IN THE FIJI COURT OF APPEAL

CRIMINAL JURISDICTION

CRIMINAL APPEAL NOS. AAU0012 & AAU0013 OF 1994S
(High Court Criminal Case No.16 of 1993)

BETWEEN:

LOTE RAIKABULA & ALIFERETI NIMACERE — APPELLANTS

-and-

THE STATE — RESPONDENT

Mr T. Fa for the Appellants
The second appellant present unrepresented
Mrs N. Shameem for the Respondent

Date of Place of Hearing : 21st February, 1995 Suva
Date of Delivery of Judgment : 1st March, 1995

JUDGMENT

The appeal in these proceedings is against the conviction of the two appellants and the sentences imposed. Each was convicted in the High Court of robbery with violence contrary to Section 293 of the Penal Code (Cap.17). The first appellant was sentenced to serve 6 years' imprisonment; the second appellant was sentenced to serve 8 years' imprisonment. Each appellant says that he was wrongly identified as one of the persons who committed the robbery; that is essentially the only ground on which each of them is appealing. Each says that the sentence imposed on him is harsh and excessive.

At the trial evidence was given by a Chinese man, his wife and their two adult daughters that three young Fijian men entered their house on the night of 26 January 1993, assaulted the Chinese man and one his daughters and stole from the house a Hi-Fi stereo system and a lady's handbag containing $40 in cash. The Chinese man gave evidence that he could not identify any of the offenders. His wife gave evidence initially that she was not certain about the identity of any of them but under cross-examination by the second appellant said that he was one of them.

The learned trial judge correctly directed the assessors to disregard that evidence as proof of identity of the second appellant as one of the offenders, as the trial was held 16 months after the offence was committed and the witness had not previously identified him. However, both of the daughters gave evidence of identifying both the appellants at an identification parade conducted at a police station 36 hours after the commission of the offence. Further a police officer gave evidence that shortly after the time at which the offence was committed, he saw both the appellants sitting by a roundabout not far from the place where the offence had been committed, that the second appellant had run away, that he had given chase but that he had been unable to catch the second appellant. That police officer and another police officer gave evidence that the first appellant had also run away but the first police officer had caught him. They both gave evidence that they recognised him because they knew him previously; the first police officer gave similar evidence in respect of the second appellant.

Both the appellants gave sworn evidence at the trial. Each denied that he had taken part in the robbery. The second appellant also denied that he had been the person chased by the police officer that evening. The first appellant gave evidence that he had been shown to the Chinese man, his wife and his daughters immediately after he was caught and that they had said that he was not one of those who had robbed them. He said that they had also seen him at the police station that night but had again not identified him. Unfortunately neither of the appellants was represented at the trial and that allegation was not put to the prosecution witnesses in cross-examination.

The second appellant gave evidence that he had complained at the identification parade that the other persons included in it were not similar in appearance to himself, in particular that most of them were a lot older and none of them was as tall as he was, six feet seven inches. He gave evidence further that the identifying witnesses had been able to see him being taken to the identification parade.

The officer who conducted the identification parade did not

give evidence; he was overseas, serving in Iraq, at the time of the trial. However, evidence of the manner in which the identification parade was conducted was given by the two daughters and, as stated above, by the second appellant. The evidence given by the two daughters was detailed. The first of them to give evidence stated, under cross-examination by the second appellant, that there were 10 or 11 men in the parade and that, although there were some other tall men, none was as tall as the second appellant. In answer to a question put to her by the first appellant she stated that she did not see him being escorted to the room where the identification parade was conducted. Following the cross-examination of the first daughter, the second daughter was asked in her examination-in-chief to give evidence about the manner in which the identification parade was conducted. She said that she was taken to a room and asked to wait while the police "sorted out" 11 men in a room below and that she and her sister then went one at a time to identify them. She said that, when she went into the room where the identification parade was being conducted, she saw 11 men and was told to walk around 3 times, to look carefully and to say if the men who had committed the robbery were there. She said that she identified both the appellants. In answer to a question put to her by the first appellant she said that she did not see him being escorted to the room where the identification parade was conducted as she was upstairs and went down only when everything was ready.

The Chinese man, his wife and their two daughters all gave evidence that, when the offence was committed, the light was on in the room where it was committed. The first of the daughters said that the second appellant punched her and she saw his face clearly; the second daughter gave evidence that she went to try to grapple with him and was pushed away by him onto the floor. She said that from there she saw his face clearly. Both the daughters said that they were able positively to identify the first appellant, as they had seen him when he came into the room and picked up the Hi-Fi system to take it away. He had been delayed because it was connected to the speakers and had had to be disconnected before it could be removed.

So far as the second appellant was concerned, the daughters both gave evidence that he was wearing a white cardigan. The constable who gave evidence of seeing him and chasing him shortly afterwards gave evidence that he was wearing a similar cardigan at that time. That was evidence tending to corroborate the daughters' identification of the second appellant at the identification parade.

Mr Fa brought to our attention three instances in which, he said, prosecution witnesses gave evidence inconsistent with statements which they had made to the police soon after the robbery took place. The first instance concerned the evidence of the Chinese man; that evidence did not tend in any way to prove that either of the accused was one of the offenders. The other two instances concerned evidence given by the two daughters. Their evidence related to their identification of the first appellant. In the statement made to the police by the first daughter, she was recorded as having said that the man who took the Hi-fi system "had a cloth covering his face and I did not recognise him". It is to be noted that she said that she did not recognise him, not that she could not do so. Cross-examined by the first appellant, she said that the person with his face covered was another of three robbers. She denied that she was mistaken as to his identity. The third instance was of evidence given by the second daughter identifying the first appellant. In her statement to the police she was recorded as saying that at the time of the robbery she "saw him from an angle but could not see his face". Cross-examined by the first appellant she gave evidence that she recognised him at the identification parade because of "the look on [his] face and [his] body shape". In answer to a question put to her by the second appellant, she had already given evidence that she had drawing skills and recognised the bones of his face, not the flesh. In our view, the alleged inconsistencies were more apparent than real. We are satisfied that the learned trial judge had no duty to refer to them in his summing-up.

There was, in our view, adequate evidence to support a conviction in respect of each of the appellants. However, because of the failure of the prosecution to call as a witness

the police officer who conducted the identification parade, and because a finding that each of the appellants was guilty of the offence would depend on acceptance that they had been properly identified, there was a vital need for the trial judge not only to state the relevant law and summarise the evidence fully and fairly but also to emphasise the risk that the identifying witnesses might have been mistaken and the reasons why that might have occurred. In the event, His Lordship's summing up was, we consider, impeccable. Of the three assessors all expressed the opinion that the second appellant was guilty of robbery with violence, as charged; two of them expressed a similar opinion in respect of the first appellant but one expressed the opinion that he was guilty of the lesser offence of robbery and not of robbery with violence. It is clear, therefore, that all three assessors were satisfied that the appellants were two of the three persons who committed the robbery.

His Lordship accepted the assessors' opinions and convicted both appellants of robbery with violence. It was entirely proper for him to do so. The appeal of each of the appellants in respect of his conviction must, therefore, be dismissed.

So far as the sentences imposed on the appellants are concerned, the first of them is 27 years old, is a casual labourer but for most of his adult life has been unemployed. He had previously been convicted of 11 offences committed between 1987 and 1991, including offences of acting with intent to rob, burglary and larceny from the person, as well as ordinary larceny. His Lordship took two matters into account in his favour. The first was that at the time of the conviction he had been free of any conviction for offences of dishonesty for four years; the second was that in the course of the commission of the offence he alone of the three offenders had not used personal violence. In light of the seriousness of the offence, committed as it was by three young men who had gone together to the home of persons, who were strangers to them, solely for the purpose of robbing those persons, we are satisfied that the sentence of 6 years' imprisonment was appropriate.

The second appellant is 29 years old, has done some casual

work but has been unemployed for most of his adult life. Since he ceased to be a juvenile he had been convicted of committing more than 50 offences. Some of them had been minor offences but there were convictions for robbery with violence, house breaking, entering and larceny, factory breaking, entering and larceny, assaulting a police officer in the execution of his duty, burglary, larceny from a dwelling house, larceny from the person and ordinary larceny. Although the violence specified in the Information as aggravating the offence was the striking of the Chinese man with a stick by the third offender, the evidence given by the Chinese man, his wife and their two daughters was that the second appellant punched one of the daughters. In all the circumstances we are satisfied that the sentence of 8 years' imprisonment was appropriate.

Order

The appeal of each of the appellants is dismissed; the conviction and the sentence imposed on each in the High Court are affirmed.

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(Sir Peter Quilliam)
Judge of Appeal

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(Mr Justice Ian R. Thompson)
Judge of Appeal

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(Mr Justice J.D. Dillon)
Judge of Appeal