

IN THE HIGH COURT OF FIJI
AT SUVA

APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO.: HAA 077 OF 2008

BETWEEN:

JONA KALOUNIVEI

Appellant

AND:

THE STATE

Respondent

Counsel: Ms. R. Senikuraciri for the Appellant
Ms. N. Ratakele for the State

Date of Hearing: Friday 30th January, 2009
Date of Judgment: Wednesday 18th March, 2009

JUDGMENT

Introduction

- [1] Following trial in the Nausori Magistrates' Court the appellant was convicted of robbery with violence and sentenced to 3½ years imprisonment on 4 June 2008. At trial, the appellant was represented by legal aid counsel.
- [2] On 24 June 2008, the appellant filed a Petition of Appeal against conviction and sentence. He raised numerous grounds of appeal.

[3] Subsequently, the appellant's application for legal aid was approved. His counsel, Ms. Senikuraciri, in her written submissions to this Court seeks leave to amend the Petition of Appeal, to pursue appeal against conviction alone, on two grounds:

- (a) Was there sufficient, credible, evidence beyond a reasonable doubt, to find the accused guilty of robbery with violence?
- (b) Did the learned magistrate err in fact and law when she failed to draw her mind to the Turnbull warning requirements on identification?

[4] The State takes no objection to the procedure adopted by the appellant to amend his grounds of appeal. Leave is hereby granted to the appellant to amend the Petition of Appeal and pursue appeal against conviction alone on the two grounds advanced in the written submissions.

Consideration of appeal

[5] The first ground requires review of the evidence.

[6] The complainant gave evidence that on 9 November 2007 at 2.00 am, a woman and three or four men hired his van to take them to Nakaile, Wainibokasi. On their way to Wainibokasi they stopped to buy beer at a shop. When they reached Nakaile, the woman and three men got off. The remaining two men asked the complainant to drop them off at Burebasaga. One man was sitting in the front passenger seat while the second man was sitting in the back seat directly behind the driver. Upon reaching Burebasaga the man sitting behind grabbed the complainant by the neck and punched him. The man sitting in the

front passenger seat got off, opened the door and punched the complainant on the face. The complainant was pulled out of the van and both men continued to punch him. They took the complainant's wallet which had \$80.00 in it. The attackers fled the scene upon seeing an approaching vehicle.

[7] In cross examination the trial counsel for the appellant put the following questions to the complainant:

Q. Put to you my client didn't grab your neck.

A. He did.

Q. Put to you my client didn't touch you.

A. Then how did I receive injuries. He was the first. There were 2 people.

Q. Put to you that you were not punched by my client and nor did he grab your neck, or pulled you out.

A. He did that.

[8] The appellant's caution interview was tendered without objection. In his interview, the appellant admitted he was sitting behind the complainant but denied assaulting him. He said he walked away to a place where his brother was drinking when the front seat passenger pulled the complainant out of the van.

[9] After close of the prosecution case, the appellant elected to give evidence. The appellant said he was sleeping in the back seat of the complainant's van when he felt the van was going out of the road. He said he saw the other passenger assaulting the complainant and he told him to stop. The appellant did not do anything else.

- [10] In a brief closing address, counsel for the appellant submitted the issue was the credibility of the complainant. Counsel did not suggest that identification was an issue.
- [11] The learned Magistrate in her judgment found the complainant to be a truthful and reliable witness. She preferred the complainant's testimony over the appellant's evidence.
- [12] It is a well established principle that an appellate court will be slow to interfere with findings of credibility of witnesses and of facts by a trial court. An appellate court is not in the same position as the trial court that has an advantage of observing the demeanor of witnesses before findings of creditability are made. Therefore, an appellate court will need cogent reasons to interfere with findings of credibility and of facts by a trial court.
- [13] I have carefully read the judgment of the learned Magistrate. The reason that the learned Magistrate rejected the evidence of the appellant was because she found inconsistencies with his evidence. The learned Magistrate's findings were available on the evidence and are not erroneous. The learned Magistrate was satisfied of the appellant's guilt beyond a reasonable doubt after accepting the complainant's evidence as true. I find no grounds to interfere with the learned Magistrate's findings of credibility and of facts. The first ground of appeal fails.
- [14] The second ground of appeal is misconceived.
- [15] **Turnbull** guidelines are intended primarily to deal with the "ghastly risk" run in fleeting encounters (**Oakwell** [1978] A AER 1223). The need for **Turnbull** direction arises only where there is the possibility of mistaken identification.

Where there is no issue as to the accused's presence at or near the scene, but the issue is as to what he was doing, it does not automatically follow that the direction must be given (*R v Slater* [1995] Crim. LR 244). However, *Turnbull* direction will be necessary where the possibility exists that a witness may have mistaken one person for another for example because of similarities of build or clothing.

- [16] In this case the appellant did not dispute his identification. What he disputed was the participation in the robbery. He said he was asleep during the robbery. The complainant said the appellant was the first to attack him from behind. The appellant did not dispute that he was the only person sitting in the back seat of the van when the complainant was attacked. There is no suggestion that the complainant was mistaken about the identity of the appellant over the other person who was sitting in the front seat and who also attacked the complainant. On the facts of this case there was no need for *Turnbull* direction. For these reasons, the second ground of appeal fails.

Result

- [17] The appeal against conviction is dismissed.

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Daniel Goundar
JUDGE

At Suva
Wednesday 18th March, 2009

Solicitors:

Legal Aid Commission, Suva for the Appellant

Office of the Director of Public Prosecutions, Nausori for the State