

IN THE COURT OF APPEAL, FIJI  
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU0031 OF 1999S  
(High Court Criminal Case No. HAA027 of 1999)

BETWEEN:

VILIVE TUBUNA

*Appellant*

AND:

THE STATE

*Respondent*

Coram:

The Hon. Sir Moti Tikaram, President  
The Rt. Hon. Sir Maurice Casey, Justice of Appeal  
The Hon. Sir Mari Kapi, Justice of Appeal

Hearing:

Tuesday, 15 February 2000, Suva

Counsel:

Appellant in Person  
Ms. R. Olutimayin for the Respondent

Date of Judgment:

Thursday, 24 February 2000

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**JUDGMENT OF THE COURT**

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The appellant Vilive Tubuna was on 28 September 1998 convicted by the Magistrates' Court of robbery with violence and sentenced to 2 years imprisonment. He appealed to the High Court against both conviction and sentence. On 14 April 1999 the High Court dismissed his appeal against conviction and increased his sentence from 2 years to 5 years. The appellant now wishes to appeal to this Court against conviction and sentence. As this is his second appeal, as pointed out by respondent's counsel, he can do so on a question of law only - see Section 22 of the Court of Appeal Act as amended by Act No. 38 of 1998.

At his trial at the Magistrates' Court the prosecution case was that he and an associate broke into a house at night, threatened and struck occupants and made off with their property. Both were arrested afterwards and charged. The associate made a statement to the police admitting that

he and the appellant were involved, but the appellant denied being there and said he was at home at the time. The only evidence connecting him with the offence was a dock identification by one of the victims to which we refer later. The learned Magistrate was critical of the police handling of the investigation, commenting on the absence of an identification parade and the failure to take fingerprints. However, he held that the associate's out-of-court statement implicating the appellant was admissible against him and entered the conviction accordingly. He was clearly in error in using it for this purpose, and this was made very plain by Townsley J on the appeal to the High Court.

His Lordship referred to the dock identification which he held to be strong in quality and on which he said the learned Magistrate could and should have acted. He therefore applied the proviso in s.3191(a) of the Criminal Procedure Code to sustain the conviction. On the appellant's appeal against his sentence of 2 years, he exercised his power under s.319(2) of the Code to increase it to 5 years, holding that 2 years was manifestly inadequate having regard to his long list of previous convictions.

The appellant was not legally represented at any stage of these proceedings, and in this Court put forward grounds of appeal challenging evidence given and conclusions of fact reached in the earlier hearings. His submissions to us were along the same lines, and it is clear that he failed to understand that such a second appeal to this Court is confined to a question of law only (S.22(1) Court of Appeal Act (Cap 12)). The only matter in the case which could give rise to such a question was His Lordship's reliance on the dock identification.

This was made by a witness who said he was sleeping in his cousin's house and was woken up at about 12.15 a.m. and saw two boys standing in front of him who threatened him with

a knife. They ordered him to lie down. He described them collecting various items and kicking his cousin who had also woken up, and they were made to face the wall while the intruders went downstairs. He identified the associate as the one who struck his cousin, and the appellant as the one who threatened them with a knife. This identification was obviously very doubtful, being apparently made in a dark room by a witness who would have been barely awake and afraid. But the appellant chose to cross-examine him and elicited the following answers as recorded by the Magistrate:-

*"You had a tattoo in your left hand. The first accused was holding the pinch bar. I could see your face, even though you covered it with a cloth. I can make out your face. Your face, eyes, nose, mouth were not covered. I recognised you the way you were standing. I am telling the truth."*

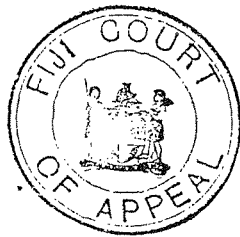
In his decision in the High Court appeal, His Lordship mentioned the tattoo mark referred to in that evidence, stating that the appellant admitted having it, and this was confirmed to us by Ms Olutimayin who was counsel in that appeal. The effect of this cross-examination was to convert the weak identification in examination-in-chief to stronger evidence capable of amounting to proof beyond reasonable doubt, implicating the appellant as one of the robbers. It differs from the situation in Suliasi Sivaro v The State (CA 43/98; 11 February 2000) where this Court held that gaps or deficiencies in the chain of custody of drugs from the police to the analyst over a 4-year period meant it had not been proved that the material in the accused's possession was hemp. That situation properly gave rise to a question of law as to the existence of any probative evidence at all. In the present case there was such evidence, and the question of the weight that should have been given to it is one of fact.

Accordingly the appeal against conviction does not raise a question of law only, and it must be dismissed.

There are also problems for the appellant in the sentence appeal, which lies to this Court from a High Court appeal only if it was unlawful or passed in consequence of an error of law (S.22(1A)(a) Court of Appeal Act). The sentence of 5 years imprisonment was one which the Judge was entitled to impose by s.319(2) of the Criminal Procedure Code in substitution for that passed in the Magistrates' Court, and the term was within the sentencing limit of that Court. We would add in passing that, having regard to the circumstances of the offence and the appellant's record, we do not see it as harsh or excessive.

### Decision

The appeal against conviction and sentence is dismissed.



*Moti Tikaram*  
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Sir Moti Tikaram  
President

*M. Casey*  
.....  
Sir Maurice Casey  
Justice of Appeal

*Mari Kapi*  
.....  
Sir Mari Kapi  
Justice of Appeal

### Solicitors:

Appellant in Person  
Office of the Director of Public Prosecutions, Suva for the Respondent