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

CRIMINAL APPEAL NO. AAU0048 OF 2002S
(High Court Cr. Appeal No. 0078 of 2001)

BETWEEN:

SULIASI SIVARO

Appellant

AND:

THE STATE

Respondent

Coram: Smellie, JA
Davies, JA
Penlington, JA

Hearing: Thursday, 6 November 2003, Suva

Counsel: Ms R.S.S. Devan for the Appellant
Mr. G.H. Allan for the Respondent

Date of Judgment: Friday, 14 November 2003, Suva

JUDGMENT OF THE COURT

The first issue for our determination is leave to appeal out of time.

In the early hours of the morning of 19 November 2000 there were two incidents of robbery with violence and one incident of office breaking and larceny at the Dive Kadavu Resort. Subsequently the appellant and two co-accused were charged with two counts of robbery with violence and one count of office breaking and larceny. The appellant and his co-accused pleaded not guilty to all charges. A

defended hearing took place in the Magistrate's Court. The appellant was represented by counsel.

The commission of the offences was not in issue. The sole question was identification. On 21 June 2001 the Magistrate gave his decision. He convicted the appellant and the two co-accused on all charges.

The Magistrate sentenced each accused to concurrent sentences of 5 years imprisonment on the first count of robbery with violence, 1 year on the second count of robbery with violence and 1½ years on the count of office breaking and larceny.

All three accused appealed to the High Court. The appeal was heard by Shameem J on 26 October 2001.

On 15 November 2001 Shameem J delivered her judgment. The appeal of one co-accused was allowed but the appeals of the other co-accused and the appellant were dismissed. Under section 26(1) of the Court of Appeal Act Cap.12 ed.1978 a person who desires to appeal to this Court is required to do so within 30 days of the decision in the High Court. The first intimation of an appeal was a letter to the Chief Registrar of this Court dated 28 October 2002. Treating this letter as an application for leave to appeal out of time there had therefore been a delay of just over 10 months.

In a further letter dated 6 November 2002 addressed to the Chief Registrar of this Court the appellant sought to explain the delay. He stated that Mr. Tevita Fa handled his case in the Magistrates Court and in the High Court. The appellant asserted that Mr. Fa had informed him that he would pursue the appellant's case up to this Court. The appellant explained that after 10 months he inquired of Mr. Fa about the appeal and that he was informed by Mr. Fa's secretary:

".....Mr. Fa has decided to withdraw himself from handling my appeal without giving me any reasons whatsoever."

There was no affidavit from the appellant or a waiver of privilege by the appellant or an affidavit from Mr. Fa.

Ms Devan who appeared for the appellant in this Court indicated that her firm had been first retained in July 2003. She contended that the time for appeal should be extended. She relied on the explanations set out in the appellant's letter of 6 November 2002 and she asserted that the intended appeal raised a clear issue of law relating to dock identification.

We do not consider that the appellant's letter of 6 November 2002 gives an adequate explanation for the delay which would justify us granting leave to appeal out of time under section 22 (1) of the Court of Appeal Act (which allows an appeal from the High Court to this Court on a question of law only where there has been an appeal from the Magistrates Court to the High Court in its appellate jurisdiction in a criminal case.)

Before leaving this part of the case we wish to make it clear to would-be appellants who allege that a solicitor has been in default in commencing an appeal within time that there should be an affidavit by the alleged defaulting solicitor, the intending appellant having waived privilege. It should set out not only the solicitor's own defaults and the reason or reasons for them but any efforts made by the intending appellant to have the appeal filed and the matter advanced. See *Dawai v Namulo* Civil Appeal No. ABU0026 of 2002S judgment 16 May 2003 at page 4.

Quite apart from the absence of an adequate explanation which would justify us granting leave we are unable to accept Ms Devan's submission that the intended appeal involves a question of law for the reasons which we now set out.

To reach this point we need to set out the background.

In the Magistrates Court the case for the prosecution was that on 18 November 2000 the appellant and his two co-accused with some others travelled in a fibre glass boat from the Suva Fish Market to Kadavu. They arrived there near to midnight where they were assisted by some others. They then proceeded to the Dive Kadavu Resort by boat which they parked on the beach along from the resort.

The Prosecution alleged that the three accused and one other went to a bedroom which was occupied by one Robert Forster, the Director of the Dive Kadavu Restaurant and his wife Nerdna. They were then in bed and Nerdna was reading.

The four men burst into the bedroom armed with knives, a pinch bar and a screw driver. Three of them had balaclavas covering their faces. The fourth had his face exposed. Two of them jumped on Forster and put a knife to his throat while the other two attacked Nerdna and threatened to rape and kill her if she did not give them money. It was then about 1.00am.

The four men ransacked the room. They took everything which was of any value. The goods taken had a value of $26,940.00.

The four men were in the room for about half an hour. It was well lit. It was approximately 12 feet in length and 12 feet in width. There was nothing to impede Mr and Mrs Forster observing the robbers closely throughout.

The person occupying the next room was one Arun Kumar. He called out words to the effect *"what is going on"*. The Prosecution alleged that the robbers then went into Kumar's room where they beat him up and took his wallet containing some air tickets and $50.00 or $60.00 in cash.

Significant injuries were inflicted on all 3 victims. Forster had a 2-3 inch bruise on the chest consistent with an assault by a screw driver. Nerdna had multiple injuries including a broken leg, a fractured cheek bone and injuries to the chest. Kumar had a swollen face, a tender chest wall and a rope mark around his neck.

The Prosecution next alleged that the three accused went to the Resort Office where they broke and entered and stole jewellery and cash to a total value of $7,270.00.

There was evidence from a witness that at about 2.00am on the morning of the robbery he saw four people coming from the resort, that he followed them and that later he heard the sound of an outboard motor going towards the open sea. A short time later he found the Forsters and Kumar tied up and injured at the resort.

The police did not conduct an identification parade.

The appellant was interviewed by a police officer on 25 November 2000. He denied any involvement in the offences. He asserted that at the material time he was asleep at home in Kinoya.

At the hearing in the Magistrates Court both Forster and his wife identified the person who did not have his face covered as the appellant. They carried out a dock identification.

The Magistrate in convicting the appellant and his two accused considered that it was safe to say that Mr & Mrs Forster had properly identified the accused (including the appellant) because of

- the confined space in the room

- the duration of time, 30 minutes, that the accused were in the room
- the closeness of the accused to the Forsters
- the fact that the room was well lit
- the fact that there was no impediment between Mr and Mrs Forster and the accused.

The Magistrate noted that a police identification parade had not been held. He observed that it "would have greatly assisted the court, in testing the identification made".

The Magistrate cited the leading case on identification ***R v Turnbull*** [1976] 1 QB 224 (CA) and the principles expounded by *Lord Widgery CJ* in that case. The Magistrate did not however specifically articulate a warning to himself of the possibility that the witnesses, no matter how honest, might be mistaken in their identification.

On appeal to the High Court the appellant attacked the Magistrate's findings on identification. In rejecting the appellant's appeal Shameem J said:

> *"The identification evidence of the 3rd Appellant was much more reliable. Firstly the witnesses watched him for a 30 minute period. Secondly his face remained uncovered for the whole period. Thirdly, the evidence of Robert Forster is corroborated by the evidence of Nerdna Forster. Taking all these matters into account, together with the evidence of bright lighting and the small size of the room, the evidence of identification of the 3rd Appellant was strong enough and reliable enough for the Chief Magistrate to convict upon it. This is so despite the failure of the police to hold an identification parade."*

Shameem J then went on to note that while the Magistrate had not warned himself he had nevertheless referred to ***Turnbull***.

Shameem J considered that the evidence of Forster and his wife corroborated each other and that this evidence was generally of good quality and arguably did not require corroboration at all. Having reached these conclusions Shameem J found that the Magistrate did not err in convicting the appellant on all three counts and his appeal was accordingly dismissed.

In this Court Ms Devan sought to argue that as a matter of law dock identification is not sufficient to support a conviction. She conceded however that she was unable to point to any case which specifically held that dock identification is inadmissible.

Ms Devan relied on three cases. In our view none of them is authority for the legal proposition for which she contended.

First in ***R v Cartwright*** [1914] 10 Cr. App. R.219 the appellant was convicted of housebreaking and larceny. There was an issue as to identity. There were a number of pieces of evidence in the case pointing to the identification of the accused. Three of the witnesses carried out a dock identification. In giving the judgment of the Court of Criminal Appeal Lord Reading LCJ observed that the accused had not been put with other men so that a witness might be able to identify him as the guilty man. Lord Chief Justice said: ***"it would have been infinitely better had this been done".*** Having made that observation the court went on however to uphold the conviction on the basis that the identification evidence in the case was of a cumulative character. The court did not refer in its judgment to the topic of dock identification.

Secondly in ***R v Howick*** [1970] Criminal Law Review 403 the Court of Appeal (Criminal Division) held that it is usually unfair to ask a witness to make an identification for the first time in court because it is so easy for the witness to point to the accused in the dock. The court observed that it was unfortunate that it had been done. The Court noted that the jury were not warned about the quality of the

identification evidence. There were also some other defects. The appeal was allowed and the conviction quashed.

And lastly in ***R v John*** [1973] Criminal Law Review 113 the accused was convicted of robbery. The issue was identity. The accused refused to take part in an identification parade. One of the witnesses identified him for the first time at the trial. The appeal to the Court of Appeal (Criminal Division) was on the grounds that the witness should not have been allowed to give the identification evidence relied on. The Court of Appeal dismissed the appeal observing that dock identification was an unsatisfactory method of identification which ought to be avoided if possible. The Court went on to hold that as the accused had refused to take part in a parade it was not wrong to admit the evidence. As well there was ample additional evidence.

In a commentary to the note on ***John*** it is stated that the identification in Court is clearly relevant evidence. The only ground for excluding it would seem to be the judicial discretion to exclude legally admissible evidence, the prejudicial effect of which in the opinion of the judge would exceed its probative value. The commentator went on note that if dock identification evidence is admitted it should be pointed out to the jury that it is necessarily much less convincing than identification in an identification parade. The commentator also noted that the Criminal Law Revision Committee had considered but rejected a suggestion that identification in court should not be permitted unless the witness has first identified the accused at an identification parade. See the 11th Report Cmnd 4991 para 201.

In our view the law does not require that a dock identification should only be permitted when a witness has first identified an accused at an identification parade.

For these reasons we conclude that the intended appeal does not turn upon a question of law. The proposition put forward by Ms Devan is not the law.

Result

As the result the appellants application for leave to appeal out of time is refused.

In any event the intended appeal does not raise a question of law only in terms of section 22(1) of the Court of Appeal Act.

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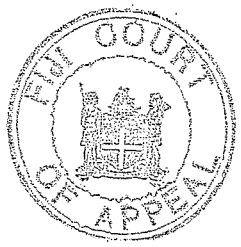
Smellie, JA



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Davies, JA

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Penlington, JA

Solicitors:

Messrs G.P. Lala & Associates, Suva for the Appellant
Office of the Director of Public Prosecutions, Suva for the Respondent

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