IN THE FIJI COURT OF APPEAL

Criminal Appeal No. 108 of 1985.

Between: JOSEFA KURUYAWA Appellant

- and -

R E G I N A M Respondent

Appellant in Person.
D. Fatiaki for the Respondent

Date of Hearing : 30th June, 1986.

Delivery of Judgment: 4th July, 1986.

JUDGMENT OF THE COURT

Speight, V.P.

Appellant was tried and convicted in the Supreme Court at Suva on two charges of Robbery with Violence contrary to section 293(1)(a) of the Penal Code, Cap. 17.

The particulars of offence were set out as follows:

" Count 1

Particulars of Offence

JOSEFA KURUYAWA and other unknown persons, on the 25th day of April, 1985 at Nasinu in the Central Division, being armed with an offensive weapon namely an empty bottle, robbed RAJEND PRASAD s/o RAM LAKHAN of 6 bottles of Fiji beer valued $6.00.

Count 2

Particulars of Offence

"JOSEFA KURUYAWA and other unknown persons, on the 25th day of April, 1985 at Nasinu in the Central Division, robbed SHIU PRASAD s/o DURGA PRASAD of 6 cartons of Fiji beer valued at $66.00 and immediately before such robbery did use personal violence to the said SHIU PRASAD s/o DURGA PRASAD."

At trial the appellant represented himself and similarly in this Court. The record of the trial and his appearance before us demonstrated him to be a man of intelligence and plausability, with a substantial knowledge of the criminal law and court procedures - whether gained from his one time service in the Police Force, or subsequently we do not say. The effect of that however has been that the trial was very protracted by many lengthy excursions by him into irrelevant areas, and persistent exchanges with the learned trial Judge on a number of matters - a fact which undoubtedly made it difficult from time to time to ascertain whether certain points might call for a ruling or a mention in summing-up. Similarly in this Court his submissions did not lack persistence and his 22 grounds of appeal contained many which were merely hair splitting. But through the mass of material, some pertinent matters emerged and we deal with those.

The two allegations against the appellant were that on the morning of 25th April 1985 he in company with two others, visited two different houses at 8 miles Nasinu, threatened the occupier and carried away a quantity of beer. At all stages the appellant has claimed that he had

been at home at all relevant times, so that it was primarily an identity case.

In respect of charge 1 there were two witnesses who had been at the house - PW1 Rajendra Prasad, and PW2 Vinod Singh. Their account was that appellant arrived driving a red taxi and entered the property accompanied by two others. Demands were made for beer, and the witnesses said they were frightened and eventually six bottles were given from a refrigerator and the men drove off. The incident must have taken some 15-20 minutes - it was daylight and there was opportunity and need for the witnesses to have a good look at the offenders. There was some discrepancy between their evidence in describing the man who drove the car and whom they said was the leader of the group.

PW1's evidence was that he had a beard on his chin only; PW2 said it was a "big beard all over". PW1 said the leader had an empty beer bottle in one hand; PW2 said he did not. PW1 had said at the preliminary enquiry that he had seen the man, whom he claimed was appellant, previously, but at trial said he had not seen him at any prior time.

In respect of the second charge PW3 Shiu Prasad was the only eye-witness called at trial. He also spoke of three men arriving at his house and demanding beer. He purported to identify appellant as one of those three, but the record gives a picture of a confused witness. In particular

despite many questions from the accused, and patient efforts by the trial Judge, he did not seem to be able to answer questions concerning the number of cartons taken with any degree of consistency, or to describe the movements in and out of the house by individual offenders.

The accused was arrested later that day, on what information we do not know, but then was released the following day. He was re-arrested two days later. It was the police duty, having the complaints of PW1 and PW3 to see if they could identify the offender.

Inspector Chandra saw appellant in the cells at the Police Station after arrest. The witnesses had told the Inspector that they would be able to identify the man or men so the Inspector asked appellant if he was willing to stand in an identification parade. For reasons we will mention shortly he was entitled to do this. Appellant refused. He was equally entitled and the fact that he had refused was not probative and ordinarily does not emerge in subsequent evidence.

The accused has made a strong attack on the request made to him and says it is contrary to Police Regulations.

In any event this complaint has nothing to do with the case for no identification parade properly so called

took place. But we think the following observations may be of assistance.

Although the Home Office Circular No. 109/1978, and presumably the Royal Fiji Police Instructions which follows it, speaks of a parade for a "suspect: there is no bar to an arrested person being invited to stand in a parade, - indeed it may be proper to do so - but he is entitled to refuse.

There can be cases where the police become seized of information from a potential and possibly important witnesses after a suspect has been arrested and charged. What is to be done? The witness will of course be called at trial. But many cases and text-books refer to the impropriety of inviting a witness in Court to make a first time "dock identification" - the perils are well known. See in particular R. v. Howick (1970) Crim. L.R. 403 where such a procedure was described as"unsafe and unsatisfactory." But it is meaningless if a witness is to speak of seeing an event and is not to have had a chance - in fair circumstances - of indicating who the person was. It is quite proper for an accused, pre trial, to be asked if he is willing to stand in a parade - but he cannot be compelled to.

It is legitimate in such circumstances for the authorities to attempt to provide an opportunity for the witness to see the suspect (accused) in company with others

and in circumstances where is he NOT pointed out as the suspect. It may be noted that in the Devlin Report on Identification in Criminal Cases (HMSO 338) it was recommended that statutory provision should be made to the following effect:-

> "Obviously it will not be possible to achieve the results we have indicated without a statutory provision which we think should be on the following lines:
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> 1. Save by consent or by leave of the trial judge, a witness for the prosecution shall not be asked to identify in court an accused person whom he saw in the circumstances of the crime unless he has previously given evidence that he took the initiative in pointing out the accused either at an identification parade or upon some comparable occasion."

Now the Criminal Law Revision Committee (Cmnd 4991) did not endorse this recommendation, and it has not been adopted into the legislature but the reasoning is helpful. One notes in particular the use of the phrase "or upon some comparable occasion" as sounding a warning against identification in circumstances where the location of the suspect indicates the likely offender to the witness. Hence the widely followed principle that dock dentifications are undesirable but in some circumstances may have to be resorted to. See R. v. Cartwright (1914) 10 Cr. App. R. 219 and other cases discussed in Archbold 42nd Edition para. 14-6 at page 1010. In particular see R. v. John (1973) Crim. L.R. 113. In some cases the circumstances are such that Appeal Courts have said that errors in procedure have made subsequent conviction "unsafe and unsatisfactory" R. v. Hunjan (1979) 68 Crim. App. R. 99.

We are concerned that the same situation appears to have arisen here, for the identification procedure was equally objectionable.

When the appellant had refused to take part in a parade the police were anxious that Prosecution Witnesses 1, 2 and 3 should have a chance of seeing him - that was legitimate enough but it needed to be done with fairness bearing in mind the kind of criteria which govern formal parades. What happened was this - the witnesses were brought to the police station. It is not clear whether all three were together, or whether PW3 came separately. Then, they were asked to look at a man (the appellant) who, on the first occasion at least had been ordered to walk over to a police vehicle before PW1 and PW2's eyes. The only other persons in view were policemen. Not only were they known to some of the witnesses to be policemen, but the appellant was seen to be handcuffed. A worse breach of the principles underlying fair identification could hardly be imagined. PW1 and PW2 there identified accused. PW3, who may have seen him separately saw accused standing alone by a police van, but did not report his observation. In our view this highlighting totally destroyed the subsequent identification by these witnesses in Court of the appellant as one of the men who raided the houses.

The appellant, who has obviously some grasp of criminal law, has cited Turnbull's Case (1976) 3 All E.R. 549. The guidelines set out there are well understood and the learned trial Judge obviously had them in mind when, in the course of summing-up he advised the assessors to consider "the circumstances of the day" - the distance of the witnesses from the offender, the lighting, the period for observation. All these are valid warnings, but one of the other Turnbull caveats and an important one is to consider how long elapsed before subsequent identification, the circumstances of subsequent identification and any discrepancies between the witness's first description to the police and his actual appearance.

Some attempt was made by the appellant at trial to have the court informed as to the original descriptions given, and this was legitimate. Somehow this attempt miscarried. He still complains about that and in our view he has some justification for doing so. More importantly there are the discrepancies as between PW1 and PW2 as to the description at the scene. And further PW1 and PW2 speak of the appellant at the police station as wearing a sulu, but PW3 says he had blue trousers. He may have changed but it seems unlikely.

We reach the conclusion that the mishandling by the police of the events at the Police Station rendered any

identification then, or more importantly at trial, dangerously unreliable. The Judge did draw attention to some of the matters requiring care, but even a much more stringent warning, which in our view was called for, could not have repaired the damage.

There were other complaints of the appellant which merited attention. There was so he submitted, no direction as to the separate charge - separate consideration principle. Nor, he claims was there a proper discussion of the ingredients of the "offensive weapon" charge - as to when and how an ordinary article such as a beer bottle can become an offensive weapon.

And a rather refined submission on the direction required concerning the cross-examination of a defence witness on the contents of an out of court statement which he denied.

In view of the positive and adverse conclusion we have come to on the identification matter we do not propose to explore these or the many other matters raised.

In our view the police procedure was so prejudicial that a fair trial on the identity issue could not now be held.

The appeal is allowed and the conviction is quashed.

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Vice-President

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Judge of Appeal

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Judge of Appeal