

**JOSEFA NAIVALUWAQA**

v.

**THE STATE**

[HIGH COURT, 1996 (Fatiaki J) 25 October]

## Appellate Jurisdiction

*Constitution- fundamental rights- provisions to secure protection of law- right of an accused person to be given adequate time to prepare a defence- Constitution (1990) Section 11 (2) (c).*

On appeal to the High Court it was argued that the 20 hours given to the appellant to prepare his defence was inadequate and therefore in breach of his constitutional rights. The High Court HELD: dismissing the appeals, that although the time given to the appellant was "very short indeed" the Constitution did not specify a minimum time to be given to an accused and that observance the right had to be examined and assessed on a case by case basis taking all into account all relevant circumstances.

No case was cited.

Appeal against conviction and sentence in the Magistrates' Court.

*Appellant* in Person

*Ms. R. Olutimayin* for Respondent

**Fatiaki J:**

On 23rd December 1995 the appellant was charged with another person for an offence of Robbery With Violence. The appellant's co-accused pleaded guilty to the offence and upon his conviction was sentenced to two years imprisonment.

The very brief facts were that the complainant, a young Australian tourist whilst taking a short-cut to his hotel in Williamson Road, was set-upon by the appellant and another who assaulted and robbed him of his wallet containing cash and travellers cheques.

The appellant for his part pleaded not guilty and as the complainant was due to depart Fiji, the prosecution successfully applied to the trial magistrate to have his evidence recorded.

The complainant testified that at about 2.50 p.m. as he was following a small track leading to his hotel he was followed by two men and was robbed of his wallet. He testified that it was the appellant (Old man) who assaulted him, as the younger one pulled his wallet out. He was very sure that the appellant was one

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of the two assailants.

A Thereafter the police prosecutor called a civilian and three police officers. The complainant's medical report and the appellant's police interview were also tendered as Exhibits 1 & 3 respectively.

B The appellant elected to give sworn evidence in his defence and denied any knowledge or involvement in the commission of the offence. In his own words when accused of the crime, he said: "I thought I was dreaming." Quite plainly the appellant raised a defence of mistaken identification.

The learned trial magistrate was clearly conscious of the appellant's defence and accordingly warned himself in his judgment in appropriate terms. He did not however itemise the evidence of identification in the case which he took into account but these may be summarised as follows:

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- (1) The offence occurred in broad daylight;
  - (2) There were only two attackers;
  - (3) The complainant was in very close proximity to his assailants for as long as it took to disable and rob him;
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- (4) The appellant in his police interview admitted being in the company of another in close proximity to the place where the offence occurred; (i.e. Williamson Road);
  - (5) The appellant was located a short distance away from the scene of the offence and was followed until he and his co-accused were caught after alighting from a bus they had earlier boarded;
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- (6) The appellant was seen a short time after the robbery in the company of an accused person from whom the complainant's wallet was later recovered.

F From the foregoing it may be said that there was before the trial magistrate a clear and unbroken chain of circumstantial evidence beginning with the robbery of the complainant, through the pursuit of his assailants, and culminating in the arrest of the appellant and his co-accused and the recovery of the complainant's property, which, if accepted (as it was), would have rendered the appellant's dock identification both safe and satisfactory.

G In the circumstances the appellant's complaint that no identification parade was conducted has no merit and is dismissed.

I turn next to consider the appellants two remaining grounds of appeal which may be summarised as follows:

- (1) That he was not formally charged by the police ;  
and

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- (2) That he was not given adequate time to prepare his defence  
in breach of section 11(2)(c) of the Constitution.

As to (1) above, there is in my view no law which requires a police officer to formally charge an accused person before he is brought to Court except under principle (d) of the Judges Rules which requires an investigating officer who has enough evidence ... without delay (to) cause that person to be charged ...

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In this case however the appellant was arrested without a warrant and Section 23 of the Criminal Procedure Code (Cap.21) merely requires him to be sent without unnecessary delay ... before a magistrate. In this latter regard on the appellant's own admission he was taken before the Magistrates' Court barely 20 hours after his arrest and in the circumstances no complaint can properly be entertained in this regard.

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Further, Section 78(5) of the Criminal Procedure Code provides :

“When an accused person who has been arrested without a warrant is brought before a magistrate, a formal charge, containing a statement of the offence with which the accused is charged shall be signed and presented by the police officer preferring the charge.

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In this regard the Magistrates' Court record contains an appropriate charge signed by both the Divisional Prosecuting Officer and the trial magistrate and dated the 23/12/95. Nothing more is required by the law and this ground of appeal must necessarily fail.

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As to (2) above, Section 11(2)(c) of the Constitution provides :

“Every person who is charged with a criminal offence -

- (c) shall be given adequate time and facilities for the preparation of his defence.”

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The appellant complains that the 20 hours since his arrest and appearance in Court was wholly inadequate to prepare his defence considering he was all the time in police custody. Again I cannot agree.

In the first place, the section nowhere provides a minimum time which an accused must be given to prepare his defence and therefore, the right must be examined and assessed on a case by case basis bearing in mind the particular circumstances of each case and the wider interests of justice which includes that of the prosecution.

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In this case the appellant's consistent defence throughout his arrest and at the

A trial tantamounts to an alibi or mistaken identification and this was fully considered by the trial magistrate and rejected. Furthermore, the special circumstances concerning the complainant and the wider interests of justice demanded that the complainant's evidence be recorded at the earliest possible opportunity provided the appellant was given every opportunity to cross-examine the complainant which he did.

B In the circumstances while the time given to the appellant to prepare his defence may be considered very short indeed, having regard to the nature of that defence and the absence of any recorded objections thereto and the constraints upon the prosecution, I am satisfied that there has been no breach of the provisions of Section 11(2)(c) of the Constitution.

C This second and final ground of appeal is without merit. The appeal against conviction is accordingly dismissed.

As for the sentence of two years imprisonment, although I can sympathise with the appellant's family, the sentence was by no means either harsh or excessive. Indeed, if anything, it erred on the lenient side when one considers the role of the appellant in the robbery and the fact that his co-accused received the same sentence although he had pleaded guilty to the offence.

D *(Appeal dismissed.)*

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