

IN THE FIJI COURT OF APPEAL

Appellate Jurisdiction

Criminal Appeal No. 71 of 1984

Between:

IMANUELI TUNI

Appellant

- and -

R E G I N A M

Respondent

Appellant in Person  
V.J. Sabharwal for the Respondent

Dates of Hearing : 6th & 14th March, 1985.

Delivery of Judgment : 23rd March, 1985.

JUDGMENT OF THE COURT

Roper, J.A.

This is an appeal against conviction only on charges of burglary and larceny.

On the night of the 4th August, 1983, the home of Jai Prakash at Princess Road, Tamavua was burgled in his absence and a quantity of property stolen. Two special constables who happened to be in the vicinity of the Prakash compound saw three young men leaving it. They called on them to stop but the men ran off with the constables in pursuit. As they fled they dropped bags which were found to contain property belonging to Mr. Prakash. The constables were only able to catch one of the men. He was Esala Tute. Later the constables,

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accompanied by Tute, went to a house in Raiwaqa. The constables gave evidence that when they saw Tuni at Raiwaqa they recognised him as one of the men seen leaving the Prakash compound, although he was not a person previously known to them. At his trial Tuni made an unsworn statement in which he alleged that when the constables first came to his house with Tute they were seeking a person by the name of Tui, and that when they could not find him they assaulted Tute until he agreed to implicate Tuni in the burglary. There was evidence from the Appellant's sister that the man Tui, whom she said was no friend of Tuni's, had indeed been at their home at some stage on the night of the burglary.

The Appellant's grounds of appeal as filed are not easy to follow, but apart from an allegation that the verdict was against the weight of evidence, which could not succeed, they all refer in one way or another to Tute's involvement in this affair. Tute gave evidence as a prosecution witness at the committal stage where he apparently resiled from his earlier statement to the police that Tuni had been involved in the burglary, and gave evidence that the police had forced him to falsely accuse Tuni. Understandably the Crown decided not to call Tute as a Crown witness at the trial and Tuni was informed of that some time prior to the trial. Three of the grounds of appeal appear to be complaints that the Trial Judge did not pay full regard to Tute's allegation that the police had forced him to implicate Tuni, and that Tute, as an accomplice, was an otherwise unsatisfactory witness. Of course the Trial Judge and the Assessors did not hear evidence from Tute so that the Appellant's criticisms on those grounds are without foundation. His real complaint

as we understand it is that he was deprived of the opportunity to call Tute as a defence witness.

At the trial Tuni, who was not represented, indicated to the Trial Judge that he wished to call Tute so that he might obtain from him the names of the persons who had actually taken part in the burglary. The printed case records such a request but not the Trial Judge's reaction to it. Tuni informed us that the request was declined by the Trial Judge as Tute was "at large". Being of the opinion that something more was required of the Crown than merely to inform Tuni that Tute would not be called as a Crown witness, particularly when Tuni was unrepresented and probably in custody awaiting trial, we asked Mr. Sabharwal to find out where Tute was at the time of the trial, the probability being that he was in custody and readily accessible. We have now been informed that Tute escaped from the Nasinu Boys Centre on the 22nd February, 1984 and was not recaptured until the 3rd September - a week after Tuni's trial had concluded. The fact is that Tute was simply not available and the Trial Judge could hardly have been expected to adjourn the trial until such time as he was found. He had already avoided recapture for six months. In the circumstances we do not consider that any miscarriage of justice occurred.

At the hearing before us Tuni presented supplementary grounds of appeal and we have now heard submissions from Mr. Sabharwal and the Appellant upon them. They concern the Trial Judge's directions to the Assessors on the question of identification, it being alleged that he failed to direct in accordance with the guidelines laid down in R. v. Turnbull & Another [1977] 1 Q.B. 224.

This is the relevant part of the summing-up :-

"You heard the two witnesses for the prosecution - very important witnesses from the prosecution point of view, SPC Anasa and SPC Erick Narayan. They said they saw the three persons who come from the compound of Jai Prakash (P.W.1) and that they were carrying a sack each over their shoulder. When confronted to stop they all ran down Mead Road. They left their bags and ran down and according to the evidence one of them was captured (Esala Tute) but the other two disappeared. According to these two special constables they recognised accused as one of them. There were plenty of lights - one about seven yards away.

So the question for you is whether they were mistaken - this is what the accused is suggesting that they were mistaken - they did not see him and could not have seen him because he was not there but at Jittu Estate in their house. According to the accused he said he did not take part in this break-in and he knows nothing about it."

It would be wrong to apply or interpret Turnbull inflexibly and the extent to which its guidelines are applied must depend on the circumstances and the state of the evidence in a particular case. The case is intended primarily to deal with the case of "fleeting encounters" and the risks inherent in identification in such cases. We have such a case here. The identification was at night although there was a street light about 20 feet from the scene. It was raining. The three men are said to have faced the two special constables when they were called upon to stop and then run off. All three were strangers to the constables, and this was not a case where they could concentrate on the identification of a single individual. At the very least the Assessors should have been warned of the special need for caution, and the reasons for the need

for such a warning; and directed to examine closely the circumstances in which the identification had been made.

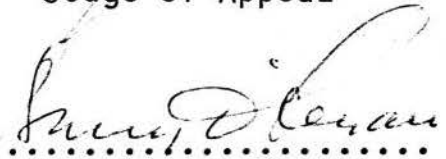
Mr. Sabharwal submitted that the summing-up although short was adequate but we cannot agree. It does not really deal with the identification issue in any significant way. The possibility of a miscarriage of justice cannot be ignored. The appeal is allowed and the conviction is set aside with an order for a new trial.



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Vice President



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Judge of Appeal



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Judge of Appeal