IN THE FIJI COURT OF APPEAL

CRIMINAL JURISDICTION

CRIMINAL APPEALS NOS. AAU0006/94S, AAU0007/94S, AAU0010/94S & AAU0011/94S
(High Court Criminal Case No. 35/92S)

BETWEEN:

ISIMELI SALABOGI
VARAAME DRE
RAVUAMA VAINI
MATAIASI JITOKO — Appellants

v.

THE STATE — Respondent

Mr T. Savu for the Appellants
Mr C. Hook for the Respondent

Date and Place of Hearing: 3 August 1995, Suva
Delivery of Judgment: 10 August 1995

Judgment

The four appellants were charged jointly with another man, Amani Cama, with raping a 15 year-old girl in Suva on 14 September 1992. They were tried in the High Court and all five were convicted; each was sentenced to serve 8 years' imprisonment. The first three appellants have appealed against their convictions as well as against the sentences

imposed. The fourth appellant has appealed only against the sentence imposed on him.

One ground of appeal of each of the first three appellants is that the learned trial judge failed to address the assessors properly on the issue of identification. The first appellant's other ground of appeal against conviction is that His Lordship failed to address the assessors properly regarding inconsistencies in statements made by the first appellant which "could show some credibility as to his refuting the additional statement was made voluntarily". The second ground of each of the second and third appellants against his conviction was that the learned trial judge failed to address the assessors properly on the issue whether the second and third appellants were in police custody at the time of the alleged offence.

The ground of appeal against sentence of each of the appellants is that the sentence was harsh and severe (in the fourth appellant's case, excessive and harsh).

At the trial the girl gave evidence of being raped by each of five men. She said that she had come to Suva early in the afternoon to do some shopping and, after she had completed the shopping, she was on her way to the bus stand when she was waylaid by five young men who forced her to go to a grassy area not far away where each of them in turn had sexual intercourse with her without her consent. She said that prior

to the rape she had been a virgin. She identified the appellants as four of the men who had raped her. She gave evidence that the time when she was waylaid was about 2.30 pm. She said that the police came to see her "after they were notified by someone" and took her to the scene of the rape. Subsequently she went with them to look for the offenders. While she was so engaged, the police found one of them and she was taken to the police station. She did not give evidence of identifying him there but said that on leaving the police station she saw another of the men and he was arrested by the police. A police officer gave evidence that the first man found was the fourth appellant and that the one seen as the girl was leaving the police station was Amani Cama. Although the girl gave evidence identifying the other three appellants as persons who raped her, she gave no account of how she was able to do so. She did not, for instance, say that she knew them before they waylaid her on the day when the offences were committed.

Other evidence relevant to the ascertainment of the times between which the offences were committed was given by two police officers. One said that at 4.30 pm he saw two men, who were later found to be the fourth appellant and Amani Cama, come out of the bushes in a manner which aroused suspicion. The other said that at about 4.45 pm, while he was on patrol, the girl came up to him with a man and said she had been raped.

The evidence does not disclose the circumstances in which the first appellant was arrested; however, Amani had made a statement at 9.45 pm on 14 September in which he named the first appellant. The first appellant was interviewed at the police station later that same night; during the interview he said that he had come upon the girl sitting with Amani and the fourth appellant and that she was wearing no trousers or underwear and was bleeding from the vagina. He was asked whether he had raped her and replied "No". Next day he was taken to an Assistant Superintendent because he offered to be a witness in the case. The Assistant Superintendent was interviewing the girl at that time. He gave evidence that the girl pointed the first appellant out to him "without hesitation" as one of the men who had raped her, that the first appellant said nothing and that the investigating officer who had brought the first appellant to him then asked the first appellant who "admitted he was one of the persons who raped [her]". The Assistant Superintendent said that the first appellant was under caution when he made that admission. Shortly thereafter at 3.45 pm that day he made a statement under caution in which he said that he had arrived at the scene after "the girl was caught" and found her sitting without any trousers. He said that he asked her if he could "have sex" and she told him to go towards the place where her long trousers were hidden; they went there and "had sex".

The first appellant's second ground of appeal against his conviction concerns the statement which he made on 15

September. At the trial he asserted that it was not made voluntarily. A trial on the voire dire was held. The first appellant gave evidence that he was assaulted by the Assistant Superintendent and other police officers, and also by the girl's relatives, and made his admissions for that reason. His Lordship gave a full written ruling in which he noted that the first appellant had not complained of the alleged assault when he was brought before the Chief Magistrate on the following day, and had not complained to the prison authorities or asked to be medically examined after being remanded in prison custody by the Chief Magistrate. He admitted the statement into evidence.

The first appellant raised the issue of the alleged assault when he cross-examined the Assistant Superintendent, but apparently by one question only; it was answered in the negative. He did not otherwise raise the issue before the assessors either by questions put to prosecution witnesses or in the unsworn statement which he made in his defence. However, the learned trial judge very properly drew to the assessors' attention the fact that the first appellant had raised the issue of the alleged assault. He directed them to "scrutinise very carefully" the confessional statements of those of the persons charged who were alleged to have made them, including the circumstances in which the interviews were conducted and the statements taken so as "to decide whether the statements may be true or not". His Lordship did not refer to any specific detail of any of the statements and in

particular did not refer to the fact that the first appellant had made an admission of having had sexual intercourse with the girl in the second statement after having denied it in the first statement. However, in the circumstances of this case it was not, in our view, necessary for him to do so. The girl had given evidence that the first appellant, as well as the other four persons charged, had sexual intercourse with her without her consent. There was evidence that she made that allegation as soon as he was brought into the room where she was being interviewed. In the absence of doubt about the first appellant's identify the evidence of his guilt was overwhelming.

His other ground of appeal against conviction is entirely without merit. He has not denied the first statement which he made to the police in which he admitted being at the scene where the offences were allegedly committed. In those circumstances there was no failure on His Lordship's part in not addressing the assessors on the question of the identification of the first appellant. His appeal against his conviction must, therefore, be dismissed.

The second and third appellants were arrested only after a police officer had shown the girl photographs of six men and she had picked out their photographs. Neither of them made any admission to any involvement in, or presence at the scene of, the offences. No witness other than the girl herself gave evidence of their involvement or presence. The girl did not

herself give evidence of having been shown the photographs. The officer who gave evidence of showing them to her tendered them in evidence. But he did not give evidence of what he told the girl or what questions he asked her when he showed the photographs to her. In his summing-up to the assessors the learned trial judge referred to the fact that the second and third appellants had denied all knowledge of the rape and that the police officer had shown the girl the six photographs. However, he did not direct them as to the critical importance of the identification process in cases where the offender was not known to the victim before the commission of the offence.

In R. v. Turnbull [1977] QB 224 the English Court of Appeal stressed the need for great care to be taken in directing the jury regarding evidence of identity where the accused person was not previously known to the witness. In the present case the assessors should have been directed that they needed to be aware of the risk of mistaken identification, particularly as the record discloses no evidence from either the girl or any police officer of what was said to her when she was shown the photographs. Mr Hook referred to the fact that the girl positively identified the second and third appellants in court. That, however, affords no guarantee that she was not mistaken as to their identify. It is in such cases that the Turnbull direction is particularly needed.

Mr Hook submitted that, even if we held that the learned trial judge should have given directions to the assessors in accordance with what was said in Turnbull, we should apply the proviso to section 23(1) of the Court of Appeal Act and not allow the appeal. In support of that submission he referred to three matters. The first was the positive dock identification of the second and third appellants by the girl. The second related only to the second appellant; it was the girl's description of one of those who raped her, which she gave before she saw the photographs, a description which fitted the second appellant. The third matter was that she had identified both of them before the trial from the photographs. In our view those matters do not materially assist the respondent. The need for a Turnbull direction when a witness makes a positive identification in giving evidence is illustrated by the very facts in Turnbull and what the Court of Appeal had to say of that situation. Similarly, because a person identified in court generally corresponds with the description given previously, the person making the identification may more readily believe in its correctness. As to the third matter, it is clear from Maynard (1979) 69 Cr. App. R. 309 that, if such evidence is admitted, an appropriate warning must be given to the assessors to disregard it unless it falls within the guidelines in Turnbull. In this case it clearly did not meet that test. The failure to give the Turnbull direction rendered the guilty verdicts in respect of the second and third appellants unsafe. In that situation it is impossible for us to "consider that no substantial

miscarriage of justice has occurred", which would be necessary before we could apply the proviso. Because the verdicts are unsafe, it would be unreasonable to allow the convictions of those two appellants to stand. Their appeals against conviction must be allowed.

Before turning to the other grounds of appeal, we think that it may be of assistance to prosecutors and to trial judges if we discuss briefly how identification by photographs should be handled by investigating officers.

In England the procedure to be followed has been prescribed in a Code of Practice issued by the Home Secretary under section 66 of the Police and Criminal Evidence Act 1984. The Code is Code D; the part dealing with identification by photographs is Part 4. That is set out in full at pages 1634 and 1635 of Archbold Criminal Pleading and Practice (1992 edition). In our view, investigating officers in Fiji should in future follow, as nearly as is reasonably possible in the circumstances of each individual case, the procedure set out in Part 4 of Code D and, if they have not done so, should be able at the trial to justify the failure. It will then be for the trial judge to decide whether the evidence of the identification by a photograph should be admitted and, if he admits it, to direct the assessors and himself in an appropriate manner.

In view of the conclusion which we have reached in respect of the first ground of appeal of the second and third appellants, it is not necessary for us to deal with the second ground of their appeals. However, we consider that we should do so briefly. There was evidence that both those appellants were arrested for attempted robbery at about 3.50 pm on 14 September 1992 and were in police custody for several hours thereafter. The girl gave evidence that she was waylaid at 2.30 pm but the police officer who said that he saw Amani Cama and the fourth appellant acting suspiciously near the scene of the rapes gave the time of doing so as 4.30 pm. The police officer to whom the girl complained of having been raped said that she did so at about 4.45 pm. She gave evidence that the second appellant was the first to rape her and that he continued to have sexual intercourse with her for about twenty minutes. She said that the third appellant was the second man to rape her. However, she did not give any account of how long the period was which elapsed between the time when the second appellant finished having sexual intercourse with her and the time when she left the scene of the offence. She was not asked how she came to fix the time when she was waylaid as 2.30 pm. Altogether the evidence as to time was most unsatisfactory. It raised doubts about the complicity of the second and third appellants. The learned trial judge should have directed the assessors to consider whether the evidence of identification dispelled that doubt or whether a reasonable doubt as to their complicity remained. He should then have directed them that, if any reasonable doubt remained, they

must acquit the second and third appellants.

We have considered carefully whether we should quash the convictions of those two appellants and direct a judgment and verdict of acquittal to be entered or whether we should quash the convictions but order their retrial. We have come to the conclusion that the interests of justice require that they should be tried afresh and we are ordering accordingly. We strongly recommend that legal aid be granted to them for the retrial.

We turn now to the appeals of the first and fourth appellants against sentence. The first appellant was 34 years old when he committed the offence. At the time of his conviction he had eighteen previous convictions, including for offences of conspiring to commit a felony (in 1980), assault occasioning actual bodily harm (in 1981), larceny (two offences in 1984 and 1985) and demanding money with menaces (two offences in 1985 and 1987). For one of the offences of larceny he was sent to prison for three months; for all the other offences he was fined. He is married. He sells juice at Suva market. His criminal record, before the rape, was one of comparatively minor but numerous offences. In *Mohammed Kasim v The State*, Criminal Appeal No. 21 of 1993, 27 May 1994, this Court indicated that in a rape case without aggravating or mitigating features the starting point for sentencing an adult should be a term of imprisonment for seven years. There is nothing in the first appellant's antecedents

that would justify reducing or increasing the sentence appropriate to the circumstances of the offence. However, those circumstances in the present case, in particular the fact that five men participated in the rape, make a sentence in excess of seven years' imprisonment appropriate. The sentence of eight years' imprisonment imposed on the first appellant is certainly not harsh, unduly severe or excessive. His appeal against sentence must be dismissed.

The fourth appellant was 28 years old when the offence was committed. At the time of his conviction he had twenty-four previous convictions, including for offences of larceny (nine, mostly petty, in 1983, 1985, 1986, 1987 and 1992), burglary (in 1983) and damaging property (in 1993). He is single. His criminal record before the rape conviction was, like the first appellant's, one of comparatively minor but numerous offences. He was sentenced to short terms of imprisonment in 1983 but for all his offences thereafter he was fined, bound over to keep the peace or conditionally discharged. There is nothing in his antecedents, therefore, justifying any reduction or increase in the sentence appropriate for the offence. For the same reasons as in the first appellant's case, a sentence in excess of seven years' imprisonment is appropriate. The sentence of eight years' imprisonment is neither harsh nor excessive. Accordingly the fourth appellant's appeal against sentence must be dismissed.

Decision:

1. The appeal of the first appellant against conviction and sentence is dismissed.

2. The appeals of the second and third appellants against conviction are allowed, their convictions are quashed and the sentences are set aside.

3. The appeal of the fourth appellant against sentence is dismissed.

4. It is ordered that the second and third appellants be retried by the High Court and that pending that retrial, unless they are serving sentences of imprisonment for any other offences or are remanded in custody in respect of any other offences, they are to be admitted to bail in the same amounts and on the same terms as the bail granted to them pending the original trial.

I.R. Thompson

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Mr Justice I.R. Thompson
Judge of Appeal

R. Savage

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Mr Justice R. Savage
Judge of Appeal

P.G. Hillyer

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Mr Justice P.G. Hillyer
Judge of Appeal