IN THE FIJI COURT OF APPEAL

Appellate Jurisdiction

Criminal Appeal No.25 of 1984

Between:

1. ERNEST WHIPPY
2. FILIMONE KAITAVU — Appellants

and

REGINAM — Respondent

Appellants in Person
E. Leung for the Respondent

Date of Hearing: 30th October, 1984
Delivery of Judgment: 15th November, 1984

JUDGMENT OF THE COURT

O'Regan, J.A.

The appellants were jointly tried on two counts. At the same trial a further six counts were preferred against the appellant Whippy. Each was convicted on all the counts preferred against him and each now appeals against his convictions and the sentences thereon.

In the first count it was alleged that Whippy broke and entered a dwelling at Samabula and stole property and cash of the total value of $60.

The main witness for the prosecution was Shiu Lingam, a kinsman of the complainant who saw a

stranger emerge from complainant's house around the time of the alleged offence. The witness spoke with the appellant and followed him some distance before he had the episode reported to the police. Eleven days later he identified the appellant at an identification parade arranged by the police and he made a dock identification at the trial.

In his notice of appeal the appellant in an informal way advanced as a ground of appeal the inadequacy of the evidence of identification. This ground was based on a description of him given to the police in the first instance. At the trial, the initial statement of the witness to the police was put to him and cross-examination was based upon its contents. The relevant excerpt from the statement was not recorded and the statement itself was not put in evidence. In the notice of appeal the appellant recorded that the witness had initially said that the person he saw was 5' in height, had red hair which he parted from the right, and was a Rotuman native. The appellant allowed that he is Part Rotuman and he elicited from the witness at the trial that he was 5' 5" in height and that the colour of his hair was black.

The appellant having raised by way of defence that the identification was mistaken, and having regard to the drift of the cross-examination to which we have just referred and to eleven day time span between the sighting of the culprit by the witness and the identification parade, we think that it behoved the learned trial Judge to direct the assessors along the lines indicated in Turnbull (1977) 1 Q.B. 224. In that case Lord Widgery C.J. in reading the judgment of the Court of Appeal consisting of Roskill and Lawton L.JJ, Cusack and May JJ. and himself, after referring to the problems as to evidence of identification in criminal cases, at p.228, said :

> "Such evidence can bring about miscarriages of justice and has done so in a few cases in recent years. The number of such cases,

> although small compared with the number in which evidence of visual identification is known to be satisfactory, necessitates steps being taken by the courts, including this court, to reduce that number as far as is possible. In our judgment the danger of miscarriages of justice occurring can be much reduced if trial judges sum up to juries in the way indicated in this judgment. "

And he went on :

> " First, whenever the case against an accused depends wholly or substantially on the correctness of 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 some reference to the possibility that a mistaken witness can be a convincing one and that a 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.
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> 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 by passing traffic or a press of people? Had 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? "

The foregoing extract, by no means records all the safeguards and guidelines laid down by the Court of Appeal but we have repeated sufficient of them to throw into bold relief, the vigilance and the care required to provide against a miscarriage of justice in matters of identification.

In our view the omission of such safeguards and

the absence of such guidelines in this case renders it unsafe to allow this conviction to stand and it is accordingly quashed.

In Count 2, the appellant, Whippy, was charged with breaking and entering the dwelling-house of Vinesh Prasad with intent to commit a felony, namely theft, therein. Both the mother and the daughter of the complainant saw the alleged culprit shortly after the breaking and spoke with him. At the trial each made a dock identification. However, it emerged in evidence that some days after their initial sighting of the culprit, neither of them identified the accused at an identification parade.

In his summing up the learned trial Judge did not give the warning prescribed in Turnbull (supra) nor allude to the guidelines given therein. For that reason and because of the inherent weakness of the evidence we find that the conviction on this count must also be quashed and it is quashed accordingly.

In Count 3 the appellant, Whippy, was charged with breaking and entering the dwelling-house of Lawrence Benjamin and stealing a radio cassette, a stereo cassette, several bottles of spirits, money and a cheque book.

Very shortly after the offence the police came upon the appellant at a hotel in Suva in possession of the stolen property. Indeed, he was in the act of writing a cheque on one of the complainant's cheque forms when the police first spoke with him.

In his unsworn statement from the dock, the appellant stated that at 9.30 a.m. on the morning of the offence he purchased the radio cassette and four bottles of liquor from one Ami Chand, an Indian fisherman for $40. He called a witness to confirm his statement. The position, then, was that the appellant was found in possession of recently stolen property.

In his summing up the learned Judge said :

" In this case, the prosecution is relying on circumstantial evidence because there was no eye witness as to the actual breaking nor was the first accused seen near the scene of the breaking when it occurred. The prosecution case depends on the items which were found in the possession of the first accused and were proved to have come from the house of Benjamin ..... "

And later :

" If, after having considered all the evidence particularly the evidence of the recovery of these goods from the first accused - and it has been proved it comes from the house of Mr. Benjamin - you are satisfied that that is what happened in this case, then it will be your duty to tell me that he is guilty of the third count. "

In our view this part of the summing up did not meet the needs of the situation.

The possession of recently stolen property, in the absence of an explanation which the tribunal of fact thinks either is true or may be true, gives rise to a presumption that the possessor is either the thief or a guilty receiver of such property or of burglary, if a burglary has accompanied the theft. And whether the possessor be a thief or receiver depends upon the circumstances of the case - Langmead (1864) L & C 427, 441.

The accused having here given an explanation, it was necessary that the assessors be instructed that if they believed it or thought it may be true, then it was their duty to acquit him. If, however, they were satisfied that the explanation was untrue, they may infer guilt and that whether the guilt be of theft and the burglary which preceded it or of receiving to was a matter for their decision, based upon their view of the attendant circumstances.

In the absence of an explanation of the

presumption of fact arising from the possession of property recently stolen and of its application to the proven facts, we think that the conviction must be quashed and it is quashed accordingly.

The fourth count contained a charge of rape against the appellant, Whippy.

In his notice of appeal he complained that the learned Judge prohibited him from pursuing a question of the complainant as to her marital status and then himself subsequently referred to her as a married woman. In our view, the question was irrelevant to any issue arising in the trial and was properly disallowed. It was, in the circumstances, unfortunate that the complainant was later referred to as a married woman particularly in the context in which the reference was made. We are, however, satisfied that such reference could not possibly have influenced the opinions of the assessors on the crucial issue in the case.

The appellant also contended that the directions given by the learned Judge as to the danger of convicting on the uncorroborated evidence of the complainant were defective. In his submissions, however, he did not amplify the ground or advance any basis for his contention. In our view, the directions given on this aspect of the Crown case were impeccable.

The appeal insofar as this count is concerned, is dismissed.

In Count 5 both appellants were charged with robbery with violence, it being alleged that they robbed Parmoud Singh s/o Sadhu Singh of various items of property and immediately prior to so doing used personal violence upon him.

In their grounds of appeal, both appellants adverted to a passage in the summing up, the relevant parts of which read :

" With regards to robbery with violence ..... three matters must be proved by the prosecution namely there must be a taking away from the person in the presence of the victim items of property in his possession or custody .....

And thirdly that violence was used upon the victim for that by the action he was put in some fear. "

They both submitted that there was no taking from the person and in doing so obviously took the reference to "the person" in the summing up to have the same meaning as in the offence of larceny from the person created by section 271 of the Penal Code, an offence against which section was alleged in the succeeding Count 6. It is clear from the context the Judge was using the words with reference to "the complainant" or "the person alleged to be robbed". There is no substance to the submission.

The appellants also submitted that their actions were not accompanied by violence. They relied on statements by the complainant to the effect that during the encounter no one hit him and that no form of personal violence was used upon him. There was, however, evidence that when the money was taken the complainant was grabbed by the collar and that, later, his shirt was torn from his body. There was a clear direction to the assessors that it must be established that violence was used. After hearing the evidence encapsulated above both the assessors and the Judge convicted the appellants of the crime charged. In our view, on the evidence they were entitled so to do.

The submissions fail.

In the sixth count it was alleged that appellant Whippy stole $23 in cash from the person of Ahmad Hussain thereby committing larceny from the person contrary to section 271 of the Penal Code Cap. 17.

The complainant stated that the money was taken from the pocket of his shirt which was hanging up in his

room.

In these circumstances the conviction cannot stand and the Crown so concedes.

The learned Judge clearly must have been satisfied on the facts that the appellant stole the cash from Hussain's shirt pocket. Indeed the appellant in his statement from the dock, stated that he made no challenge to the evidence of the complainant to that effect.

In these circumstances we forbear from allowing the appeal and instead substitute for the verdict given a verdict of guilty of the offence of larceny in a dwelling-house and in substitution for the sentence of imprisonment for 2 years passed at the trial, we impose a sentence of imprisonment for eighteen months.

In the seventh count it was alleged that both appellants committed burglary and larceny in a dwelling-house contrary to section 299(a) and section 270(a) of the Penal Code in that they, in the night, broke and entered the dwelling-house of Inoke Tabualevu and stole certain moneys and property.

By section 299(a) it is provided that :

> " Any person who in the night breaks and enters the dwelling-house of another with intent to commit any felony therein..... is guilty of the felony called burglary. "

And by section 270(a) it is provided that :

> " Any person who steals in any dwelling-house any chattel, money or valuable security if the value of the property stolen amounts to not less than ten dollars ..... is guilty of a felony. "

During the course of the trial the learned trial Judge expressed reservation as to the propriety of including two separate crimes in the one count. Later in the trial, after considering the matter, counsel for the Crown applied

to amend the charge to one of larceny in a dwelling-house. The learned Judge then said that he, too, had looked into the matter and was then inclined to that view that the count as framed was in order and in the event the application for amendment was not pursued.

The appellants have submitted that the Judge's action in "overruling" the application was prejudicial to them. The fact of the matter is that the application was not overruled or declined. It was not pursued by the prosecution.

The appellants also submitted that the conviction for burglary could not stand inasmuch as it had not been proved that there was a breaking into the building. The Crown conceded that such was the case. Both appellants admitted the other ingredients of the charge. Accordingly we substitute for the verdicts given, verdicts of guilty of larceny in a dwelling-house contrary to section 270(a) of the Penal Code and in substitution for the sentence passed at the trial, in each instance, impose a sentence of 2 years' imprisonment concurrent with the other sentence, in the case of Filimone Kaitavu, and the other sentences, in the case of Ernest Whippy, imposed in respect of other counts in the indictment.

In Count 8, the appellant Whippy was charged with escaping from the lawful custody of a prison officer on an occasion when he was brought to the Court for the hearing of a bail application. The appellant asserted at his trial that the prison officer agreed to take him to visit a friend and in his statement from the dock he gave a long and involved account of the movements of the prison officer and himself after the conclusion of the hearing. The learned Judge and the assessors, of course, heard this account and appellant's cross-examination of the officer and they obviously accepted the evidence of the prison officer. No question of law arises.

The submission fails.

Both appellants appeal against the sentences imposed upon them.

With regard to Count 5, we think that the violence offered was, comparatively speaking, of a minor degree. And there was no direct physical assault on the complainant. We do not think that these factors were sufficiently allowed for when the penalty was assessed. We quash the sentences of imprisonment for three years imposed on each appellant. In substitution therefor we sentence each of them to be imprisoned for two years.

The other sentences imposed were warranted and the appeals as to them are dismissed.

In summary, the results of the appeals are :

Count 1	-	Quashed
Count 2	-	Quashed
Count 3	-	Quashed
Count 4	-	Appeals against conviction and sentence dismissed.
Count 5	-	Appeals against conviction dismissed. Appeals against sentence allowed. The sentences of imprisonment for 3 years imposed on each appellant are quashed. In substitution therefor, sentences of imprisonment for 2 years are, in each instance, imposed. The sentence upon the appellant, Whippy, is to be consecutive to the sentence upon Count 4.
Count 6	-	Instead of allowing or dismissing the appeal, the Court substitutes, for the verdict found, a verdict of guilty of larceny in a dwelling-house and in substitution for the sentence of imprisonment for 2 years passed at the

trial, sentences the appellant to be imprisoned for 18 months.

Count 7 - Instead of allowing or dismissing the appeal, the Court substitutes for verdicts found, verdicts of guilty of larceny in a dwelling-house and in substitution for the sentences of imprisonment for three years passed at the trial on each appellant, sentences them to 2 years' imprisonment concurrent with the other sentence or sentences imposed at the trial.

Count 8 - Appeals against conviction and sentence dismissed.

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Judge of Appeal

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Judge of Appeal

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Judge of Appeal