IN THE SUPREME COURT OF FIJI
Appellate Jurisdiction
Criminal Appeal No. 124 of 1980

000130

Between:

1. PAULA TIKOISUVA
2. MARIKA LUTU — Appellants

and

REGINAM — Respondent

Appellants in Person
Mr. R. Lindsay for the Respondent

REASONS FOR JUDGMENT

I have already allowed this appeal of second appellant and set aside his conviction on a charge of robbery with violence. I reserved my reasons to be given later. This I now proceed to do.

On the 30th September 1980 second appellant was convicted after trial by Suva Magistrates Court of robbery with violence and was sentenced to three years' imprisonment.

First appellant pleaded guilty to the same charge and was sentenced to four years' imprisonment. His appeal is against sentence only. I shall deal with his appeal later in this judgment.

Second appellant was convicted on the evidence of complainant (P.W.1) and his companion (P.W.2) both of whom testified that this appellant was one of three youths who attacked and robbed P.W.1 at Dovi Road, Nadera on the afternoon of Friday 12th September 1980.

When he was seen and interviewed by Detective Sergeant Gyan Chand (P.W.5) on 14th September appellant denied having taken part in any robbery. He said on the day of the incident he was out fishing with his cousin, one Fabiano Gata (D.W.1) who testified to that effect in Court. At his trial appellant

again denied any involvement in the robbery alleged against him claiming that he was out fishing with his cousin at the time when the alleged robbery was supposed to have taken place.

In his evidence P.W.1 said on that particular Friday he was returning after work from Laucala Beach Estate on his way to Nadera where he lived. He had $31 in a pay packet which he had put in his bag where he kept his clothes. P.W.2 was with him. It was raining when they reached Dovi Road where they met three youths who had been walking from the opposite direction. According to P.W.1 one of the youths was appellant. He said one of the youths held his shirt. One of them asked for cigarettes and money to which P.W.2 replied that they had no money whereupon he was punched by one of the youths. He managed to struggle free and ran off. P.W.1 said appellant punched him over each eye and held him by the neck. He then grabbed the bag from him, took out his clothes and pay packet and threw the bag away. P.W.1 said appellant was wearing a singlet.

P.W.2 gave evidence that he was with P.W.1 and claimed that appellant was one of the youths involved in the robbery. According to him appellant had a hat on but couldn't remember what sort of clothes he was wearing.

Neither P.W.1 nor P.W.2 knew appellant. As far as they were concerned appellant was a complete stranger to them.

The defence in this case was one of alibi. Appellant's alibi was given and known to the police on 14th September so that the police knew or ought to have realised that the issue of identification was going to be important in their case against appellant. It was particularly important that appellant should be properly identified because by putting forward his alibi appellant was asserting that P.W.1 and P.W.2 were mistaken in regard to his identity. Furthermore the person identified as appellant was said to be wearing a hat which could easily have caused them to make a mistake in regard to their so-called

identification of appellant. No particular reasons were given by P.W.1 and P.W.2 why their identification of appellant as one of the culprits in the robbery should be regarded as reliable and safe in the face of appellant's consistent denials. The prosecution identification evidence so far as it relates to appellant did not have that degree of positiveness which a Court would normally require bearing in mind the high standard of proof required in a criminal case. In this case the possibility that appellant may have been identified erroneously cannot on the evidence before the Court be ruled out altogether.

It appears that the police was somewhat slipshod in this case in omitting to test the appellant's alibi by holding a properly conducted identification parade. The circumstances of the case clearly indicated one. As I have already pointed out the police was aware of the alibi defence put forward by the appellant on 14th September. The case did not come up for trial until the 29th September which meant that an identification parade could easily and should have been held if better proof of the identity of appellant was to be obtained. As it was, the evidence at the trial was reduced to one oath against another making it impossible for a Court of Law to rule out the possibility that appellant's alibi might well be true and that he was in fact out fishing with his cousin as he claimed all along. In any case his alibi defence which as not been shown to be fabricated or unworthy of belief must by that very fact create a reasonable doubt about his alleged involvement in this case. Such a doubt must of course be resolved in appellant' favour. It is interesting to note that appellant has no record of any kind with the police and what I have seen of him, he appeared to be a forthright person.

Crown Counsel did not seek to support the conviction of appellant at the hearing of this appeal. He stated he had certain lingering doubts about appellant's implication in the robbery in question.

For the reasons given the appeal has had to be allowed and the conviction quashed.

I now turn to the appeal against sentence brought by the first appellant who had pleaded guilty to the charge of robbery in this case and was sentenced to four years' imprisonment.

The case as is clear from the facts to which I have already made reference was not the worst of its kind, serious as the charge undoubtedly was. The total value of property taken was $49.50. Neither P.W.1 nor P.W.2 was seriously harmed in the incident which occurred in broad daylight and appeared to be spontaneous and unplanned. In these circumstances I think the sentence of four years' imprisonment was manifestly excessive and ought to be adjusted.

Accordingly the appeal would be allowed and the sentence imposed in the Court below set aside and in lieu thereof appellant is sentenced to eighteen months' imprisonment.

(T.U. Tuivaga)
Chief Justice

Suva,
13th February 1981.