IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO.: HAA 130 OF 2017

BETWEEN: **SERUPEPELI RAVOUVOU**

Appellant

A N D: **STATE**

Respondent

Counsel: Appellant In Person
Ms. Naibe for Respondent

Hearing: 05th January 2018

Judgment: 23rd January 2018

JUDGMENT

1. The Appellant was charged in the Magistrate's Court in Nadi for one count of Robbery with Violence, contrary to Section 293 (1) (b) of the Penal Code. He was first produced in the Magistrate's Court on the 31st of March 2008. Subsequent to a protracted delay and clusters of adjournments, the matter was eventually fixed for hearing in the absence of the Appellant on the 19th of June 2017. The prosecution called two civilian witnesses for the prosecution during the course of hearing. Moreover, the prosecution has tendered the caution interview and the charged statement of the Appellant in evidence. The learned Magistrate in his judgment dated 26th of July 2017, found the Appellant guilty for this offence. Accordingly, the learned Magistrate convicted and sentenced the Appellant for a period of twelve (12) years imprisonment with eleven (11) years of non-parole period. Aggrieved with the said conviction and the sentence, the Appellant filed this appeal on the following grounds, which I reproduce verbatim as follows:

   i) That the Appellant was sentenced from His Learned Magistrate for 5 years 6 months and 17 days and non-parole period of 5 years.

ii) *That the Learned Magistrate erred in law when he fixed the non-parole for 5 years which is wrong in all the circumstances of this case and miscarriage of justice.*

iii) *That the Learned Magistrate erred in law when he failed to give 1/3 discount for guilty plea thus saving this court's time and resources.*

iv) *That the Learned Magistrate erred in law when he not give much weight and attention to the mitigating factors and failure to direct the law principles of sentence and offender but he direct himself.*

v) *That the Learned Magistrate erred in law when he failed to consider the facts of the case which was from last 10 years which should be a suspended sentence.*

vi) *That the Learned Magistrate erred in law when the sentences which he imposed on me are manifestly harsh and excessive.*

vii) *That the Learned Magistrate erred in law when he granting the prosecution's application for trial in absenteeism and thereafter taking up the case for trial in absentia.*

viii) *That the Learned Magistrate erred in law when he failed to consider the fact the Appellant was in remand in another matter from Magistrate court Nadi.*

ix) *That the Learned Magistrate erred in law allowing the Prosecution to tender the caution interview of this Appellant in evidence without conducting a trial within a trial in order to determine the admissibility of the caution interview of the Appellant in evidence.*

x) *That the Learned Magistrate erred in law and in fact when he convicted the Appellant despite the Prosecution failing to satisfy the elements of the offence.*

xi) *That the trial for this matter at hand was commenced and approved in the absence of the Appellant whereby it has breached the constitutional right of the Appellant to have a fair trial as stipulated under section 15(1) of the constitutional as stated (1) every person charged of an offence has the right to a fair trial before a court of law I this Appellant believe that the trial in this matter was unfair biased and prejudiced due to it being a single sided affair;*

xii) *That the Learned Magistrate erred in law and in fact by not giving proper discount for the period spent in remand custody. The Learned Magistrate stated in his sentencing that it appeared to the court that I had appeared in court but that the Honourable Magistrate failed to give a proper discount for the period in remand whereby he sentenced the Appellant but never has been question neither was any formal Application ever filed in court;*

xiii) *That the Learned Magistrate erred in law and in fact by not properly establishing all the elements of the offence whereby stated I had used a technique to do vehicle in robbery but no evidence or elaboration was given to what the technique was thus putting a shadow of doubt over the physical element of the offence;*

xiv) *That the sentence imposed by the Learned Magistrate is manifestly harsh and excessive considering all the circumstance of the case and also the Learned Magistrate failed in law and in fact whereby the Learned Magistrate did not give even a single thought to Section 14(2)(n) of the Constitution of Fiji;*

xv) *That the Learned Magistrate erred in law and in fact when released the police exhibit [evidence] to the complainant before the trial date was even set thus contravening section 155(a) and section 156(i) subsection 3 (a) of the Criminal Procedure Decree No: 43 of 2009 miscarriage of Justice occurred when the trial Magistrate on his own discretion returned the item recovered to the complainant even though the accused had opted for legal counsel and particularly in case as such theft whereby the only material evidence which the court brought forward to close examination to determine the validity of the offence neither was any motion or application filed to the Honorable Court for the return of the items that clearly shows that the learned Magistrate exercised his own discretion and did not allow to evaluate the whole case;*

xvi) *That the Learned Magistrate erred in law when he failed to consider the cell diary as that it was also requested by the defence for voir dire please consider the court records.;*

xvii) *That the Learned Magistrate fell into error when he considered the evidence of the Prosecution and stated in his sentencing you sotie but*

never I believe was this material evidence which is ever presented in court;

xviii) *That the Learned Magistrate fell into error when he set a 11 years non-parole period which is wrong in all the circumstance of the case;*

xix) *That the Learned Magistrate erred in law and in fact when he sentence the Appellant without taking his mitigating factors in consideration when in fact he was in the police cell for produced in another court for another matters for sentencing delivered;*

xx) *That the Learned Magistrate erred in law that the Appellant make and applications too for him to produce in court and also the Appellant inform the Prosecution name by Ms Drilo that if she can inform the court that I am in Nadi Cell "could you please call my case" and she said ok don't worry will call you up;*

xxi) *That the Learned Magistrate erred in law when he mistook the fact and imposed the sentences which is wrong in principles and all the fact of law.*

2. The Appellant is appearing in person. Hence, the drafting of the above grounds of appeal are not perfect and precise as of the drafting of a trained lawyer. Therefore, with the consent of the Appellant and the learned counsel for the Respondent, I would summarized the two main contentions of the Appellant as follows:

i) Whether the Learned Magistrate made an error in law and in fact by admitting the confession made by the Appellant in his caution interview, without conducting a proper *voir dire* hearing in order to determine the admissibility of caution interview in evidence,

ii) Whether the Learned Magistrate has exceeded his sentencing jurisdiction as stipulated under Section 7 of the Criminal Procedure Act,

Ground I,

3. Lord Carswell in **R v Mushtaq (2005) 3 All ER 885, at 908** has discussed the importance of careful evaluation of the confession before it is accepted in evidence, where his Lordship held that:

"It has long been recognized that the content of a confession made by an accused person has to be evaluated with great care in order to determine whether it can safely be accepted as an admission against his interest. The approach of the law to that evaluation has varied over the years and the rules applied by the courts have to be kept under review to ensure that they reflect the standards accepted by each generation."

4. Accordingly, it appears that the court is required to adopt a cautionary approach in order to admit the confession of an accused in evidence. Justice Goundar in **State v Akanisi Panapasa (Criminal Case No 34 of 2009)** has outlined the general rule on admissibility of confession, where his Lordship found that:

"As a matter of general rule, a confession made by an accused person to a person in authority out of court is admissible only if the confession was made voluntarily. The rule which was developed by the English common law is the state of law in Fiji."

5. The rights against self-incrimination has been embodied in Article 13 (1) (d) of the Constitution, where it states that:

"not to be compelled to make any confession or admission that could be used in evidence against that person"

6. Moreover, Article 14 (2) (k) of the Constitution has stipulated that unlawfully obtained evidence should not be adduced against a person who is charged with an offence. Article 14 (2) (k) of the Constitution states that:

"not to have unlawfully obtained evidence adduced against him or her unless the interests of justice require it to be admitted"

7. Accordingly, the court is required to satisfy that the accused person has made his confession or the admission voluntarily and under fair and just circumstance before such evidence is admitted in evidence.

8. The Fiji Court of Appeal in **Rokonabete v The State [2006] FJCA 40; AAU0048.2005S (14 July 2006)** has explicitly discussed the appropriate procedure of conducting a *voir dire* hearing, where the Fiji Court of Appeal held that:

> *23. "The purpose of excluding the jurors in to allow the judge to determine the admissibility as a question of law without the risk that the jurors will hear matters which may be inadmissible. In Fiji, the assessors are not the sole judges of fact. The judge is the sole judge of fact in respect of guilt and the assessors are there only to offer their opinions based on their views of the facts. It is sensible to exclude them, as is done for jurors and for similar reasons, whilst evidence which may be excluded from the trial of the case is led. However, the judge is in a similar position to a magistrate. He hears the evidence in the trial within a trial and, if he concludes that it is inadmissible and must be excluded, he will have to continue with the trial having put it out of his mind. We see no sensible reason why the magistrates should not follow the same procedure."*

9. The Fiji Court of Appeal in **Rokonabete (Supra)** gone further and held:

> *24. "Whenever the court it advised that there is challenge to the confession, it must hold a trial within a trial on the issue of admissibility unless counsel for the defence specifically declines such a hearing. When the accused is nor represented, a trial with a trial must always be held. At the conclusion of the trial within a trial, a ruling must be given before the principal trial proceeds further. Where the confession is so crucial to the prosecution case that its exclusion will result in there being no case to answer, the trial within a trial should be held at the outset of the trial. In other cases, the court may decide to wait until the evidence of the disputed confession is to be led."*

10. Having outlined the applicable procedure of conducting a *voir dire* hearing, the Fiji Court of Appeal in **Rokonabete (supra)** has then discussed the responsibility of the Magistrate in conducting a *voir dire* hearing, where the Court of Appeal found that:

25. "It would seem likely, when the accused is represented by counsel, that the court will be advised early in the hearing that there is a challenge to the confession. When that is the case, the court should ask defence counsel if a trial within a trial is required and then hear counsel on the best time at which to hold it. If the accused is not represented, the court should ask the accused if he is challenging the confession and explain the grounds upon which that can be done.

26. We are conscious of the time that such a procedure will consume and we consider that there is scope for one variation from the procedure followed in trials with assessors. If the magistrate allows the statement to be admitted it will not be necessary to rehear the evidence on the matters already raised in the trial within a trial. However, even in such a case, it will necessary to call at least some of the witnesses from the trial within a trial to read the contents of the hitherto challenged document."

11. The guideline enunciated in **Rokonabete** (supra) has further been confirmed and adopted by the Fiji Court of Appeal in **Tukana v State (2014) FJCA 188; AAU13.2011 (5 December 2014)** and **Ledua v State [2015] FJCA 66; AAU01115.2014 (28 May 2015).**

12. In view of the guideline expounded in **Rokonabete (supra)** the trial Magistrate must conduct a trial within a trial (*voir dire*) if the accused is unrepresented and the prosecution proposes to adduce the confession made by the accused in evidence. Moreover, the ruling of the trial within a trial must be given before the principle trial proceeds further. If the trial Magistrate admits the admissibility of the caution interview in evidence, it is necessary to call at least some of the witnesses from the trial within a trial to read the contents of the caution interview during the trial proper.

13. In this case, the Appellant was not only unrepresented, but also absent during the course of the hearing. Accordingly, the main issue, that needs to be determined is whether the **Rokonabete (supra)** guidelines applicable to the cases where the hearing was proceeded in the absence of the accused.

14. The Appellant had informed the court on the 9th of October 2008 and 1st of May 2012 respectively, that he challenges the admissibility of the caution interview in evidence. However, according to the record of the proceedings in the Magistrate's court on the 16th of September 2013, the learned Magistrate has recorded that the Appellant does not want to challenge the caution interview. Subsequent to several years of adjournment, the matter proceeded to hearing in absentia on the 19th of June 2017. The learned Magistrate in paragraph 11 of his judgment has states that:

> *"Interestingly however the Accused challenged the caution interview but there is no voir dire grounds filed. The accused had also disclosed to court that he was threatened, the court had also directed the officers involved in the investigation be produced for the voir dire hearing, but the accused was not present. The voir dire hearing was never pursued for various reasons and there has never been a voir dire hearing in this matter to date in view of the accused failure to attend court. The court is left with no option but to accept the caution interview".*

15. In view of the above paragraph of the judgment of the learned Magistrate, it is clear that the learned Magistrate was aware about the fact that the Appellant had challenged the admissibility of the caution interview in evidence on the ground that he was threatened. However, the learned Magistrate had accepted the caution interview on the ground that Appellant failed to appear in court to challenge the admissibility.

16. Trial in absentia does not mean that the accused loses his rights that have been protected under the Constitution. Specially, the rights of the accused person to have a fair trial as stipulated under Section 15 (1) of the Constitution. It is the responsibility of the trial Magistrate to conduct the trial, protecting the rights of the accused who failed to appear in court.

17. If the prosecution proposes to adduce the confession made by the accused in his caution interview in evidence, in a trial which is conducted in the absence of the accused pursuant to Section 14 (2) (h) (i) of the Constitution, the trial court must conduct a trial within a trial, in order to determine the admissibility of the caution interview of the accused in evidence,

18. Accordingly, the failure of the learned Magistrate to conduct a trial within a trial in order to determine the admissibility of the caution interview in evidence has denied the Appellant of his rights to have a fair trial, thus making the eventual conviction made against the accused unsafe. Therefore, I find this ground of appeal has merits and succeed.

Ground II

19. The learned Magistrate has sentenced the Appellant for a period of twelve (12) years imprisonment. Section 7 of the Criminal Procedure Act has stipulated the sentencing jurisdiction of the Magistrate, where it states that:

> *i) A magistrate may, in the cases in which such sentences are authorised by law, pass the following sentences, namely—*
>
> *a) imprisonment for a term not exceeding 10 years; or*
>
> *b) fine not exceeding 150 penalty units.*
>
> *iii) A magistrate may impose consecutive sentences upon a person convicted of more than one offence in a trial, but in no case shall an offender be sentenced to imprisonment for a longer period than 14 years.*
>
> *iv) The sentencing limits prescribed in sub-section (1) may be further restricted in relation to magistrates of certain classes as provided for in any law dealing with the establishment and jurisdiction of the Magistrates Court.*
>
> *v) Where any magistrate of a certain class sentences an offender for more than one offence in a trial, the aggregate punishment shall not exceed twice the amount of punishment which that magistrate has jurisdiction to impose.*

20. Accordingly, the learned Magistrate has no jurisdiction to impose a sentence above ten years of imprisonment pursuant to Section 7 (1) of the Criminal Procedure Act. Therefore, the sentence of twelve (12) years of imprisonment period imposed against the Appellant is wrong and cannot be stand. In view of these reasons, the second ground of appeal succeeds.

Re-Trial

21. Having concluded that the conviction and the sentence entered by the learned Magistrate is wrong and invalid, I now turn on to discuss the appropriate remedy pursuant to section 256 (2) of the Criminal Procedure Act.

22. Waidyarathne JA in **Josateki Cama and others v The State (Criminal Appeal No AAU 61 of 2011)** has expounded the scope of the discretionary power of the court to order for a retrial in a comprehensive manner. His Lordship observed that:

> *"It had been held that the exercise of the discretion to order a retrial requires the consideration of several factors, some of which may favour a retrial and some against it,*
> *Public interest to prosecute offenders without terminating criminal proceedings due to a technical error by the trial judge and the availability of sufficient evidence against the accused are factors that could be considered in favour of an order for a new trial. Considerable delay between the date of offence and the new trial and the prejudice caused to the appellant due to non-availability of evidence at the new trial may favour an acquittal of the appellant."*

28. It appears that the prosecution case is mainly founded on the evidence of the complainant, his wife and the confession made by the Appellant in his caution interview. I am mindful of the fact that this offence was allegedly committed in 2008. However, the two main civilian witnesses of the prosecution were available for the hearing, that was conducted in 2017. Therefore, I find the main witnesses of the prosecution are still available for a re-trial.

29. Having considered the reasons discussed above, it is my opinion that the availability of the witnesses of the prosecution, and the interest of justice have outweighed the prejudicial impact on the accused if an order of retrial is granted. Hence, I find a re-trial against the Appellant would serve the interest of justice.

30. I accordingly make the following orders.

i) The Appeal is allowed on the reasons discussed above,

ii) The Conviction entered against the Appellant on the 26th of July 2017 is set aside,

iii) The Sentence imposed against the Appellant on the 28th of July 2017 is quashed,

iv) An immediate Re-trial is ordered before another Resident Magistrate in the Magistrate's Court of Nadi,

v) The Appellant is remanded in custody till 31st of January 2018,

vi) The matter to be mentioned in the Magistrate's court in Nadi on the 31st of January 2018.

31. Thirty (30) days to appeal to the Fiji Court of Appeal.

R.D.R.T. Rajasinghe
Judge

Judgment delivered by Sharma J in court on 23.01.18

At Lautoka
23rd January 2018

Solicitors
Appellant In Person.
Office of the Director of Public Prosecutions for the Respondent.