IN THE FIJI COURT OF APPEAL

CRIMINAL JURISDICTION

CRIMINAL APPEAL NO. AAU0013 OF 1995
(High Court Criminal Case No. HAC0013S of 1993)

BETWEEN

SAVENACA PE — APPELLANT

-and-

THE STATE — RESPONDENT

Appellant in Person
Ms. R Shafiq for the Respondent

Date and Place of Hearing : 15 May, 1996, Suva
Date of Delivery of Judgment : 17 May, 1996

JUDGMENT OF THE COURT

On 9 September 1991 the appellant was charged with robbery with violence; attempted robbery; and damage to property. The trial commenced before assessors on the 20 September 1995. In the course of the trial the counts of attempted robbery and damage to property were withdrawn by the learned trial Judge. Only the count of robbery with violence (contrary to Section 293 (1) (a) (b) of the Penal Code, Cap. 17) was submitted to the assessors for their opinion. They were unanimous that the appellant was guilty. The learned trial Judge concurred with those opinions. The appellant was then sentenced to 4 years imprisonment. It is against that conviction that the appellant now appeals.

The facts and back ground of this case may be briefly summarized as follows:-

Nitin Pala and his father Hajeen Pala operate a jewellery shop in Nadi. After the shop closed at 5:30 p.m. on the 30 July 1991 Nitin Pala gathered up two pieces of gold, two dias, a fan and some groceries and placed these articles in a bag and subsequently into the boot of his car. He and his cousin left the shop about 5.45 p.m. and drove to his home some 5 minutes away. Upon arrival in his compound and while he was removing the bag from the boot of his car he was suddenly attacked from behind. There were he said 5 people in a blue car that had parked beside his own. He was able to clearly see those 2 people who were still in the car and to recall 3 faces - he identified 2 of them in Court when giving evidence - one he pointed out was the appellant in the dock. He conceded that he did not see who hit him. However, after picking himself up from the ground, he did have an unobstructed view of articles being removed from the boot of his car. He then ran inside to ring the Police at which time his attackers left the compound in the same blue car by which they had arrived. He also rang his father who was still at the shop. He immediately returned to his shop to find that in fact the front door had been broken down, with broken glass and blood near by.

Hajeen Pala recalled the incident of the 30 July 1991 when his son rang him at about 6 p.m. While still on the phone

he saw 3 men approaching the shop. One of these men wore a mask and endeavoured to break down the front door of the shop. As a result the glass in the door was broken; the masked man was injured; and his two companions had to carry him away. Although the other two men were not wearing masks the witness could not see their faces and so was not now able to identify them.

Satya Nand Naidu gave evidence corroborating that of Hajeen Pala. He was one of the shop's employees and was able to describe exactly what had happened. He did not see the faces of the 2 men who did not wear masks. He could only say they were males.

Three witnesses were then called to give evidence of a blue car arriving at the home of Olive Tabua at about 6.30 p.m. on the 30 July 1991. Mrs Tabua saw Aca Tabua her half brother lying on the porch. When she enquired as to how he had been injured the appellant said that he had fallen through the roof of a house they were building and had hurt himself. Subsequently on the 7 September 1991 at a specially arranged police identification parade Mrs Tabua picked out the appellant as one of the people at her house on the evening of 30 July 1991. The appellant was also separately identified at that Identification parade by Semi Vueti and Mr Panapasa who were also at Mrs Tabua's house on the evening of 30 July 1991. It was Mr Panapasa who eventually took Aca Tabua to the Hospital. The appellant had

said he didn't want to take the injured Aca Tabua to Hospital.

Police Officer Seru Savou gave evidence that he was the investigating officer in this case and that Aca Tabua was arrested at the Nadi Hospital and charged in connection with this incident. Both the appellant and Ms Shafiq acknowledge that he pleaded guilty to the charge of robbery with violence.

Finally it is necessary to consider the evidence of a Miss Campbell who on the 30 July 1991 had been living in a de facto relationship with the appellant for some 3 years. At the time of the trial that relationship had terminated.

She related how the appellant returned home from Nadi during the last week of July 1991; that when he went to the cloak room she found in his jacket pocket a piece of gold, a bangle, a gold chain, and a silverish thing wrapped in a balaclava. She did not discuss these items with the appellant but said the appellant gave them to a man who later came to their house.

At this stage of the trial the witness was shown her original statement which recorded that it was she and not the appellant who had given the jewellery to the man who had called. She stated that the truth of the matter was what she had said that day in court viz. that it was the appellant who gave the jewellery to the man who later called at their house.

Finally Miss Campbell gave evidence of how the Police had called at the house making enquiries as to the whereabouts of the appellant. When she told the appellant about the Police enquiries he told her to say that he was at home at all times and to tell the Police he had not gone anywhere.

The appellant did ask this witness the date when he went to Nadi; and he did object to her saying that he gave the jewellery to the man who called at the house. Significantly however the appellant did not challenge any of the other evidence that was given by this witness.

At the conclusion of all the evidence for the prosecution the appellant was invited to make submissions as to whether the prosecution had established a prima facie case. Instead he accepted the offer by the learned trial Judge to make such a ruling. As a result the charges of attempted robbery and damage to property were withdrawn, leaving the assessors to consider only the charge of robbery with violence.

The appellant was also invited to call evidence; or to give evidence himself either on oath or by way of a statement from the dock. The appellant elected not to call evidence; not to give evidence; and not to make a statememt.

With that background to the substantive evidence produced at the trial it is now appropriate to consider the grounds of appeal relied on by the appellant against his conviction. These are contained in the 3 statements he filed dated the 29 September 1995; the 4 February 1996; and the 3 April 1996 respectively. Principally the appellant relies upon the absence or inadequacy of identification; and a challenge to the evidence of Miss Campbell with whom he no longer had a de facto relationship at the time of the trial.

The appellant's final statement of appeal adequately summarizes the several grounds detailed in the two earlier statements:-

"This is my final grounds of Appeal against the criminal case # H.A.C. 0013931 of 1991:-

1. *That the verdict of the Assessor ought to be set aside on the grounds, "It is unreasonable and cannot be supported having regard to the evidence." The evidence before the Assessors had proved that there was an absence of a proper identification parade which required the attendance of NITIN PALA who was the sole eye witness of the prosecution to identify me. The only proper identification parade conducted by Police Officers was on September 7th, 1991 at Nadi Police Station. NITIN PALA failed to turn up during such a crucial period, but he obviously came to identify me in Court in 1995 after 4 years when the crime was allegedly committed. In fact convictions have also being quashed*

where the identification of the prisoner has not been conducted properly in a case where it is important (Criminal Appeal, subsection 936, Page 342, in Archbold thirty sixth Edition, 1984).

2. *The Prosecution is obliged to prove at the trial every fact and circumstances stated in the indictment which is a material and necessary to constitute the offence charge (ibid). In other words the prosecution has yet to show the appellant was the actual person seen by NITIN PALA during the commission of the said robbery with violence, and secondly, that Miss Campbell did really see a piece of gold, a gold chain, and a silverish thing in my jacket pocket. I must stress, since it is quite notable that Miss Campbell who is no longer staying with me when she gave her statement to the Police. She could have easily framed and fabricate her statement to fulfil her earnest desire by seeing me convicted and sent to prison. It is therefore too dangerous for the Prosecutions to rely on her unsubstantiated statement."*

The appellant conducted his appeal in person. He marshalled his facts capably and presented them to us eloquently. He concentrated principally on the issue of identification. He conceded that the learned trial Judge had adequately "warned" the assessors of the dangers inherent in a dock identification. He submitted however that the assessors had not been "warned" of what he termed "a fleeting glimpse" identification in the compound of Nitin Pala, where the robbery was alleged to have been committed.

However, in his summing up to the assessors on whether Nitin Pala was able to identify his attackers the learned trial Judge at page 73 of the record said -

"He (Nitin Pala) was able he said to identify the assailants. And that is the first point that I have to raise with you. Because identification is a very crucial factor in this particular case and a matter that you have to be very very cautious about for the following reasons."

He then went on at length to discuss those reasons and to advise the assessors that it would be "extremely dangerous to proceed on dock identification alone."

There is no doubt that crucial to this trial was the proper identification of the appellant and the reliance by the State for that identification on the circumstantial evidence surrounding the events of the evening of the 30 July 1991.

The robbery was committed in the compound of the complainant Nitin Pala who identified the appellant some 4 years later while he was in the dock at the High Court at Lautoka. In this context the appellant points out that while the Police arranged an identification parade for 3 other witnesses this complainant did not attend. He acknowledged to us that he did not challenge that identification parade. Rather it was the dock identification some 4 years after the event that should not be relied upon. That of course is a valid criticism.

In addition to the appellants claim of inadequate identification he referred us to the discrepancies in the description of the goods alleged to have been stolen at that time. The complainant Nitin Pala is recorded in evidence as

saying that -

> *"When he left the shop he took with him two pieces of gold, two dias, a fan and some groceries. They were inside a bag in the boot of the car."*

On the other hand Miss Campbell described in her evidence how she found the following items in the appellant's jacket pocket viz:-

> *"He returned with a piece of gold, a bangle and a gold chain and something wrapped in a balaclava. It was a silverish thing."*

If the evidence presented to the assessors had been limited to the descriptions of the goods stolen as given by the complainant and compared with that given by Miss Campbell together with the dock identification of the appellant then the opinions of the assessors could well have been the subject of serious speculation. However the evidence presented to the assessors was not limited to that information only. As explained to the assessors in some detail by the learned trial judge the State relied on a sequence of events which collectively it was suggested provided circumstantial evidence sufficient to establish the guilt of the appellant.

It was in this context that the learned trial Judge took particular care to explain to the assessors on at least eight occasions during the course of his summing up as to what could be regarded as circumstantial evidence and the weight to be given to such evidence in order to ensure that any reasonable doubt would be resolved in favour of the appellant.

He referred to the injuries received by Aca Tabua and the circumstances surrounding his being taken to the Hospital at Nadi and there being arrested; to the denial of the appellant that he in company with others was present at Mrs Tabua's home that evening; to reference to a blue car which was identified as being in the compound and then subsequently at Mrs Tabua's house; and to evidence that the appellant was not willing to take the badly injured Aca Tabua to the Hospital. There were other instances to which the learned trial Judge referred but always with a repeated caution to the assessors as to the weight to be given to such evidence in order to ensure that any assessment that created a reasonable doubt had to be disregarded in favour of the appellant.

The appellant's original caution interview which was recorded by Detective Constable Apimeleki on the 6 September 1991 followed the police identification parade earlier that same day. In that interview the appellant confirmed that Vilimoni Nasau; Semi Vueti; and Olive Joy Tabua had identified him as one of the persons at Mrs Tabua's home on the evening shortly after the offences had been committed. However he denied in that statement that he had ever been present as those 3 witnesses had alleged. When asked for an explanation the statement records -

> *"I do not understand the reason why they had picked me out in the parade."*

A further explanation is recorded in the typed "comments" which the appellant handed to us at the hearing of this appeal viz-

> *"My denial of being at Olive Tabua's house on 30/7/91 has many good reasons. But it should not be used as corroborating evidence to the only unreliable visual identificaiton of P.W.1 who had a fleeting glimpse of his assailants."*

Unfortunately the appellant did not explain to us what were the **"many good reasons"** and so we are unable to either comment on them or evaluate their relevance or significance.

That type of evidence and all the other evidence presented by the State at this trial together with the manner and demeanour of the witnesses who gave it provided the assessors with the opportunity to utilise their individual knowledge of human nature and their independent judgment of what evidence they should accept and what evidence they should reject.

It has been said that evidence which is circumstantial can on certain occasions be more compelling than direct evidence itself. What is important is that each individual assessor should be convinced beyond reasonable doubt by the totality of the circumstantial evidence presented. Their unanimous opinions have signified in our view that they were so convinced.

The record of the summing up establishes that the learned trial Judge properly directed the assessors as to their duties and responsibilities. The unanimous opinions they reached can be justified by the circumstantial evidence available for their deliberation and consideration.

We refer now to the comprehensive and detailed chronology prepared by Ms Shafiq by way of explanation for the delay of 4 years between the offence on the 30 July 1991 and the trial commencing on the 21 September 1995.

In this respect we refer to article 11 (1) of the Constitution which provides -

> *"11 (1) If any person is charged with a criminal offence then unless the charge is withdrawn the case shall be given a fair hearing within a reasonable time by an independant and impartial Court established by law."*

What is to be considered as "within a reasonable time" was considered by the New Zealand Court of Appeal in the case of Martin v. Tauranga District Court (1995) 2 NZLR 419. In that case a delay of 17 months between the charge and trial was held to constitute " undue delay" under the New Zealand Bill of Rights Act 1990 S.25 (b). As a result a stay of proceedings was ordered.

However there were special circumstances relating to the Crown prosecutor's conduct which influenced the Court. It was not prepared to lay down any general time limit, stressing that regard had to be paid to the reasonable availability of court and judicial resources as well as to factors in the case itself giving rise to the delay. It suffices to say that we consider a delay of 4 years hard to justify in this case even though a number of the delays can be attributed to the appellant himself. However, it is not possible to conclude it has resulted in a miscarriage of justice in view of the strength of the circumstantial evidence.

For the reasons we have already set out above we dismiss the appeal against conviction.

Sir Moti Tikaram
President, Fiji Court of Appeal

Sir Maurice Casey
Judge of Appeal

Justice J.D. Dillon
Justice of Appeal