acquaintance with the husband of one Henry Fong. The Appellant wished to call Henry Fong's wife, Sereana (at whose address one of the defence witnesses apparently resided) but the application was refused.

[26] As will be seen from the record, after he had already called three alibi witnesses the Appellant requested leave to call another, unnamed alibi witness apparently Sereana Fong. The prosecution objected. The court pointed out that the Appellant had been allowed "all opportunities to give full details". We take this to be a reference to the alibi warning which the record shows was given to the Appellant in accordance with the requirements of s 234 of the Criminal Procedure Code (Cap 21). In our view, the judge afforded the Appellant considerable indulgence in allowing him to call several alibi witnesses notwithstanding that none had been the subject of the required statutory notice. His refusal to allow the trial to be adjourned yet again to enable the Appellant to call yet another unnotified witness does not seem to us to be at all unreasonable. The fact that he may have been acquainted with that witness's husband does not in our view affect the question of whether the judge's discretion was reasonably exercised and neither does it give rise to a reasonable apprehension of bias. This ground also fails.

Result

Appeal dismissed.

Appeal dismissed.