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

CRIMINAL APPEAL NO. AAU0063 OF 2006S
(High Court Criminal Action No. HAA 57 of 2006S)

BETWEEN: OVINI TUITOGA

Appellant

AND: THE STATE

Respondent

Coram: Ward, President
Ellis, JA
Penlington, JA

Hearing: Tuesday, 19th June 2007, Suva

Counsel: Appellant in Person
A Driu for the Respondent

Date of Judgment: Monday, 25th June 2007, Suva

JUDGMENT OF THE COURT

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[1] Pursuant to leave granted by Ward P sitting as a single Judge of this Court this is an appeal from the High Court in its appellate jurisdiction under s.22(1) of the Court of Appeal Act Cap 12 on two questions of law.

Background

[2] The factual background can be stated shortly. A man called Dinesh Chandra Sharma (Sharma) on 12 February 2005 was robbed of $25 after he had been assaulted. Early in the evening of that day Sharma had picked up six boys to go to

Waila. Of the six persons Sharma knew the appellant and another named Mesu. When Sharma stopped his van Mesu got out and opened the sliding door. As the others got out someone assaulted Sharma from the rear. The dashboard light was switched on. Another Vilive Qio showed Sharma a wall clock and asked him if he wanted to buy it. The appellant then snatched money from Sharma's pocket, Sharma tooted the horn of his vehicle and his six passengers fled. A little later Sharma met up with a police patrol. An effort was made to find the assailants. The appellant was found. Sharma identified him as one of the robbers. The appellant was then arrested and taken to the police station. Sharma also went to the police station. He saw the appellant there. An identification parade was not held. The appellant was interviewed but he denied any involvement in the robbery. Later Qio was found and arrested. Sharma also identified him at the police station. Again there was no identification parade. Later the appellant and Qio were charged with robbery with violence.

The Case in the Magistrate's Court

[3] On 14 February 2005 the appellant and Qio appeared in the Magistrate's Court at Nausori on one count of robbery with violence. Each pleaded not guilty. After some remands the trial took place in the Magistrates Court on 12 April 2005. Again both the appellant and Qio were unrepresented. The prosecution called Sharma and five police officers. In the course of Sharma's evidence there was a dock identification of the appellant. Under cross-examination by the appellant Sharma was asked how he had come to know his (the appellant's) name. Sharma answered "used to work for me as a casual labourer." Here it is to be noted, because this point is relevant to the first question of law, there was no evidence before the Magistrate that Sharma knew the appellant as a casual labourer "with the Nausori Town Council." Indeed the Nausori Town Council was not mentioned in evidence.

[4] At the end of the prosecution case the Magistrate found that there was a case to answer in respect of each accused. Both the appellant and Qio then elected to give sworn evidence. The appellant said in evidence that he did not know anything about the matter. Under cross-examination the appellant admitted that he knew Sharma "when running shop" in Waila. At the conclusion of the evidence the Magistrate adjourned the hearing to 29 April 2005 for judgment.

[5] On 29 April 2005 when the case was called the appellant was not present. He appeared on 2 May and was warned to appear on 13 May, however, he failed to do so and a bench warrant was issued for his arrest.

[6] On 2 February 2006 the appellant appeared on the bench warrant having recently been apprehended. The Magistrate delivered judgment. The appellant was found guilty as charged. Qio was acquitted. After hearing the appellant in mitigation the Magistrate sentenced him to 3 years in imprisonment. The appellant thereupon appealed against both conviction and sentence to the High Court.

Appeal to the High Court

[7] The appeal was heard on 31 October 2006. Ahead of the hearing the appellant, who was representing himself, filed written submissions. The Judge distilled the following three grounds of appeal.

> *"(a) That the Court should have rejected the complainant's testimony as false as it was inconsistent with pre-trial police statements made by him.*
>
> *(b) That the Court should have rejected the complainant's identification of the appellant as:*
>
> - *There was no identification parade at the police station.*

- *That the complainant's statements on identification pre-trial to the police were different from his evidence in court in that it was said he identified one Mesulame Vakayadra and Vilive Qio as the robbers not the appellant*

- *That the complainant falsely testified that he knew the appellant through his part-time work at the Nausori Town Council.*

(c) Otherwise it was submitted the trial was unfair as the learned Magistrate did not explain to the unrepresented appellant the general principles of criminal law, the purpose of cross-examination and the essential elements of the crime."

(We have underlined one of the sub grounds which is relevant to one of the issues now before us).

[8] Judgment was delivered on 3 November 2006. The Judge rejected all three grounds of appeal and as well rejected the appeal against the sentence.

[9] In the course of considering the second ground of appeal relating to identification the Judge said.

> *"Further, the fact that the complainant under cross-examination on page 18 said that he knew the appellant as a casual labourer with the Nausori Town Council is not significant. As even if that evidence is ignored, the pre-trial identifications, the appellant's submission(sic admission) that he knew the complainant and the dock identification provide an evidential basis for the learned Magistrate's identification findings."*

[10] As we have stated earlier there was no evidence before the Magistrate that Sharma knew the appellant as a casual labourer with the Nausori Town Council. The evidence was simply that the appellant used to work (for him) as a casual labourer. The connection with the Nausori Town Council first appeared in the appellant's

grounds of appeal filed ahead of the High Court hearing. We have set out and underlined the judge's summary of the relevant passage in the appellant's appeal.

Appeal to the Court of Appeal

[10] After the dismissal of the appeal to the High Court against conviction and sentence the appellant lodged an appeal to this Court. This of course, was an appeal from the High Court in its appellate jurisdiction, and accordingly was within the terms of section 22(1) of the Court of Appeal Act Cap12. Such an appeal is limited to a question of law.

[11] The appellant relied on a number of grounds of appeal which did not involve any question of law. He did however complain that there was a failure by the Magistrate to inform him, an undefended accused, of his right to call witnesses.

[12] As to the appeal against sentence the appellant did not raise any issue which would allow this Court to consider as appeal under s.22(1A) of the Court of Appeal Act.

The Two Questions of Law

[13] The appeal was called before Ward P, sitting as a single Judge of this Court on 16 January 2007.

[14] The appellant was granted leave to appeal on two questions of law:

(a) whether the Judge in the High Court erred by considering a fact on appeal in relation to the issue of identification, namely, the appellant working for Sharma at the Nausori Town Council when this piece of evidence was not raised at the trial at the Magistrates Court; and

(b) whether there was a miscarriage of justice at the trial when the appellant was not informed of his right to call witnesses.

[15] We shall deal with each question in turn.

The Nausori Town Council Question

[16] It is a common ground that the appellant did not at any time work for the Nausori Town Council.

[17] The appellant claims that the Judge's references to Sharma knowing the appellant "as a casual labourer with the Nausori Town Council" (which the Judge dismissed as not being significant) when in fact he had not worked there was prejudicial and detrimental to the determination of the appeal.

[18] As we have already said there was no evidence at all relating to Nausori Town Council. Likewise there was no evidence that either Sharma or the appellant worked there or that that was how Sharma knew the appellant. This then was a mistake as to the facts of the case on the part of the Judge on appeal.

[19] His reference to the point was understandable. It was the appellant himself in his submissions on the High Court appeal who had mentioned the Nausori Town Council for the first time. In those submissions the appellant asserted as one of his grounds of appeal that the "complainant falsely testified that he knew me as I worked at the Nausori Town Council." That of course was a false assertion by the appellant.

[20] The Judge's mistake is not however determinative. We must ask ourselves: was the appellant adversely prejudiced by that mistake of fact and, if so, did such prejudice give rise to a risk of injustice?

[21] First, quite clearly, the mistake did not infect the rest of the Judge's reasoning. He himself said that the point was "not significant."

[22] Secondly, there was sufficient evidence to support the finding of the Judge that the identification of the appellant as one of the robbers was established beyond reasonable doubt. We point to the following:

(i) Sharma's evidence that he knew the appellant.

(ii) The two pre-trial identifications, namely, when the appellant was found by the police and then at the police station.

((iii) The admission by the appellant that he knew Sharma when he was running a shop at Waila.

(iv) The dock identification at the trial.

[23] We therefore conclude that although the Judge made an error of fact, it did not amount to an error of law because the appellant was not prejudiced thereby and it did not give rise to a risk of injustice. That is sufficient to answer the first question.

The Right to call Witnesses

[24] The second question concerns the appellant's right to call witnesses. The appellant asserts that he was not informed by the Magistrate of his right to call witnesses.

[25] There are two provisions which are relevant. First, s.29(1) of the Constitution which provides that every person charged within an offence has the right to a fair trial before a court of law; and secondly s.211(1) of the Criminal Procedure Code Cap 21 which provides:

> ***"At the close of the evidence in support of the charge, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any).***
> (The emphasis is ours).

[26] This point was not raised in the High Court.

[27] The record of the proceedings in the Magistrate's Court is silent as to whether the appellant was informed under s.211(1) of his right to call witnesses. At the point in the record when the prosecution had closed its case the following is recorded:

> ***"Court:***
>
> ***I find that there's a case to answer against both accused.***
> ***Put them to their defence.***
>
> ***Accused 1: Wish to give evidence on oath.***
> ***Accused 2: Wish to give sworn testimony."***

[28] The appellant then gave evidence in his own defence.

[29] Here, we note that before Ward P, the appellant, who appeared in person, told the Court that he had wished to call his mother, Sera Tuitoga, as his witness to depose that he had not worked for the Nausori Town Council at any time.

[30] We therefore intend to proceed on the basis that the appellant was not told by the Magistrate that he had the right to call witnesses. It necessarily follows that the Magistrate made an error of law. Taking this view we are entitled to consider the

point notwithstanding that it was not raised in the High Court. See ***Edwards v. Bairstow*** [1956] AC 14, 36 ***Avinesh Kumar v. The State*** Criminal Appeal No AAU0048 of 2006.

[31] Down the years a number of cases have dealt with the situation where an accused has not been told that he has the right to give evidence on his own behalf, another obligation on the presiding judicial officer under s.211(1) of the Criminal Procedure Code.

[32] ***Archbold Criminal Pleading Evidence and Practice*** 39th Edition para. 505 states:

> ***"The defendant ought to be distinctly told by the court of trial that he has a right to give evidence on his own behalf: R v Warren (1909) 2 Cr.App.R.194; but failure so to inform him does not itself necessarily invalidate the trial: R v. Saunders (1899) 687 L.J.Q.B. 296; R v Yeldham (1924) 17 Cr.App.R. 18, though, where the trial is unsatisfactory in other respects, such a failure may lead to the conviction being quashed: R v Graham (1924) 17 Cr.App.R. 40."***

[32] On the basis of these authorities we are of the opinion that a failure to comply with s.211(1) of the Criminal Procedure Code does not, of itself, necessarily invalidate the trial. That would be so, however, if the trial was otherwise unsatisfactory and that would result in the quashing of the conviction.

[33] Had the evidence of the mother been given, in our view, the conviction would still have stood. The mother's evidence would not have added any weight to the appellant's defence, as there had been no evidence from the prosecution, as we have pointed out earlier, that he had worked as a casual labourer for the Nausori Town Council. Indeed the mother's evidence would not have been relevant to lthe issues before the Magistrate.

[34] Apart from the failure of the Magistrate to inform the appellant of his right to call witnesses there were no other matters which rendered the trial unsatisfactory. We

therefore conclude that the appellant was not prejudiced by the failure of the Magistrate to inform him of his right to call witnesses and no injustice arose therefrom. The appellant had a fair trial.

[35] This therefore is a proper case for the application of the proviso to s.23(1) Court of Appeal Act Cap 12. We find that while there was an error of law on the part of the Magistrate there has not been a substantial miscarriage of justice.

General comments as to Summary Trial Practice

[36] Before parting with the case we make some general comments which are directed to Magistrates conducting summary trials in the Magistrates Court.

[37] First, the terms of s.211(1) of the Criminal Procedure Code must be complied with in their entirety.

[38] Secondly, and importantly, the presiding Magistrate should carefully record in his or her notes that s.211(1) has been complied with. In the event of an appeal such a record would put compliance beyond doubt.

[38] In making these comments we are conscious of the pressure of time in a busy summary trial court. We cannot however emphasise too strongly that s.211(1) must be complied with.

Result

[39] For the reasons given the appeal against conviction is dismissed.

Ward, President

Ellis, JA

Penlington, JA

Solicitors:

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

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