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

CRIMINAL APPEAL NO. AAU0018 OF 2000 & AAU0020 OF 2000
(High Court Criminal Case No. HAC 0005 of 1999L)

BETWEEN: 1. **FIDA HUSSEIN**
2. **JAI KUMAR SOLANKI** *Appellants*

AND : **THE STATE** *Respondent*

Coram: **Ward, President**
Barker, JA
Ellis, JA

Hearing: **Tuesday 6th March 2007**

Counsel: **No appearance for first appellant**
I Khan for second appellant
A Driu for respondent

Date of Judgment: **Friday 9th March 2007**

JUDGMENT OF THE COURT

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[1] The appellants were convicted in the Labasa High Court on a joint count of arson of the shop in which the second appellant conducted his business. The fire destroyed his shop and all its contents and a number of adjoining commercial

premises. The offence was committed in January 1998 and the trial started in January 2000. The assessors' unanimous opinion was that the appellants were guilty. They were convicted by the trial judge. On 11 May 2000, the first appellant was sentenced to four years and the second to six years imprisonment.

[2] This Court has seen delays of that length between arrest and trial too often in Labasa. Such delays impede justice; witnesses leave and memories fade and the possibility of a true result is reduced.

[3] Both appellants filed petitions of appeal in the time allowed but this Court had to wait more than four years for the trial judge to check and correct the transcript of his notes of evidence. The length of that delay was such that the earlier delay faded into relative insignificance.

[4] The result is that both appellants have now completed their terms of imprisonment before their challenge to the conviction has been heard. It has not been possible to locate the first appellant to advise him of the date of the appeal hearing because the information of his whereabouts when the appeal was listed is now long out of date.

[5] The trial itself in the High Court was lengthy and protracted. At no time does the record suggest any attempt was made to ensure the proceedings were conducted with any expedition. After the trial had progressed for five days, the court started a trial within a trial. The assessors were sent away, having heard 20 witnesses. The trial within a trial continued over ten more days after which the judge adjourned from 1 February to 3 April in order to write his ruling.

[6] The case then resumed and the assessors continued to hear the remaining witnesses over the next twelve sitting days. Counsel's closing addresses took two days. Following that, the judge adjourned for five days to prepare his summing up to the assessors. They retired to consider their opinions and returned in 45 minutes with a unanimous decision that the appellants were both guilty.

[7] The evidence the assessors were considering was heard over a total of 17 days but that had been in two batches spread over a total period of more than 17 weeks. The summing-up covers 55 pages of typescript in the record and the grounds of appeal largely relate to its suggested inadequacies and inaccuracies.

[8] At the hearing, Ms Driu did not seek to uphold the summing-up on three of the grounds raised by the appellants. She was right to take that course. The three matters were the manner in which the judge directed the assessors on circumstantial evidence (ground 2), non-disclosure of a witness statement (ground 3) and the burden of proof (ground 5). In the light of the respondent's concession, we need deal with them only briefly.

Circumstantial evidence

[9] The prosecution case relied heavily on the statements under caution by each of the appellants. They were detailed and complete admissions to the offence in themselves, but the prosecution also called a number of witnesses whose evidence linked the appellants with the offence circumstantially and helped confirm the accounts in the statements under caution. The statements were challenged by both appellants and so the view the assessors took of the circumstantial evidence was likely to form a significant element in their assessment of that challenge.

[10] The judge gave a lengthy direction on circumstantial evidence and the appellants challenge the manner in which he dealt with this topic on two grounds.

[11] First, although the direction was correct in general terms, the manner in which the judge dealt with it was confusing. One example is sufficient:

> *"The State in this case puts to you the circumstantial thread of evidence which the State says points inexplicably (sic) to the two accused. Now, the State has to prove each of the points in the thread beyond reasonable doubt. You have to be sure and satisfied so as to be sure before you take that particular point and you put it here in the heap that forms the thread or chain. If you are not sure*

of that particular point, then you cannot say that they have proved that point beyond reasonable doubt, you must discard it. The important thing to remember is this, the State does not necessarily have to prove every single point but the points that you are satisfied that is has proved beyond a reasonable doubt must form the chain. They must form the thread."

[12] The second objection is that, having given that confused and confusing direction, the Judge gave no indication as to which parts of the evidence were circumstantial. A summing-up is to assist the assessors in their understanding of the evidence and its significance. Without any reference to the evidence which fell within this description, the direction was of very little value.

Non- disclosure

[13] The defence placed considerable emphasis at the trial on the failure of the prosecution to disclose an earlier witness statement made by the first appellant in the early stages of the investigation in which he had apparently denied the offence. It was suggested that the failure by the police to disclose that statement was evidence of impropriety or malice. Counsel made reference to the issue in their closing submissions and it was necessary for the Judge to explain the significance to the assessors.

[14] The suggestion of the defence was that it was a clear failure to disclose a relevant matter to the defence. The prosecution denied that it was a document which should have been disclosed. The assessors would have to decide that issue. It needed a clear direction on the prosecution's duty to disclose but, instead, the Judge gave a lengthy dissertation on the law. He started by reading section 28(1) of the Constitution followed by the third and fourth of the 1998 Guidelines on Disclosure issued by the DPP. He then referred to and read the English Attorney General's Guidelines on Disclosure of Information to the Defence and repeated a passage from an English case on disclosure.

[15] Then, in flurry of negatives, he directed the assessors:

> *"The alleged non-disclosure I consider was not only not required to be disclosed but also it was not a material irregularity. The non-disclosure, of the facts and circumstances of this case, has not disabled the defence to present an arguable case along the lines they have already pursued."*

[16] The matter having been raised, the question of the effect of the failure to disclose and the motives of the prosecution was for the assessors to decide and not the Judge.

Burden of proof

[17] The Judge gave a clear and correct direction on the burden of proof at the outset of the summing-up and repeated it at the end. Unfortunately, during his summary of the evidence, he used expressions which suggested an incorrect approach. They fell into two categories; references to the need for the assessors to "Decide who you believe" between a prosecution witness and an accused and references to the need of the assessors to "weigh the evidence of [a prosecution witness and an accused] and ascertain where the truth lies".

[18] The concept of the burden of proof is not complex. We suggest that the average person has little difficulty understanding it. Judges will achieve a clear result if they state it clearly and concisely. Additional and unnecessary examples or explanations are more likely to confuse the assessors or, as here, direct them incorrectly.

[19] Any suggestion that the assessors need to decide whether a prosecution witness or a defence witness is to be believed or is telling the truth ignores the burden on the prosecution to prove the guilt of the accused. The assessors do not need to believe the accused or their witnesses are telling the truth in order to acquit. In order to convict, on the other hand, they have to reach that conclusion in respect of the relevant aspects of the prosecution evidence. Those phrases could have led

the assessors to believe that, the decision of whether the accused were guilty or not, simply went to the side whose witnesses they believed were telling the truth. If they did approach the matter thus, the defence would, in order to avoid conviction, face a burden similar to that placed on the prosecution.

The summing-up

[20] The defects in the summing-up on the first and third of those grounds are sufficient to allow the appeal against conviction. However, before leaving the case, we also add some general comments on the summing-up.

[21] The purpose of the summing-up is to assist the assessors in recalling and understanding the evidence and the law to which it relates.

[22] After a protracted trial, such as occurred in the present case, it is essential that they are reminded of the evidence that was adduced in a way which will ensure they recall it and that they are able to appreciate the relationship of the various aspects of the case one with the other. That goal is not well served by a lengthy repetition of the evidence as it was given by each witness in turn, as the Judge did in this case. This Court has stated before that the purpose of the summing up is to clarify the issues and not simply to repeat the evidence; *Barbados Mills and others v The State* [2005] Crim App AAU 35/04, 16 July 2005. The Judge does not need to deal with every aspect of the evidence. What is required is a summary of the salient points and an explanation of how the opposing sides in the case deal with them.

[23] Similarly, when dealing with the law, it is not sufficient simply to read the section under which the charges are laid. Nor is it appropriate to read to the assessors extracts from decided cases or legal text or (as occurred here) the whole of the Judge's Rules. What is needed is an explanation of the ingredients of the offence. In *Henry Ali v The State* [2003] Crim App AAU 9/01, 14 February 2003, the Court pointed out:

> *"It is part of the duty of the judge when summing up the case to direct the [assessors] on the law and explain it in a way that ensures it is comprehensible to a layman. It is rarely necessary or desirable to go into legal niceties ..."*

[24] In Ali's case, the Court quoted a passage from R v Lawrence [1982] AC 510,519 in which Lord Hailsham LC criticised a long and complicated summing-up. It appears it is necessary to repeat it.

> *"It has been said before but obviously requires to be said again. The purpose of a direction to a jury is not best achieved by a disquisition on jurisprudence or philosophy or a universally applicable circular tour round the area of law affected by the case. The search for universally applicable definitions is often productive of more obscurity than light. A direction is seldom improved and may be considerably damaged by copious recitations from the total content of a judge's notebook. A direction to a jury should be custom-built to make the jury understand their task in relation to a particular case. Of course it must include references to the burden of proof and the respective roles of jury and judge. But it should also include a succinct but accurate summary of the issues of fact as to which a decision is required, a correct but concise summary of the evidence and arguments on both sides and a correct statement of the inferences which the jury are entitled to draw from their particular conclusions about the primary facts."*

[25] An appellate court will look at the summing-up as a whole in any case and need to be satisfied that it achieved the purpose of providing a clear and concise explanation to the assessors. A lengthy and repetitive summing-up, even though accurate in the myriad details supplied, may not pass that test.

[26] In many cases that deficiency, in itself, may not be sufficient to set the conviction aside but, where this Court is left with a clear feeling that the summing-up was sufficiently confusing to have impeded a fair trial, the court will not hesitate to set aside.

[27] The deficiencies in the summing-up were compounded by the long and prima facie unjustified adjournments in the course of the trial for which we can find no explanation. The effectiveness of the appeal process has been seriously compromised by the totally unjustified delay in the submission of the Judge's notes. We do not understand why there needed to be a delay of two months just to prepare a ruling on the voir dire. Trial judges normally are expected to make such rulings with the utmost expedition. In this case, such a delay was unfair to the accused and inconvenient to counsel, witnesses and assessors.

[28] The appeal against conviction is allowed. Normally such a decision would result in the case being returned to the lower court for a fresh trial. Because of the serious delays in the preparation of this appeal, the appellants have both completed the sentences passed on them. It would be unjust to send the case back and we consider the only order open to the court is to acquit them.

[29] The first appellant was not notified of the date of this hearing. However, his appeal was not withdrawn and, in the circumstances, we shall allow his appeal on the same grounds,

Result

[30] Appeal against conviction of each appellant allowed

[31] The conviction of each accused is quashed and a verdict of acquittal substituted.

Result

1. Appeal against conviction of each appellant allowed

2. The conviction of each accused is quashed and a verdict of acquittal substituted.

Ward, President

Barker, JA

Ellis, JA

Solicitors:

No appearance for 1st defendant
Iqbal Khan & Associates for 2nd defendant
Director of Public Prosecutions Office for the respondent