

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

CRIMINAL APPEAL NO.: AAU0041 OF 2007S
(High Court Criminal Case No.: HAC 087 of 2006S)

BETWEEN:

AMINIO WAISU

Appellant

AND:

THE STATE

Respondent

Coram:

Hon. Mr. Justice Devendra Pathik
Hon. Mr. Justice Isikeli Maitoga
Hon. Mr. Justice Daniel Goundar

Hearing:

Tuesday 12th February, 2008

Counsel:

Appellant in Person
Mr. P. Bulamainivalu for the State

Date of Judgment: Wednesday 12th March, 2008

JUDGMENT OF THE COURT

- [1] This is an appeal from a Judgment dated 3rd April 2007, which found the Appellant guilty of robbery with violence on two counts.
- [2] The facts of this case were succinctly summarized in the trial judge's summing up to the assessors as follows:

The prosecution evidence is that on the 9th of October 2003, a taxi-driver Shalen Chandra picked up 4 men from Raiwaqa and took them to the Walu Bay Wharf. Three of the men got out at the Canteen and were talking to the 4th man in the car. He then drove off with the 4th man. Later the same 3 men came running down Roma Street and got back into the taxi. He dropped them off at Sanyo Cabs.

On an identification parade on 27th October he identified the Accused as being one of the 3 men.

Lice Rarawa was in the canteen across the road on the 9th of October at midday. She said 3 men stood outside her canteen and saw them talking to Iliaseri Saqasaqa in a taxi parked outside. They stood outside her canteen for 45 minutes, then suddenly ran across the road to the Shell Office and pulled down the shutters. A little later they came out.

She also attended an identification parade on the 27th of October and identified the Accused as being one of the 3 men.

Shalen Chandra said the Accused had worn $\frac{3}{4}$ pants and a t-shirt. Lice Rarawa said he had worn long trousers and a shirt.

- [3] At the trial, the Appellant's defence was one of complete denial. He gave sworn evidence that at the time of the offence, he was drunk and asleep at the house of one Joape in Vatuwaqa. He suggested that the identification of him by Shalen Chandra and Lice Rarawa was mistaken.
- [4] The trial judge gave a careful direction on the identification evidence in accordance with the guidelines laid down in *R v Turnbull* [1977] 63 Cr. App. R.132 and approved by this Court in *Semisi Wainiqolo v The State*, Criminal Appeal No. AAU0027 of 2006S.
- [5] The Appellant on appeal to this Court alleged numerous errors in the directions given to the assessors by the trial judge.

- [6] On 1st June 2007, Ward P refused him leave to appeal on all except the ground alleging misdirection on circumstantial evidence. The Appellant contends that the trial Judge's direction on circumstantial evidence shifted the burden of proof on him.
- [7] The trial Judge's direction on circumstantial evidence is contained in the following passages of the summing up:

The State relies on circumstantial evidence asking you to draw an inference that the 3 men got off and then later got on the taxi running, and the evidence of Lice Rarawa that they were the 3 men involved at that time, in the robbery at Supreme Fuel. The State says that this is the only reasonable inference to be drawn from the evidence of the taxi-driver and Lice.

In a case of circumstantial evidence the question for you is whether there is any other reasonable inference to be drawn from the circumstances of the case, other than the guilt of the accused. If you accept that the Accused was one of these 3 men, are you satisfied beyond doubt that the only reasonable inference to be drawn from the evidence of Shalen Chandra and Lice Rarawa, that the Accused with two others was part of the robbery at Supreme Fuel? Or is there another explanation consistent with the Accused's innocence?

- [8] When the prosecution relies on circumstantial evidence to prove the guilt of an accused, no special directions are required of a trial judge in directing on the use of circumstantial evidence. This was the position taken by the House of Lords in *McGreevy v DPP* [1973] 1 WLR 276.
- [9] In *McGreevy*, the House of Lords held:

"It would be undesirable to lay it down as rule which would bind judges that a direction to a jury in cases where circumstantial evidence is the basis of the prosecution case must be given in some special form, provided always that in suitable terms it is made plain to a jury that they must not convict unless they are satisfied of guilt beyond all reasonable doubt."

[10] In *Sisa Kalisoqo v R*, Criminal Appeal No. 52 of 1982, this Court agreed and declared the above passage to state the law of this country.

[11] The decision in *Sisa Kalisoqo* was confirmed by this Court in the later case of *Senijeli Boila and Anor v The State*, Criminal Appeal No. AAU0073 of 2005S, and by the Supreme Court on appeal to that court (see, *Senijeli Boila v The State*, Criminal Appeal No. CAV005 of 2006S).

[12] In *Boila (supra)*, The Supreme Court said:

“The Court of Appeal observed that no special directions are required of a trial judge in directing on the case of circumstantial evidence. What is required is a clear direction that the tribunal of fact must be satisfied of the guilt of the accused beyond reasonable doubt (*McGreevy v Director of Public Prosecutions* [1973] 1 WLR 276, applied *Kalisogo v R*, Criminal Appeal No. 52 of 1982). See also *R v Hart* [1986] 2 NZLR 408. The adequacy of a particular direction will necessarily depend on the circumstances of the case”.

[13] We have considered carefully the trial Judge’s direction on circumstantial evidence. The direction made it clear to the assessors that the evidence of Shalen Chandra and Lice Rarawa must lead them to the sure conclusion that the Appellant was part of the alleged robbery and that there was no other explanation consistent with the Accused’s innocence. The direction on circumstantial evidence followed after the trial Judge had directed the assessors that the burden of proof rests on the prosecution.

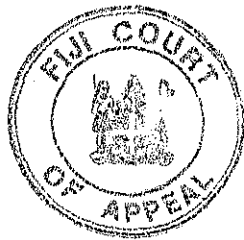
[14] The trial Judge’s charge on circumstantial evidence must be viewed in the light of the following passage in the summing up, where the Judge summarized the issues for determination by the assessors:


“I ask you to look at the identification evidence carefully. Do you have any reasonable doubt about that identification? Were there discrepancies in it to raise any doubt in your mind for instance about the clothing of the suspect? Was Lice’s view obstructed

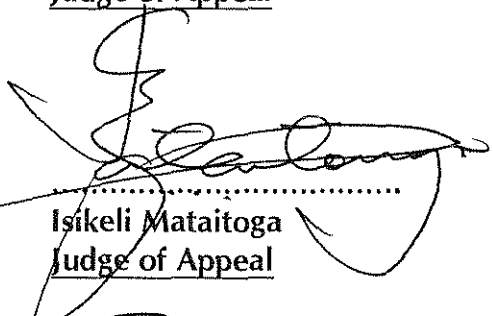
across the road, or at an angle? Were there vehicles in the way? Was her identification of the Accused and that of the taxi-driver Shalen Chandra reliable? Did they watch for long enough? In good light? Were they mistaken in their identification? Was the identification parade fairly conducted? Or was the Accused at the house of one Joape Cakau at the relevant time? And if you accept the identification of the Accused, as being one of the 3 men, is the only reasonable inference to be drawn, the guilt of the Accused?"

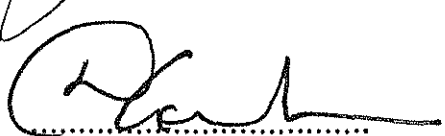
[15] After considering the summing up in totality and the trial Judge's direction on the use of circumstantial evidence and the consistent of that evidence, we are satisfied that no error has been shown by the Appellant and that there has been no risk of a miscarriage of justice having resulted.

[16] The appeal is dismissed.




 Devendra Pathik
 Judge of Appeal


 Isikeli Maitaitoga
 Judge of Appeal


 Daniel Goundar
 Judge of Appeal

At Suva
 Wednesday 12th March, 2008

Solicitors:

Appellant in Person
 Office of the Director of Public Prosecution, Suva for the State