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IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

CRIMINAL APPEAL NO. 14 OF 1989
(Criminal Case No. 7 of 1989)

Between :

LITIWAI SETEVANO — Appellant

v.

THE STATE — Respondent

Mr. R. Chand for the Appellant
Mr. R. Perera for the Respondent

Date of Hearing : 29th October, 1990.
Delivery of Judgment : 27th May, 1991.

JUDGMENT OF THE COURT

The Appellant was charged and pleaded not guilty to an offence of murdering *Jeet Kaur d/o Niranjan Singh* on the 12th of February 1988. He was tried in the High Court at Suva before a judge and 3 assessors. The assessors returned the unanimous opinion that the Appellant was not guilty. The learned trial judge then adjourned the trial until the following day and on resumption delivered a judgment in which he over ruled the assessors and convicted the Appellant of *Manslaughter*. Thereafter the Appellant was sentenced to 5 years imprisonment.

The Appellant has advanced 5 grounds of appeal against his conviction and sentence as follows :

" *(a)' That the Learned Trial Judge erred in law and in fact in failing to consider the conflicting evidence of the state witnesses.*

(b) That the Learned Trial Judge erred in law and in fact in failing to consider the defence submission as to the mode of identification.

(c) That the Learned Trial Judge erred in law and in fact in disregarding the unanimous verdict of all the assessors.

(d) That under all the circumstances and in consideration of all the evidence of the case the finding of the Learned Trial Judge is unsafe unfair and unreasonable.

(e) That the sentence of the Learned Trial Judge is too harsh and excessive and is not supported by the facts of the case. "

It is convenient to deal with grounds *(a)* to *(d)* together as they collectively attack the judgment of the learned trial judge convicting the appellant, and, although each raises a distinct ground of complaint they may all be succinctly compressed into a single question, namely :

" *Was the learned trial judge entitled on the evidence before him to disregard the unanimous opinions of the assessors ?* "

In answering the question it is necessary to briefly consider the legal position as set out in the provisions of the *Criminal Procedure Code Cap. 21.*

Section 263 lays down that the mode of trial in the Supreme Court (*now the High Court*) shall be by a judge sitting with 2 or more assessors. In this case the Appellant was tried before Mr. Justice Jesuratnam and 3 male assessors.

Section 299(1) requires each of the assessors to state his opinion orally of the guilt or otherwise of the accused to the judge after he has summed-up the case to them. Here the trial record reveals that each of the 3 assessors orally expressed the opinion that the accused was : *'Not Guilty'*.

Then *Section 299(2)* provides so far as relevant for our present purposes :

> *"(2) The judge shall give judgment, but in doing so shall not be bound to conform to the opinions of the assessors :*
> *Provided that, ... when the judge does not agree with the majority opinion of the assessors, he shall give his reasons, which shall be written down and be pronounced in open court for differing with such majority opinion ..... "*

Clearly the opinions of the assessors in a trial in the High Court are not binding on the trial judge; but if he disagrees with the assessor's opinions, then he is required to give written reasons for differing from them.

Whilst we would not seek to categorically prescribe the circumstances in which a trial Judge may overrule the unanimous or majority opinions of the assessors a reference to some of the prior judgments of this Court on the subject should be helpful. In Apakuki Saukuru v. R. *Cr. App. No. 45 of 1981* this Court referred to decided cases which provide *"some guidance to the proper exercise of these particular judicial powers"*.

We quote the following passages appearing on *pages 14, 15 and 16* of this Court's judgment in Apakuki Saukuru's appeal :

The earliest case appears to have been Ram Lal v. The Queen (Cr. App. 3/1958) in which the following passages appear. We quote them from the judgment in Ram Bali v. R. (1960) 7 F.L.R. 80 at 83 :

" *'In order to justify a Court in differing from the unanimous opinion of the assessors who were in a favourable position to assess the reactions of a man of the class and race they would find the accused to be, there must be very good reasons reflected in the evidence before that Court' .....*

'A trial judge would require to find very good reasons indeed, reflected in the evidence, before being justified in differing from an unanimous opinion of the assessors on such a question of fact.' "

With reference to that passage, however, it was said in Ram Bali's case, at p.83 :

" *It will be observed that, in both of those passages, the Court was careful to limit its propositions to the particular sort of question which arose in that case, namely, the probable reactions to alleged provocation of a man of a particular class and race; and this present Court does not doubt that, on such a question, the Judge ought not to differ from a unanimous opinion of assessors unless he can find - and can find 'reflected in the evidence' - very good reasons for so doing. But it would be wrong to erect this into a general proposition applicable in all cases. In general, it is enough if, as in the present case, the Judge proceeds on cogent and carefully reasoned grounds based on the evidence before him and his views as to credibility of witnesses and other relevant considerations. "*

The Privy Council in P.C. Appeal No. 18 of 1961 upheld the action of the trial judge in Ram Bali's case and sustained the conviction, saying :

" *'This was a strong course to take but there is no reason to think that the learned Judge did not pay full heed to the views of the assessors or to the striking circumstance that they were unanimous in favour of acquittal. Nor is there reason to think that he was unmindful of the value of their opinions or their qualifications to assess the testimony of the various witnesses in a case of this nature. In his summing-up he had said that their opinions would carry great weight with him. The decision of the learned Judge was based upon his own emphatic conclusions in regard to the evidence.*

Their Lordships can discern n o error in the approach of the learned Judge in arriving at his positive and affirmative conclusions : It is manifest that his acceptance of certain witnesses and his rejection of others made him satisfied beyond even 'the slightest shadow of doubt' of the guilt of the appellant.' "

In Narend Prasad v. Reginam (1971) 17 F.L.R. 200 this Court having quoted that passage of the Privy Council's judgment, said, at p. 220 :

" *The judgment of the Privy Council upheld the action of the trial Judge and sustained the conviction. We are are of the opinion that the passages quoted from their judgment would apply with equal force to the case before this Court. We are satisfied that ample reasons did exist for the action of the learned trial Judge in differing from the opinion of the assessors, and that proper consideration had been given by him to all the factors involved.* "

The same authorities were referred to in Shiu Prasad v. R. (1972) 18 F.L.R. 68, and at page 71 this Court said:

" *As regards the second ground of appeal, it is true that if a Judge is to differ from the opinions of the assessors he must have cogent*

reasons for doing so and those reasons must be founded upon the weight of the evidence in the case and must of course also be reflected in his judgment. "

And later, referring to the Ram Bali case :

" *That is the case here. Those 'emphatic conclusions' expressed in his judgment are all the reasons which a trial Judge requires for differing from the opinions of assessors. The learned Judge, in his lengthy summing up to the assessors, stressed that he would give weight to their opinions, and we have no doubt that he considered them carefully.* "

In allowing the Saukuru appeal and quashing his conviction for murder and substituting it with manslaughter the Court of Appeal asked :

" *If the majority of the assessors thought there was a doubt, has the learned Judge given emphatic conclusions reflected in the evidence for excluding that doubt ?* "

Later in the same judgment, the Court said :

" ..... *but when a Judge adopts what the Privy Council called a strong line and overrules unanimous assessors, we agree with the decided cases that his reasons must be cogent and his own approach to the relevant law should be impeccable.* "

More recently in Mataiasi Raduva and John Heatley v. R. Cr. App. No. 109 of 1985 this Court set aside a conviction in which the unanimous opinions of the assessors was over-ridden by the trial judge in circumstances not dissimilar to the present appeal. At page 4 of the cyclostyle judgment this Court said :

" *Now there are cases from time to time in Fiji where a judge does convict in the face of contrary assessor opinion. These cases are rare and in our experience are one's where the evidence against an accused is so over-whelmning and so affirmatively established that one can say that the assessors' conduct was perverse.* "

Then at *page 5* in dealing with the question of assessing credibility this Court said :

" *In matters of this sort, where credibility is in issue, we would like to say, from not inconsiderable experience on the bench in criminal proceedings, that the status of being a judge does not confer any advantage, in the field of assessing truthfulness, over any other man of the world. Indeed the contrary is sometimes suggested. That is why we have assessors or juries.* "

In this case 3 citizens, a training officer, a salesman and an aerial surveyor having seen and heard all the evidence in the case and after having heard his lordship's detailed summing-up to them, unanimously decided that the appellant was *'not guilty'* of any offence.

It is clear that a Judge in Fiji is entitled in law to disagree with the majority opinions of the assessors, and even where they are unanimous, but his reasons for doing so must be cogent and they should be clearly stated. In our view they must also be capable of withstanding critical examination in the light of the whole of the evidence presented in the trial.

In this case the learned judge gave his reasons for differing from the unanimous opinions of the assessors in a 4 page document entitled JUDGMENT.

In brief the learned trial judge accepted the appellant's confessional statement as accurate and credible. There was also the independant supportive testimony of the three principal prosecution witnesses *Naseeb Kaur*, *Sumintra Wati* and *Filimone Serua*. The trial judge also accepted that the deceased died as a result of the brain injury she sustained when she was assaulted by the appellant and then dropped from a height onto an area of rocks and stones. In the event he was satisfied that there was sufficient evidence to convict the appellant of *Manslaughter*.

Were the assessors' opinions so erroneous or contrary to the evidence led in the case as to tantamount to being 'perverse' or can they be explained away on any other basis ? In his judgment the learned judge went to considerable lengths in trying to explain the assessors' opinions but was finally driven to conclude *" ... their verdict is inexplicable on any basis"*.

With respect to the learned trial judge we do not agree. We do not know what evidence the assessors accepted or rejected nor can we make any findings based on credibility of witnesses. We are entitled however, to accept and act upon the sworn evidence led in the trial in determining whether the learned trial judge erred in his reasons for over-ruling the unanimous opinions of the assessors.

Firstly, the trial judge states in his judgment that there was no reason for the assessors to reject the appellant's confessional statement. There are good grounds to surmise that the assessors could not have attached any weight to the appellant's confessional statement.

the assessors could have believed that the appellant was assaulted by the police and there is cogent evidence that pointed in that direction. *Naseeb Kaur*, one of the two main prosecution witnesses, in describing the appellant's appearance at the identification parade which was conducted during the appellant's police interview, said in her cross-examination at *p. 17* of the record :

> " *There were about 10 Fijians in parade. There was no one similar to him. He was totally outstanding. Accused had swollen lips. Swollen on one side. There was some swelling around the eyes.* "

The trial judge also had before him the sworn evidence of the prosecution's witness *Emosi Radio* who had testified albeit in cross-examination that after he and the accused were taken to the police station they were both beaten up by the police and questioned in a harsh and rough manner. He too saw the accused's face was swollen.

Although the trial judge did not allude to this evidence in his ruling in the trial within a trial or refer to it in his summing-up to the assessors nevertheless it was evidence which they were entitled to consider in determining what weight *(if any)* they could attach to the accused's confessional statements.

Then there is the *undisputed* evidence of the defence witness *Netani Motokai* who had attended the same identification parade and who also testified at *p. 147* in the trial within a trial and at *p. 279* in the trial proper that he too had seen the accused's face, mouth, lips and cheeks were swollen.

This latter witness was not cross-examined on this important aspect of his evidence either in the trial

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within a trial or in the trial proper by the State Prosecutor but nevertheless counsel submitted that he was not worthy of credit.

In Walter Berkley Hart *(1932) 23 Cr. App. R. 202* where 3 alibi witnesses were not cross-examined, the Court of Appeal quashed the conviction and said at *p. 207* :

> " *In our opinion, if, on a crucial part of the case, the prosecution intend to ask the jury to disbelieve the evidence of a witness, it is right and proper that that witness should be challenged in the witness box or, at any rate, that it should be made plain, while the witness is in the box, that his evidence is not accepted.* "

In spite of this the learned trial judge in his ruling in the trial within a trial dismissed Netani's evidence with a passing reference to his long familiarity with the accused and an irrelevant eye-sight disability.

In similar vein the learned judge having himself laid the foundation for suggesting that the accused's swollen mouth and lips were the result of a birth deformity, embarked on speculation that had no basis in the evidence before him as to the cause of the accused's swollen face, eyes and lips. He further enlarged on his speculation when he sought to *'explain away'* Naseeb Kaur's evidence as a mistake.

Having carefully considered the learned trial judge's ruling we are also left with the indelible impression that he misdirected himself as to the burden of proof in regard to the admissibility of the accused's confessional statement.

In the *4th paragraph* of his ruling in the trial within a trial the learned judge states :

" *It is not enough merely to challenge the statement. There should be at least some evidence to throw doubt, to throw suspicion. I am most anxious to find out whether there could be a basis for the allegation made by the accused.* "

Then in *paragraph 8 the following sentence occurs :*

" *The accused has not succeeded in throwing any doubt on the admissibility of the statement.* "

And finally at *paragraph 10* :

" *There should be created in my mind some doubt, on the voluntariness of the statement.* "

In the celebrated judgment of Ibrahim v. R. *(1914) AC 599 Lord Sumner* set out the classical formulation of the rule concerning the admissibility of confessions when he said at *p. 609* :

" ..... *no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement* ..... "

Then in DPP v. Ping Lin *(1976) 62 Cr. App. R. 14 Lord Morris* in re-affirming the primacy of the rule observed at *p.17* :

" *In my view, it is not necessary, before a statement is held to be inadmissible because not shown to have been voluntary, that it should be thought or held that there was impropriety in the conduct of the person to whom the statement was made.* "

Clearly it is for the prosecution to affirmatively prove the voluntariness of a confessional statement sought to be adduced in evidence and not for the accused to cast a doubt in the matter.

In our considered view the evidence before the Court at the trial within a trial stage certainly raised a reasonable doubt which, had it not been for the trial judge's misdirection of himself as to the burden of proof, would have been resolved in favour of the accused.

Then there is the statement about the 'rape story' in the penultimate paragraph of the trial judge's ruling where he says :

> " *The rape story recorded by the police gave the lie direct to the accused's complaint that he did not give it. The police must have certainly known by the 8th from the medical examination of the deceased on the 5th that there had been no rape.*"

This statement is expanded in the *summing-up* at *p. 309* of the record and repeated again in slightly different words in the first paragraph of the *JUDGMENT* where it is asserted as a fact in the following terms :

> " *The police had the medical evidence with them at the time when they recorded the statement of the accused, which would indicate that she had not been violated in any way sexually.* "

With respect to the learned trial judge we have been unable to turn up any reference whatsoever in the court record to any such medical evidence being tendered by the prosecution nor does it appear to have been elicited in the oral examination of any of the several doctors who were called by the prosecution during the course of the entire trial.

What the police did have however at the time of the accused's interview was a statement from *Emosi Radio*.

If that statement followed his evidence in court before he went back on it, then the police did have evidence that the deceased had been sexually violated by the accused but, in the absence of a complaint from the victim the police would have known that the only charge that could have been proferred at that time would have been one of *Attempted Rape*.

Needless to say no doctor could embark on an examination of a married woman who was unconscious and assert that she had not been raped. Consequently there is no proper evidence that the deceased was medically examined for evidence of rape.

In our view contrary to what the learned trial judge thought that there was no reason why the accused should confess to rape when he had not committed it, his confession if anything lent weight to his complaint of assault against the police.

The trial judge also relied very heavily on the evidence of *Filimoni Ledua* as the following passage in his judgment illustrates. He said at *p. 319* of the record :

> " *What is most important is that the assessors have lost sight of the importance and significance of the evidence of Filimone Ledua. He is the man who connects all these tit-bits and establishes beyond doubt that it was no other than the accused whom he saw on the evening of the 4th and inferentially, from the description given by Sumintra Wati that he was the person who attacked Jeet Kaur on the 5th. He had said that from the description given by Sumintra Wati on the 6th of the man and the description of his clothes, he thought that the suspect was the accused. He was a Fijian villager. There was no need for him to have unnecessarily implicated a fellow Fijian villager. It is significant that although on the 6th of December, Filimone knew who the accused was, he did not*

volunteer to go to the police. He probably thought, why should he put another Fijian villager into trouble? But, when the police went to him on the 8th, he straightaway told them who the suspect was. There was no reason for the assessors to have rejected the evidence of Filimone. Probably they did not reject his evidence but they did not realise the significance of his evidence, because he was not one who identified the accused at a formal identification parade. But, in my view, his identification and location of the suspect from the description given by Sumintra Wati clinches the issue beyond any doubt. This circumstantial identification is of great importance and significance. It is more important than even formal identification at a parade. "

Why the learned trial judge should have thought that such an *'identification'* based on hearsay was more important than a properly conducted identification parade is not at all clear but in any event we cannot agree.

When Ledua's evidence is properly considered, it becomes apparent that the only relevant evidence he gives (*if any*) is that on the day before the alleged offence he saw and spoke to the accused and at the time the accused was wearing blue shorts. He did not identify the accused as the person who committed the offence, he merely *'believed'* that it was the accused from the description given by *Sumintra Wati* which more particularly included that the offender also wore blue shorts. Needless to say the physical description of the offender also fitted one *Delai*.

Ledua's evidence was of no value to the prosecution. At best it assisted the police in finding the accused who did have a pair of blue shorts.

If anything Ledua's evidence assisted the accused's case more by throwing considerable doubt on the evidence of

Sumintra Wati in the following manner; Ledua was a witness to the *"roti incident"* that occurred at Sumintra's house the previous night. He heard Sumintra calling out : *"Fijian, thief, thief!"* and almost immediately thereafter he met a Fijian youth running from the direction of her house. He spoke to the young Fijian who turned out to be *Emosi Radio*.

He did not see the accused at that time and only saw him some time later after Radio had brought the accused to assist him to recover some pineapples that he Ledua had apparently improperly removed.

The trial judge here again saw no reason why the assessors rejected Ledua's evidence.

We doubt if the assessors did reject his evidence, as they were quite entitled to, rather they may well have considered that his evidence implicated Radio in the 'roti incident' which in turn threw considerable doubt on Sumintra's identification of the accused. They may also have considered, correctly in our view, that Ledua's evidence as to the events of the previous night bore no relationship to and was of little assistance in determining what happened <u>or</u> who committed the offence on the following day.

We have also considered whether or not the accused's defence was properly left *(if at all)* to the assessors or considered in his lordship's judgment and we are satisfied that this was not done.

In <u>Augustine Achuzia Kachikwu</u> *(1967) 52 Cr. App. R. 538*, Winn L.J. in delivering the judgment of the Court of Criminal Appeal said at *p. 541* :

" *It is asking much of judges and other tribunals of trial of criminal charges to require that they should always have in mind possible answers, possible excuses in law which have not been relied upon by defending counsel or even, as has happened in some cases, have been expressly disclaimed by defending counsel. Nevertheless, it is perfectly clear that this Court has always regarded it as the duty of the judge of trial to ensure that he himself looks for and sees any such possible answers and refers to them in summing up to the jury and takes care to ensure that the jury's verdict rests upon their having in fact excluded any of those excusatory circumstances.* "

In his defence the accused testified that on the day of the incident he was attending a funeral gathering at his uncle's place in *Tacirua Village* and knew nothing about the incident until he was taken by the police several days later. He had never been to the deceased's house.

That evidence was *'summarily dismissed'* in the following passage in his lordship's summing-up where he said at *p. 314* of the record :

" *The learned State Counsel said that the accused attempted to raise defence of an alibi but it is not alibi in that sense. Alibi means evidence that he was somewhere else perhaps miles away. Here is a case where he said he was in the village. He could have been in the village for the funeral and he could have gone for a couple of minutes to the house of Jeet Kaur to commit this offence. No other witnesses can come and say that they saw him round the clock in that funeral house. That, I do not think is a matter that should worry you.* "

With respect to the learned trial judge evidence in support of an *alibi* may be defined as evidence tending to show that by reason of the presence of the accused at a particular place or in a particular area at a particular time he was not, or was unlikely to have been, at the place where the offence is alleged to have been committed

at the time of its alleged commission. This would certainly have been the nature and effect of the accused's evidence if it was properly left for the consideration of the assessors as it should have been.

Furthermore the undisputed evidence in the case is that the accused's plantation is about *3 miles* from the deceased's house which in turn is about *5 miles* distant from *Tacirua Village* where the funeral gathering took place. Accordingly if the accused was at *Tacirua Village* as he claims he was at the time of the incident he would have literally been "miles away" from the place of the incident nor do we consider that such a distance could have been traversed both ways in a "couple of minutes", to adopt his lordship's expressions.

Having so dealt with the accused's evidence it is not surprising then that the trial judge nowhere referred to it in his judgment over-turning the unanimous opinions of the assessors. He had in effect disabled himself from properly and fairly considering the accused's defence.

In Bharat v. The Queen *(1959) A.C. 533* where the trial judge had failed to properly leave the question of provocation to the assessors and had failed to mention it in his judgment, *Lord Denning* in the course of delivering the reasons for the Privy Council's advice quashing the conviction said at *p.539*:

> " *According to Section 246 of the Criminal Procedure Code (now Section 263) the trial is by the judge 'with the aid of assessors'. The judge is not bound to conform to their opinions, but he must at least take them into account. If they have been misdirected on a vital point, their opinions are vitiated ..... He has, in truth, by his misdirection, disabled the assessors from giving*

> *him the aid which they should have given; and thus in turn disabled himself from taking their opinions into account as he should have done. This is a fatal flaw.* "

and later at *p.540* after referring to the well-known case of Bullard v. The Queen *[1957] A.C. 635* his lordship said:

> " *The failure of the judge to direct the assessors properly upon it, or to consider it himself in his summing-up, means that his judgment cannot stand.* "

Needless to say the assessors may well have been aware of the evidence of the distances involved in the case and may have rejected his lordship's directions to them in dealing with the accused's evidence, as they were quite entitled to.

The main issue however in the case was the identification of the accused and although the assessors were not directed to ignore *Ledua's* evidence in that regard as they should have been, nevertheless, they appear to have correctly done so.

If we examine the evidence relating to the *identification parade* it will become apparent that the police went beyond permissible lengths to ensure that the two main identification witnesses would identify the accused.

There is the quite inexplicable conduct of the police in showing both women the accused's pair of blue shorts at their homes before they attended the identification parade. Furthermore although the officer conducting the parade denies it, *Sumintra Wati* testified that the police told her that the person she was to identify was in the parade line-up.

The significance of this highly irregular conduct only becomes apparent when viewed against the accused's claim that he was made to change into his blue shorts before he attended the identification parade. This latter fact is partly confirmed by the officer who conducted the identification parade and *Sumintra Wati*, although, unlike *Naseeb* they were unsure of the colour.

In John Alexander Dickman *(1910) 5 Cr. App. R. 135* the Court of Criminal Appeal said at *p. 142* :

> " *We need hardly say that we deprecate in the strongest manner any attempt to point out beforehand to a person coming for the purpose of seeing if he could identify another, the person to be identified, ... if we thought in any case that justice depended upon the independant identification of the person charged, and that the identification appeared to have been induced by some suggestion or other means, we should not hesitate to quash any conviction which followed. The police ought not, either directly or indirectly, to do anything which might prevent the identification from being absolutely independant, and they should be most scrupulous in seeing that it is so.* "

Then there is the glaring omission of both *Emosi Radio* and *Delai* from the parade. The former was a clear suspect in the 'roti incident' and the latter a person whose physical description fitted the witnesses' oral accounts to the police yet no effort appears to have been made to question *Delai*.

And, although the officer conducting the parade denied seeing any injuries on the accused's face at the time, *Naseeb Kaur* and *Netani* both testified that the accused's face, eyes, lips and mouth were swollen when they saw him on the identification parade.

In the circumstances we conclude that the mishandling by the police of the events prior to *and* in the conduct of the identification parade rendered the identification of the accused by the witnesses dangerously unreliable.

The fact that the assessors appear to have reached a similar conclusion lends support for our view that the evidence of the identification parade was so seriously flawed in so many material respects that it ought to have been rejected.

In the absence of the confessional statement and evidence of the identification parade and with the marginally relevant evidence of *Filimoni Ledua*, there only remains the evidence of the 2 main prosecution witnesses *Naseeb Kaur* and *Sumintra Wati* as to the identity of the alleged offender.

Even accepting that the incident occurred in broad daylight nevertheless this was a case of *"fleeting glances"* in which the learned trial judge ought to have carefully directed and warned the assessors and himself along the lines laid down in the leading case of Turnbull *(1977) 1 Q.B. 277.*

These include the special need for caution before convicting in reliance on the correctness of contested visual identification evidence and the reason for the need for such caution. A warning to examine closely the circumstances in which the identification came to be made and any subsequent identification parade *(if held)* with particular reference to any specific weaknesses in the identification evidence.

In Robert William Long *(1973) 57 Cr. App. R. 871* Lawton L.J. in dealing with the duty of a judge summing-up in a visual identification trial said at *p.877* :

> " *In these cases, as in all, a judge should sum up in a manner which will make clear to the jury what the issues are and what is the evidence relevant to these issues. Above all he must be fair; and in cases in which guilt turns upon visual identification by one or more witnesses it is likely that the summing-up would not be fair if he failed to point out the circumstances in which such identification was made and the weaknesses in it. Reference to the circumstances will usually require the judge to deal with such important matters as the length of time the witness had in seeing who was doing what is alleged, the position he was in, his distance from the accused and the quality of the light ..... Above all the jury must be left in no doubt that before convicting they must be sure that the visual identification is correct."*

In this case *Naseeb Kaur* who had never previously seen the accused observed the incident from a distance of *52* yards with her view obstructed by bush and mango trees. [*See* : the surveyor's evidence and *photo 2(a)*]. *Sumintra Wati* on the other hand had seen it from a greater distance but she claimed to have seen the accused on the previous night, that claim however, is not free of some considerable doubt having regard to *Ledua's* evidence.

Sumintra also agreed that there were many people that fitted her description of the accused including *Delai* and although she claims to have identified the accused *'by his face'* at the identification parade, in her police statement she said she saw the Fijian man only from the back and his hair and build *"looked similar"* to the person who entered her house the previous night.

This same witness was reluctantly compelled in cross-examination to admit that she was shown the accused's

blue shorts by the police prior to her attending the identification parade.

Needless to say although these discrepancies in her evidence were not referred to in the summing-up, the assessors would no doubt have had these in mind when considering the value (*if any*) to be placed on her evidence.

In Mohinder Singh Hunjan *(1978) 68 Cr. App. R. 99* the Court of Criminal Appeal in quashing the conviction and in refusing to apply the *proviso* said at *p. 104* :

> " *There is no doubt that there was a misdirection in this case in that the TURNBULL warnings were not given, or in so far as they were given were not given adequately.* "

In the present case inspite of the absence of any warnings or any reference to any weaknesses in the identification evidence the assessors were unanimously of the opinion that the accused was *"not guilty"*.

In this respect too we are satisified that the learned trial judge misdirected himself and we remain unconvinced that had he not done so and had he fully and carefully considered the evidence in the case, that his judgment would nevertheless remain unaltered.

We accept that this appeal is by way of rehearing and accordingly we have carefully considered all of the evidence in the case. Our view is that on a proper consideration of the facts there is at least reasonable doubt that the accused was the person who committed the offence. He is entitled to be given the benefit of that doubt. The assessors' unanimous opinion is entirely explicable on this basis.

Accordingly we would answer the question earlier posed in this judgment at p.2 in the negative. The appeal is allowed, the conviction is quashed and the appellant is acquitted.

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(Sir Moti Tikaram)
Justice of Appeal

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(Sir Ronald Kermode)
Justice of Appeal

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(D.V. Fatiaki)
Justice of Appeal