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

CRIMINAL APPEAL NO. AAU0027 OF 2006
(High Court Criminal Case No. HAC008 of 2005)

BETWEEN:	**SEMISI WAINIQOLO**	***Appellant***
A N D :	**THE STATE**	***Respondent***

Coram: **Ward, President**
Scott, JA
McPherson, JA

Hearing: **Monday 20 November 2006**

Counsel: **Appellant in person**
A Prasad for respondent

Date of Judgment: **Friday 24 November 2006**

JUDGMENT OF THE COURT

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[1] The appellant was convicted on one count of armed robbery and one of unlawful use of a motor vehicle following trial in the High Court. He was sentenced to a total term of ten years imprisonment which was ordered to run consecutively to a sentence of seven years he was already serving for another robbery.

[2] The victim of the robbery was the wife of the owner of a nightclub in Suva. On 4 January 2005, she was driving out of their home on her way to bank the takings from the New Year period, amounting to $13,000.00. The money was under the seat in the car and she had her nine month old son in the seat alongside her. As she left the compound and was waiting for her teenage cousin to close the gate, a vehicle was driven up close to her car to prevent it being driven further. Four masked men ran out and up to the car. They were armed with an axe and cane knives. The windscreen of the car was smashed with the axe and one of the men tried to reach for the keys. As he did so, he removed his balaclava and the woman was able to see his face. She recognised him and said, "Semisi, you can't do this to me, I know you". He replied that he didn't know her and threw the keys back in the car. As he went to rejoin the others she heard him say, "Someone has recognised me".

[3] The witness told the court that their grandmothers were sisters and so she and the appellant were regarded as cousins. She had not seen him since she was a small child in the village except for once recently when he had visited the Night Club in December 2004 or the first days of January 2005. When the appellant gave evidence, he agreed he had been told they were related but he did not recall having seen her. He agreed he had been to her Night Club once but said it was in April 2005, which would appear to be a reference to April 2004.

[4] There was no identification parade held by the police and, at the trial, the witness was asked to identify the appellant in court – a so-called dock identification.

Grounds of Appeal

[5] The appellant has appealed against conviction in two grounds; (1) that the judge erred in allowing a dock identification where there had not been any identification parade and failed to direct the assessors correctly on the dangers of identification evidence, and (2) that the appellant had been seen by the assessors in handcuffs

during the time the trial was being heard which was highly prejudicial. He was given leave to pursue those grounds and has filed extensively argued submissions on them.

[6] In further submissions he has repeated and expanded those submissions and, in the process, has raised three further grounds: that the judge misstated the evidence of the alibi witnesses, that he failed to sum up the evidence fairly and that the appellant was prejudiced because he was unrepresented at the trial. Leave has not been sought for these additional grounds but we have heard the appellant on those as well and grant leave.

Identification

[7] The principal ground of appeal relates to the issue of the identification of the appellant. The appellant's case is that the police should have held an identification parade. They did not do so and allowing the witness then to identify the appellant in the dock was prejudicial and unreliable and should not have been permitted. The result is that the appellant was denied his right to a fair trial.

[8] He suggests that the judge failed to follow the guidelines in the case of *R v Turnbull*, [1977] 63 Criminal Appeal R 132 and that there had been an inadequate warning of the dangers of a dock identification. The appellant has clearly carried out substantial research on the topic. He is unrepresented and we acknowledge the depth and general accuracy of his work. However, he relies, in part, on the provisions of the English Police and Criminal Evidence Act (PACE) which has no application in Fiji.

[9] On the other hand, the guidelines in *Turnbull's case* have been accepted as the law in Fiji. They were stated by Widgery LCJ :

"First, whenever the case against an accused depends wholly or substantially on one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms, the judge need not use any particular form of words. Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as, for example, by passing traffic or a press of people? Had the witness seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent observation to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? ... Finally he should remind the jury of any specific weakness which had appeared in the identification evidence.

Recognition may be more reliable than identification of a stranger but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

[10] The learned judge gave a careful and extensive direction to the assessors and clearly had those guidelines in mind:

"This is a case where the State relies upon the accuracy of an identification of the accused and the defence contends she is mistaken. Where that is so, I should warn you of the special need for care before relying on the identification evidence alone as the basis for a conviction. The reason for that is that experience has shown that it is quite possible for a perfectly honest witness to be mistaken about identification. An honest witness who is convinced of the accuracy of what he or she says may well come across as convincing but may still be mistaken.

Bear in mind that we all make mistakes in thinking that we recognise people even those we know well. That is not to say that you cannot rely on identification evidence. Of course you may, but you need to be

careful in deciding whether the evidence is good enough to be relied upon.

Can I suggest that you think about the circumstances under which this witness saw the accused at the time in question. How long did the witness have the accused under observation? What sort of distance were they away from each other? What was the lighting like? Had the identification witness ever seen the accused before? Did the identification witness know the accused and, if so, how well? Was there anything about the situation which would cause the identification witness to take particular note?

Think about these sorts of issues carefully to see if you can rely upon the evidence of identification given by the first prosecution witness."

[11] Later he returned to this aspect of the case:

"The [witness] can only have caught a quick glimpse of the robber who took off his balaclava in the process of searching for something inside the vehicle. They were clearly quite close to each other; at most according to [the cousin] some one metre away. It was a bright morning so there was good lighting but her view of the robber would have been impeded by the car structures, the roof, the door jamb, etc. She was in fear.

The witness was, it seems, a distant relative of the accused. They grew up in the same village. She knew him by sight but not really to speak with. It will be a matter for you to determine just how well she knew the accused prior to this incident. Take into account that prior to the incident she says she hadn't seen him for a long time but did recently catch sight of him sometime in December 2004 or January 2005. ...

Against these matters you must weigh the warning that I earlier gave you about the possibility of identification witnesses being perfectly honest and convinced of the accuracy but nonetheless mistaken."

[12] We consider that was very fair and proper application of the Turnbull guidelines and find no ground for criticism.

[13] However, the appellant also appeals against the use of the dock identification when there had been no identification parade. The learned judge referred to it in two passages:

> *"There was in this case a dock identification. I feel I should warn you about this. Given the layout of the courtroom, the dock and the officials that are in the court, who else is the witness likely to identify but the accused."*

And later:

> *"The police did not hold an identification parade as they accepted what the witness said. Accordingly you do not have the benefit of a subsequent identification of the accused in the line up of characters of a similar build and description."*

[14] For some time before *Turnbull's case*, the courts in England had disapproved of the practice of allowing dock identifications as the first identification since the first sighting. In *R v Hunter* [1969] Crim LR 262, for example, the Court of Appeal in England held that such a method of identification should be avoided if possible and, where used, the judge should give a warning of the inherent dangers in terms similar to those used by the judge in the present case.

[15] *R v Horsham JJ ex p Bukhari* [1981] 74 Crim App R 291 concerned the discretion of committing magistrates to exclude evidence but, at 297, Forbes J also pointed out:

> *"... the Court of Appeal in Turnbull gave guidance on identification evidence. That was concerned with evidence of what I might term "initial sighting" and the quality of that evidence.*
>
> *Dock identification raises a different point: the reliability of the identification of the suspect as the person seen in the initial sighting. ... but the courts had, for a very long time, taken the view that dock identification itself is undesirable. See, for instance, Cartwright [1914] 10 Crim App R 219 and the more recent case of Caird [1970] CrimLR 656. ... The discretion, of course, of the judge at the trial – as I say, not a discretion open to the examining justices – is ... to reject the evidence or refuse to admit it, on the grounds that its prejudicial effect outweighs its probative value. ... the court's duty will, in my view, always be to exercise its discretion in appropriate cases to exclude identification*

evidence which is more prejudicial that probative and, in accordance with Turnbull, to warn juries of the dangers inherent in the evidence of identification."

[16] As similar test was suggested in the New Zealand case of *The Queen v Rangi Tawea Walker* [2000] NZCA 42, 9 March 2000, and as in *Bukhari's case*, the court stressed the need for a clear direction on the lines of that given by the learned judge in the present case.

[17] The circumstances in the present case were different from a case where the first identification after the offence takes place in court. This was a case of recognition rather than identification of a stranger and different considerations arise.

[18] The witness in this case told the court that she recognised the person committing the robbery as someone she already knew. Whether that recognition was reliable was a matter for the assessors taking into account the Turnbull guidelines against the circumstances in which the sighting occurred as suggested by the learned judge.

[19] An identification parade would have added nothing because it would not have tested the accuracy of her previous identification of the robber. She believed she had seen a person, a relative, she already knew. The accused is the person she thought she saw. If he had been placed on a parade, she would have been identifying him as that relative, not checking the accuracy of her original recognition of him. More than that, it would appear likely that an identification parade could be prejudicial in such a case because it could be seen as strengthening the initial identification when it is, in fact, no more than an identification of a person on the parade that she already knew and would be looking for.

[20] Equally the identification in the dock was no more than identifying the accused as the person she knows as a relative. It added nothing to the original recognition which, as we have said, was the identification the assessors needed to consider against the Turnbull warnings.

[21] Following the judge's direction, the assessors must have evaluated the evidence of the witness' recognition in terms of Turnbull's case and accepted it was accurate reliable.

[22] This ground of appeal fails.

The Use of Handcuffs

[23] The second ground was that the assessors or some of them saw the appellant in handcuffs during the time the trial was being held. We accept that it is undesirable to produce an accused person in court in handcuffs. It does not appear the appellant is suggesting this occurred in the courtroom and, indeed, had it happened, we would expect the judge to have ordered them to be removed and explained his action to the assessors if they had seen the incident. There is nothing in the record to suggest the assessors saw the appellant in handcuffs. Had it occurred, the matter should have been mentioned to the judge and he could have dispelled any possibility of prejudice.

[24] The appellant's submission is that the assessors saw him in hand cuffs and, in consequence, would have thought he was a dangerous prisoner. Accepting, for this purpose, that they saw such an incident, we cannot accept that would have been the assessors' conclusion. The arrangements in the courts in Suva are such that many accused have to be taken along the verandas and corridors on their way to and from court. The sensible expedient of keeping them in handcuffs at that time is well known and we do not accept it suggests the man is in handcuffs because he is a particular security risk or a particularly dangerous prisoner.

This ground fails.

The Alibi Direction

[25] The appellant's complaint about the alibi evidence is that the judge appears to have misheard the evidence in respect of one of the defence witnesses, Apisalome Vuadreu. The appellant tells the Court that the prosecutor mentioned it to the judge after the assessors had retired and was told that he would not bring the assessors back because they have retired. There is no clear record of such a request but, at the end of the typed summing up, there is a note in the judge's hand:

"Court to State

Q. Is there anything you wish to draw to my attention by way of law or fact that may be in error? ... *[indecipherable]* issue of who winning cards (cf p 35 my notes) Any other matter.

A No"

[26] Counsel for the respondent was not counsel in the High Court and cannot confirm or deny the appellant's suggestion but the note supports his suggestion that it was raised by the prosecution. If that occurred in the way the appellant suggests, it was most unfortunate. The appellant was unrepresented and the judge would have been wiser to ensure that any possibly incorrect account of the evidence, especially of the defence, was cleared up before the assessors considered the case.

[27] The appellant's alibi was that he had been at the docks hoping for work on the morning of the robbery. He was playing cards with some of the others who were also looking for work and he called witnesses to support his account. One of the witnesses was recorded by the judge as having stated that Apisalome was winning. The appellant and, it would appear, the prosecution had heard the answer as Apisalome was there.

[28] The significance of the passage arose from the fact that another of the alibi witnesses, Leone Marawa, had been in court whilst the appellant had been giving evidence and the question arose whether he had tailored his evidence to fit. The judge's direction clearly referred to the winning but we consider that the manner in which he directed the assessors on this was fair and was favourable to the defence:

> *"Remember too concerning the card game that while Leone may have been in court during Semisi's evidence, he wasn't in court when the evidence of Apisalome was given and it may be a fair inference that he could not have known that Apisalome told us that he was the winner of the card game that day. That evidence between the two of them should be weighed carefully by you. There is no suggestion that it was concocted or fabricated as the issue was not clearly put or cross-examined on and so it may show some consistency in the alibi evidence."*

[29] It is clear that the assessors rejected the evidence of the alibi in its entirety despite that direction. We do not consider it gave rise to a risk of a miscarriage of justice.

[30] The other two grounds can be dealt with briefly.

[31] The appellant suggests that the judge gave a biased version of the evidence in his summing-up. He cites a number of authorities, principally *Ivan Fergus v R* [1994] 98 Cr App R 313, 318 in which Steyn LJ explained:

> *"... in a case dependent on visual identification, and particularly where that is the only evidence, Turnbull makes it clear that it is incumbent on a trial judge to place before the jury any specific weaknesses which can arguably be said to have been exposed in the evidence. And it is not sufficient for the judge to invite the jury to take into account what counsel for the defence said about the specific weaknesses. Needless to say, the judge must deal with the specific weaknesses in a coherent manner so that the cumulative impact of those specific weaknesses is fairly placed before the jury."*

[32] We have considered his submissions on this ground but do not think the judge erred. He gave a clear and careful account of both the prosecution and the defence cases. He was at pains to emphasise the problems of identification and to explain the details of the alibi raised by the appellant.

[33] The final ground is that the appellant was prejudiced by his lack of representation. The record shows that the case was adjourned a number of times to allow him to instruct counsel. At first he indicated he would represent himself but then applied for legal aid. That was eventually refused and he told the court he would proceed unrepresented. That was repeated at two subsequent hearings including the pre-trial conference at which the appellant gave notice of is alibi. On the day of the trial, he repeated that he intended to represent himself. He indicated that he wanted his statements excluded and then, after discussion, the issue was resolved and he withdrew his objection to admissibility whilst reserving his right to comment when he gave evidence. Throughout he showed he understood the proceedings and was able to conduct his case competently.

[34] This court has commented many times on the number of cases which proceed with the accused unrepresented. However the test, as was stated in *Asesela Drotini v State*, [2006] Cr App AAU 1/05, 24 March 2006, is whether there is a possibility that he was adversely prejudiced by the lack of representation. The court must consider whether that prejudice was such that there has been a risk of injustice. In order to assess that, the court will consider the nature and strength of the State's case and the defence that is made to it; *Rusiate Tuidravu v State* [2006] Cr App AAU 35/05, 10 November 2006; *McInnis v The Queen* [1979] 143 CLR 575.

[36] The prosecution case depended on the identification by the victim but, if accepted, it was a clear indicator of the involvement of the appellant. Considering the record as a whole, we can see no evidence that the appellant was unable to

represent himself properly. On the contrary, the record shows he displayed a considerable knowledge and ability.

[37] The appeal against conviction is dismissed.

Sentence

[38] The appellant raises two grounds of appeal against sentence; that the judge took into account previous convictions which had been quashed on appeal and that the sentence is harsh and excessive.

[39] The appellant has a long string of previous convictions starting in 1977. They were supplied to the judge on a normal record form on which is a handwritten note, "Not fully updated". The last conviction on 14 July 2005 had also been added in manuscript. Included in that list were two convictions for rape and one for burglary in January 1998 for which the appellant was sentenced to a total of eight years imprisonment. That conviction had been quashed on appeal in July 1998 and should not have been included. The appellant points out that those serious convictions may well have affected the sentence he received for the present case.

[40] When passing sentence, the learned judge referred to the appellant's previous convictions:

> *"I see from your previous conviction history that since 1997 you have committed 36 related violence offences. These have accumulated with several unrelated convictions. Included in your previous criminal history are 12 serious violence offences including rape. You have committed 5 previous robberies. Needless to say you have been to jail. You are currently serving a 7 year term of imprisonment in respect of the violent robbery of the Westpac Bank." (We note that the figures given show that the reference to 1997 must be a typographical error and should be 1977.)*

[41] The inclusion of inaccurate information in the list of previous convictions was a serious failure by the police. The suggestion the record had not been updated presumably referred to the conviction the appellant was serving at the time and which was added in manuscript. It is hard to find any justification for such an omission. The sentence in that case had been passed nine months before sentence in the present case. Even worse is the failure to remove the record of the convictions which had been quashed. They were quashed eight years before and we can only presume that any courts which has sentenced the appellant in the meantime has done so having been given a criminal record form with those serious convictions still included.

[42] We would also take this opportunity to remind courts and prosecution authorities of the Rehabilitation of Offenders Act 1998 which requires anyone who intends to refer a sentencing court to an irrelevant convictions to seek the leave of the court which must be sought in chambers; section 23. There has been no mention of any such application in any of the criminal appeals which have been brought before this Court in the current session. It is protection of the accused which must be observed.

[43] The learned judge ordered a sentence of ten years imprisonment in this case. He explained how that was reached:

> *"I fix a starting point of 12 years imprisonment. ...and now consider the aggravating features. In my view they are the accompanying terror to the victim, her teenage relative and infant child. This was a well planned and joint enterprise. The attack was executed with weapons and a clear willingness to use them. None of the money has been recovered and you have a long list of relevant previous convictions. Accordingly I believe the justified starting point is aggravated by those features and may be increased by an additional 3 years making an available sentence for you of 15 years in jail.*
>
> *I have read with care what you have written to the court by way of mitigation. I note that you ask me to consider that you are already serving 7 years in prison and I will do so in a moment when I come to*

consider the totality principle. Your plea concerning the needs of your family is hollow. If you really had the needs of your family at heart, if you really wanted to be a leader to your child and a good husband to your wife you would have turned away from this life of habitual crime ... Sadly your family will grow up without you because society can no longer tolerate your living amongst us.

There is little that can be said by way of mitigation for you but in recognition of your family needs I deduct 1 year from the 15 years aggravated total in jail coming to a penalty for this offending of 14 years imprisonment. ...

I now turn to the totality principle. I must consider whether the sentence of 14 years should be consecutive or concurrent with your existing term. ...In my view you deserve a consecutive sentence. That would mean that you would not be released from jail until 2024. I see such a long term of imprisonment as being of no practical deterrent or rehabilitative effect on you and the only victims of such a long and crushing period of incarceration would be your family. For that reason and that reason alone I am going to reduce the 14 year term of imprisonment I would have imposed to 10 years to be served consecutively with your existing sentence."

[44] Whilst it may be that the inclusion of the quashed convictions in the appellant's criminal record could have prevented some further reduction of the fourteen year sentence, it would not have amounted to anything in the region of four years - the amount the judge took away on account of the totality principle. The reduction from fourteen to ten years was the result solely of the application of the totality principle and would have resulted in the sentence being reduced to ten years in any event.

[45] The second ground of appeal is that the sentence was harsh and excessive. We cannot agree. Earlier this year, in the case of *Sakiusa Basa v State* [2006] Cr App AAU24/05, 24 March 2006, this Court pointed out that the levels of sentences in robbery cases should be based on English authorities rather than those from New Zealand, as had been the previous practice, because the sentence provided in our Penal Code is closer to that in the English law.

[46] The learned judge, properly, considered the English cases of *Turner and others* [1975] 61 Cr App R 67, *Daly* [1981] 3 Cr App R (S) 340 and *Hooley* [2001] 2 Cr App R (S) 105 in order to determine the appropriate starting point. He did so carefully and properly and the sentence he arrived at was correct.

[47] The appeal against sentence is dismissed.

Order:

[48] Appeals against conviction and sentence dismissed and sentence of ten years imprisonment consecutive to the appellant's present sentence is confirmed.

Ward, President

FIJI COURT OF APPEAL

Scott, JA

McPherson, JA

Solicitors:

Appellant in person
Office of the Director of the Public Prosecutions, Suva for the respondent