

ISEI TURAGAKULA v STATE (AAU0006 of 2010)

COURT OF APPEAL — MISCELLANEOUS JURISDICTION

5 TEMO JA

26 July, 16 August 2012

10 **Criminal Law — directions to jury — appeal against conviction — whether trial court failed to direct assessors on law of identification — confession — Land Transport Act ss 56(3), 114 — Penal Code ss 292, 293(1)(b).**

15 The appellant was convicted of two counts of robbery with violence, one count of unlawful use of a motor vehicle and one count of driving a motor vehicle without a driving licence, and was sentenced to 12 and a half years' imprisonment. The appellant applied for leave to appeal his conviction on the ground that the trial judge failed to direct the assessors on the law on identification.

Held —

20 If the assessors and the trial judge accepted the appellant's confession, that was sufficient to ground a conviction on all the counts. It was thus unnecessary for the trial judge to give the assessors an identification direction, because the state was not relying on the complainants' identification evidence to ground a conviction.

R v Turnbull; R v Whitby; R v Roberts [1977] QB 224, cited.

25 Appeal against conviction dismissed.

M. Savou instructed by *Legal Aid Commission, Suva* for the Appellant.

Tikoisuva instructed by *Director of Public Prosecutions Office, Suva* for the Respondent.

30 [1] **Temo JA.** On 23rd October 2009, after a trial with assessors at the Lautoka High Court, you were found guilty of two counts of 'robbery with violence', contrary to s 293(1)(b) of the Penal Code, chapter 17 (ie Count no. 1 and 3); one count of 'unlawful use of a motor vehicle', contrary to s 292 of the Penal Code (ie. Count no. 2), and one count of 'driving a motor vehicle without a driving
35 licence', contrary to s 56(3) and 114 of the Land Transport Act 1998 (ie. Count no. 4). The court convicted you on the above counts. For the 'robbery' counts, you were sentenced to 12 years imprisonment on each count, on the 'unlawful use of a motor vehicle', you were sentenced to 12 months imprisonment, and 6 months imprisonment on 'driving without a licence'. The sentence in counts nos.
40 1, 2 and 3 were made concurrent to each other, and the sentence in count no. 4 consecutive to the others. Your total sentence was 12 1/2 years imprisonment, from 23rd October 2009.

45 [2] You appeared aggrieved by the above decisions, and you have applied for leave to appeal out of time, because you were 65 days out of time. This application was not opposed by the State, and in the interest of justice, I grant you leave to appeal out of time.

50 [3] Previously, you indicated you want to appeal against the above convictions and sentence. Your counsel has withdrawn your appeal against sentence. There was no objection from the State. Consequently, I grant you leave to withdraw your appeal against sentence. We will therefore concentrate on your appeal against convictions.

[4] You previously filed four grounds of appeal on your convictions. Your counsel has decided to abandon the other three grounds of appeal on conviction, and concentrate on one ground, that is, ‘the learned trial judge erred in law when he failed to direct the assessors on the law on identification’. The State has not
5 objected to the above, and consequently, I grant you leave to withdraw your other appeal grounds, and concentrate on the one involving ‘identification’.

[5] Your counsel, on your behalf, argued that, on the evidence, the complainants were the ones that identified you. The complainants made dock identifications in court, but the learned Trial Judge did not warn himself, nor
10 apply the directions to the assessors, as laid down in *R v Turnbull*; *R v Whitby*; *R v Roberts* [1977] QB 224. Consequently, your counsel argued that, your convictions were unsafe and therefore should be quashed and set-aside.

[6] In *R v Turnbull* (supra), a five judges English Court of Appeal, laid down the following direction to be observed by trial judges, when ‘identity’ was an
15 issue:

‘...First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for
20 caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.

Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example, by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only
25 occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material
30 discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given....Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence...’

[7] Counsel for the State argued that, in obtaining the conviction against you, they did not rely on the complainants’ identification evidence. They primarily
40 relied on your confession to ground a conviction against you. Both identification evidence, and confessions, if accepted by the assessors and the trial judge, are sufficient to ground a conviction against you, on the offences. Either type of evidence, or both of them, if accepted by the court, are sufficient to ground a conviction. In this case, the State said, it did not rely on the identification
45 evidence to ground a conviction against you, thus it was unnecessary to direct the assessors on the *R v Turnbull test* (supra). They said, they relied on your confession, and this was accepted by the assessors and the trial judge, and that was the end of the matter.

[8] I have carefully perused the court record, the Summing Up, the Judgment and the Sentence. In my view, the State was correct if the assessors and the trial
50 judge accepted your confession in this case, that was sufficient to ground a

conviction against you on all the counts. It was thus unnecessary for the trial judge to give the assessors an R v Turnbull identification direction, because the state was not relying on the complainants' identification evidence to ground a conviction against you. Consequently, your appeal on this ground fails, and I
5 dismiss it accordingly.

[9] Given the above, I dismiss your appeal against your convictions on all the counts. In summary, your appeal against conviction is disallowed.

Appeal dismissed.

10

15

20

25

30

35

40

45

50