

IN THE FIJI COURT OF APPEAL AT SUVA  
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU0011 OF 1997S  
(High Court Criminal Case No. HAC028 of 1996)

BETWEEN:

WAISAKE TUIMEREKE  
APENISA RALULU

*Appellants*

AND:

THE STATE

*Respondent*

Coram:

**The Rt. Hon. Sir Maurice Casey, Presiding Judge**  
**The Hon. Justice I.R. Thompson, Justice of Appeal**  
**The Hon. Justice J.D. Dillon, Justice of Appeal**

Hearing:

**12 August, 1998**

Counsel:

**Mr. G.P. Lala for the Appellants**  
**Mrs. N. Shameem, Director of Public Prosecutions**  
**for the Respondent**

Date of Judgment:

**14 August, 1998**

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**JUDGMENT OF THE COURT**

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The appeal by each appellant is against conviction for robbery with violence and sentence of five years' imprisonment. The appellants were unrepresented at their trial. Neither appellant gave sworn evidence, made an unsworn statement or called evidence. Each addressed the Court on the evidence.

Both appeals are concerned only with the identification of the appellants as two of three men (plus the driver of a getaway car) who on 16 October 1995 waylaid a car carrying four employees of Morris Hedstrom Limited, threw empty beer bottles at them, threatened them

with a cane knife and stole a large sum of money belonging to Morris Hedstrom Limited. The evidence of the prosecution witnesses regarding the robbery was not challenged except as to the identification of the appellants as two of the robbers. Four issues were raised by Mr Lala, namely whether the learned trial judge erred in directing that the evidence of a prosecution witness, Tevita Leweutitovo, was to be disregarded; whether another witness, Esava Vakaceresoso, should have been declared hostile; whether an identification parade was conducted fairly and properly; and whether the judge failed to direct the assessors in respect of inconsistencies between the evidence of some of the prosecution witnesses. Mr Lala applied for leave to call fresh evidence.

We shall deal first with the application for leave to call fresh evidence and then with each of the four issues in turn. Before doing so, however, it is necessary to refer briefly to the evidence given at the trial relevant to the identification of the appellants as two of the robbers.

After the robbery three of the Morris Hedstrom employees gave chase in their own vehicle to the vehicle used by the robbers. Having travelled some distance the robbers abandoned their vehicle and ran away after again throwing bottles at the employees. There were, therefore, two opportunities for the employees to see the robbers. The appellants were not arrested until, in the first appellant's case, 17 October 1995 and, in the second appellant's case, 18 October 1995. No evidence was given of what caused the police to arrest the appellants.

Three of the four employees gave evidence that they would not be able to recognise any of the robbers if they saw them again. One, Apimeleke Nataucama, a security

guard, identified the two appellants at an identification parade held at Samabula Police Station on 18 October 1995. He gave evidence that he had not known either of them before the robbery but that he had a view of the face of the second appellant at the scene of the robbery and of both appellants when they left their vehicle after the chase. He again identified them in court at the trial. Assistant Superintendent Livai Vuli gave evidence that he conducted the identification parade properly. Apimeleki denied allegations put to him in cross-examinations that, before he identified the appellants, he saw them in the cells of the police station and was told by a man who was in the cells with them that they were the suspects.

A Fijian man, Esava Vakaceresoso, who was residing near where the getaway car was abandoned, gave evidence that three men ran past him about half an hour after the time at which robbery took place. He said that he did not recognise any of them by face but did recognise the voice of one, when he threatened him. He said that he had known the man for some years; it was the first appellant. He had been declared hostile by the trial judge before he gave that evidence.

Another Fijian man, Timoci Veravalu, gave evidence that on 17 October 1998 he was a police officer and was present when the first appellant was arrested on that day and that he searched the house where the first appellant was found and discovered a yellow and green Canterbury jacket under a bed there. He said that he was looking for such a jacket. The investigating officer, Cpl Semo Matiro, gave evidence that that was because of a statement made by Apimeleki Nataucama on the day of the robbery. In court Apimeleki identified the jacket as the same as a jacket worn by one of the robbers.

The fresh evidence which the appellants are seeking leave to adduce is that of the man who the first appellant suggested during his cross-examination of Apimeleki told Apimeleki before the identification parade that the appellants were the suspects. When Apimeleki rejected that suggestion, the first appellant said that he would call the man to give evidence at the trial. However, despite that assertion the man was not called to give evidence at the trial. This Court can, if it thinks it necessary or expedient in the interests of justice, receive fresh evidence during the hearing of an appeal (Court of Appeal Act (Cap.12) section 28(c)). The purpose for which it can do so is to enable it to determine the appeal.

Section 23(1) of the Court of Appeal Act (cap.12) provides that, on an appeal against conviction, the Court must allow the appeal if it thinks that the verdict should be set aside because *inter alia* "on any ground there was a miscarriage of justice". In *Ratten v. R.* (1974) 131 CLR 510 at 516 Barwick C.J. observed that the meaning of miscarriage of justice had been "fairly worked out in decided cases", One of the situations where there was a miscarriage of justice was where "the jury did not have before it evidence *not available to the appellant at the time of his trial* which, if believed by the jury, was likely to lead to an acquittal, the jury not being satisfied beyond reasonable doubt of guilt" (emphasis added). At page 516 he said:

"..... there will be no miscarriage of justice simply because evidence which was available to him actually or constructively was not called by the accused, even though it may appear that if that evidence had been called and been believed a different verdict at the trial would most likely have resulted."

Mc Tiernan J., Stephen J. and Jacobs J. concurred generally with Barwick C.J.'s judgment. Mason J. did not address this particular aspect of the admissibility of fresh evidence but did not disagree with Barwick C.J. in respect of it.

In Lawless v. R (1979) 142 CLR 659 Stephen J. referred to Ratten's case and said that it contained "a definitive pronouncement of appropriate principle" in respect of the concept of fresh evidence. He said that it required "that the evidence in question, not being before the jury at the trial, was not then available to be called by the defence." Barwick C.J. and Mason J. applied that principle and Aickin J. expressly agreed with it. Murphy J. dissented but on the ground that the evidence of the proposed new witness had been suppressed at the trial.

Section 23 of the Criminal Appeal Act 1968 (U.K.), particularly in the provisions of subsection (2), differs in significant ways from section 28 of the Court of Appeal Act (Cap. 12). The provisions of section 28 make it more appropriate for this Court to seek guidance from Australian cases than from English cases. However, it is to be noted that in the circumstances in which the appellants are seeking leave to adduce fresh evidence the courts in England would almost certainly not admit the evidence (see e.g. Stafford and Lavaglio (No.1) (1968) 53 Cr. App. R.1 and particularly Edmund Davies L.J.'s comments at page 3).

In this appeal the appellants have not presented any evidence that the witness whom they wish to call was not available to give evidence at the trial. Indeed Mr Lala did not even assert that. In view of the first appellant's statement at the trial that he intended to call the witness there, the evidence before us tends to show that his evidence was available at the trial.

The application for leave to adduce the evidence of the witness cannot succeed; we dismiss it.

We turn now to the first of the issues raised by Mr Lala. Tevita Leweutitovo gave evidence that on 17 October 1995 a man named Apenisa Ralulu gave him \$5,400 in cash to look after for him. He said that he did not know where the money had come from. However, he said that the second appellant was not the person of that name who gave him the money. Instead, he identified another man as being that person. The prosecutor acknowledged that the name of the man identified, who was serving a sentence of imprisonment, was Apenisa Ralulu. It appears that the prosecutor had mistakenly believed that a reference to Apenisa Ralulu in a written statement made by the witness before the trial had been to the second appellant. Both appellants were given an opportunity to cross-examine the witness; neither of them did so.

In his summing-up Townsley J. directed the assessors to disregard Tevita's evidence and not to use it in any way against the second appellant or to his prejudice. Mr Lala has submitted that the assessors should have been directed that the evidence could be used in the second appellant's favour to cast doubt on his identification as one of the robbers. That is to say, an inference could be drawn that the other Apenisa Ralulu was one of the robbers and that the second appellant had been arrested in error. Mrs. Shameem pointed out that the source of the money was unknown and that any suggestion that it was part of the proceeds of the robbery was mere speculation. Be that as it may, we think that the learned trial judge was simply making it very clear to the assessors that this part of the prosecution evidence was not to be used against the second appellant. To have directed them that the evidence might be used in the second appellant's favour to cast doubt on his identification would have required them to enter into the realm of speculation. In our view the learned trial judge had no option but to give the direction

in the terms in which he gave it and made no error in doing so.

The second issue concerns the declaration of Esava Vakaceresoso to be a hostile witness and the direction given to the assessors that they might give to his evidence such weight as they thought fit. Mr Lala pointed to the distinction drawn by the courts between a witness who is hostile, that is to say deliberately giving evidence which is different from what he said in a previous statement or deposition, and one who is unfavourable although doing his best to state the facts honestly as he remembers them. In the present case the witness clearly was giving evidence which conflicted with a statement he had made to the police. Although some of that evidence was in terms that he could not recall certain facts, he stated positively that at the time when he saw the men running past his house he "could not really recognise the voice". We are satisfied that at that point Townsley J. was entitled to declare him to be a hostile witness. It is apparent that thereafter Esava gave evidence which accorded with his previous statement.

In his summing-up the learned trial judge said of Esava:

"After he looked this (sic) witness statement, and was advised that he had nothing to fear, he sparked up and gave quite particular evidence under cross-examination. It is a matter for you assessors as to what you make of [Esava]. Depending on how you view [Esava], after giving effect to my warning, Apimeleki may not be entirely on his own in identifying the accused Tuimereke."

The warning his Lordship was referring to was one which he had given shortly before that the assessors must be very careful before they accepted his evidence of identifying Tuimereke by his voice in the circumstances in which he saw and heard him.

It is now accepted by the courts that, even where a witness has made a previous statement which is inconsistent with his evidence, there is no inflexible rule that a direction must be given that his evidence is to be treated as unreliable (*Driscoll v. R* (1977) 137 CLR 517); although the judge must warn of the risk of unreliability, the jury or assessors are free to give such weight to the evidence as they think fit. *A fortiori*, where the witness eventually gives evidence which accords with his previous statement or deposition, as the witness Esava did in the present case, the judge can properly direct the jury or assessors simply to evaluate the evidence of the witness, provided that he gives any other warnings in respect of his evidence that may be required, as Townsley J. did in respect of identification by voice and in respect of some inconsistency with the evidence of Apimeleki. We can find no error in the directions given by the learned trial judge regarding Esava's evidence.

In respect of the third issue it is to be noted at the outset that the only evidence in respect of the identification parade given at the trial was that of the prosecution witnesses Apimeleki, Assistant Superintendent Vuli and the investigating officer. There were inconsistencies between their respective accounts of what took place immediately before the identification parade was held. The learned trial judge properly directed the assessors regarding those inconsistencies. In cross-examining those witnesses the appellants put questions suggesting that there were serious improprieties in the events immediately preceding the identification parade; but all of the witnesses rejected those suggestions. If the appellants had

given evidence, made unsworn statements or, as the first appellant stated that he intended to do, called a witness to give evidence of the alleged improprieties, the assessors would have had to be directed to consider whether that evidence or those unsworn statements raised a reasonable doubt about the propriety and fairness of the conduct of the parade. But the evidence of the prosecution witnesses was uncontradicted. There was, therefore, no reason why the assessors, having been directed in respect of the inconsistencies between those witnesses' accounts of what occurred, should not have been satisfied beyond all reasonable doubt that the identification parade was conducted properly and that nothing in the events which preceded it vitiated Apimeleki's identification of the appellants. We can find no error in the learned trial judge's summing-up in that regard.

The fourth issue relates to inconsistencies between the evidence of the prosecution witnesses regarding the details of the events which occurred on the day of the robbery. There were indeed a considerable number of such inconsistencies. Some were in respect of matters of no great significance but others were significant. The significant inconsistencies concerned the clothing worn by the person identified by the witnesses as the first appellant, how many of the robbers wore masks and which of them was carrying a cane knife. They were not so gross that no reasonable assessors, properly directed, could have found the appellants guilty but they were of sufficient significance to make it necessary for the evidence to be carefully evaluated before, essentially, Apimeleki's evidence identifying the appellants as two of the robbers could be relied on as the basis for satisfaction of their guilt beyond reasonable doubt. Townsley J. expressly drew the assessors' attention to each of those inconsistencies and gave them appropriate warnings in respect of them. He did not address them on the inconsistencies which lacked significance; the fact that they were not significant meant that he

had no need to do so. We find no error in the manner in which he directed the assessors in respect of the inconsistencies.

The appeals of both appellants against conviction must be dismissed. Both have appealed also against their sentences on the ground that they are harsh and excessive. As we pointed out at the hearing of the appeal, a sentence of five years' imprisonment is at the lower end of the scale of sentences for an offence of the gravity of that of which the appellants were convicted. There were no mitigating circumstances to be taken into account. Neither appellant is a first offender, although the second appellant had not been convicted of a serious offence since 1989. We are satisfied that the sentences imposed were, in all the circumstances, neither harsh nor excessive. The appeals against them must be dismissed.

**Order:**

The appeal of each of the appellants against conviction and sentence is dismissed.

*M. E. Casey*  
 .....  
 Sir Maurice Casey  
 Presiding Judge

*I. R. Thompson*  
 .....  
 Justice Ian Thompson  
 Justice of Appeal

*J. D. Dillon*  
 .....  
 Justice J.D. Dillon  
 Justice of Appeal

**Solicitors:**

Messrs. G.P. Lala & Associates, Suva for the Appellant  
Office of the Director of Public Prosecutions, Suva for the Respondent