

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO.: HAA 79 OF 2017**

**BETWEEN:**           RONIL KUMAR

**Appellant**

**A N D:**               STATE

**Respondent**

**Counsel:**           Mr. J. Singh for Appellant  
                          Ms Naibe for Respondent

**Hearing:**           05<sup>th</sup> January 2018

**Judgment:**       24<sup>th</sup> January 2018

**JUDGMENT**

**Introduction**

1. The Appellant was charged with two others in the Magistrate's Court of Nadi for three counts of Robbery with Violence, contrary to Section 293 (1) (b) of the Penal Code. The Appellant and the two co-accused were first produced in the Magistrate's Court on the 27th of February 2009. The matter then proceeded at a snail's pace over a period of more than six years with clusters of adjournments. During the course of this protracted delay, the Prosecution had dropped the charges against the third accused. Eventually, the matter was taken up for hearing on the 30th of June 2015. The prosecution had called eight witnesses, including three complainants. Moreover, the prosecution has tendered the medical certificate of the second complainant, the caution interview made by the Appellant and the charging statement of the Appellant in evidence. At the conclusion of the Prosecution's case, the learned Magistrate found there is no case to answer to the second accused and acquitted him accordingly.

Subsequent to several adjournments sought by the Appellant in order to call his defence, the court refused to grant further adjournment on the 12th of July 2016. The Appellant then informed the court that he does not wish to give evidence but wishes to call his witnesses for the defence of alibi. The learned Magistrate had refused the said application on the ground that the Appellant had failed to give sufficient notice of alibi. The matter then adjourned for the judgment. On the 20th of April 2017, the learned Magistrate delivered her judgment, finding the Appellant guilty for these three counts. Subsequent to that, the learned Magistrate convicted and sentenced the Appellant for a period of eight years and six months imprisonment. Aggrieved with the said conviction and the sentence, the Appellant filed this appeal on the following grounds, *inter alia*;

***Appeal against the conviction,***

- i) *That the learned Magistrate erred in law and in fact when she failed to consider the identification of the Accused was not established within the establish principle of the case authorities,*
- ii) *That the learned Magistrate erred in fact and in law when she took into consideration the inconsistent statements given by the prosecution witnesses and thus enhancing a miscarriage of justice,*
- iii) *That the learned Magistrate failed to consider the prosecution amending the charge before the close of the prosecution case,*
- iv) *That the learned Magistrate allowed the caution interview to be tendered without conducting a voir dire hearing and also considered the caution interview in her judgment but failed to hold a trial within a trial to determine its admissibility as the Appellant was unrepresented.*

***Appeal against the Sentence,***

- v) *That the learned Magistrate took extraneous factors when considering sentence.*

**Ground IV**

2. For the convenience, I first draw my attention to the IV ground of appeal against the conviction. The Appellant contents that the learned Magistrate admitted the confession made by the Appellant in his caution interview without conducting a voir dire hearing

in order to determine the admissibility of caution interview in evidence when he was not unrepresented by a lawyer during the course of the hearing.

3. The learned counsel for the Respondent, in her supplementary written submissions conceded this ground. Having taken into consideration the availability of the witnesses of the prosecution, the seriousness of the alleged offence, and the realistic prospect of obtaining a conviction against the Appellant, the learned Counsel for the Respondent suggested in her submission that an order of re-trial would serve the interest of justice in this case.
4. 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 recognised 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”.*

5. 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”.*

6. 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;”*

7. 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;”*

8. 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.
9. 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.*

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

24. "Whenever the court is advised that there is a 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 not represented, a trial within 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."

11. 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 be necessary to call at least some of the witnesses from the trial within a trial to read the contents of the hitherto challenged document."

12. 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).

13. 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.
14. In this case, the Appellant was unrepresented during the hearing. The prosecution has adduced the caution interview of the Appellant in evidence. The learned Magistrate has not informed or explained the Appellant that he could challenge the admissibility of the caution interview in evidence. Instead of that, the learned Magistrate has continued and concluded the trial proper admitting the caution interview of the accused in evidence. The learned Magistrate, in her judgment, has heavily relied on the confession made by the Appellant in his caution interview in order to reach to her conclusion.
15. According to Sections 13 (1) (d) and 14 (2) (k) of the Constitution and the guidelines enunciated in **Rokonabete (supra)**, I find that 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 rights of the Appellant to have a fair trial, thus making the eventual conviction and the sentence made against the Appellant unsafe. Therefore, I find this ground of appeal has merits and succeed.

#### Re-Trial

16. 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.

17. 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:

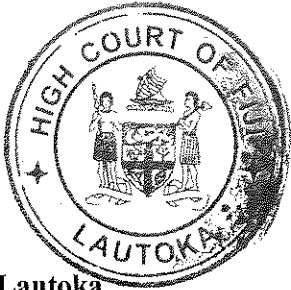
*“It had been held that the exercise of the discretion to order a retrial requires the consideration of several factors, some of which may favour a retrial and some against it,*

*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”.*

18. It appears that the prosecution’s case is mainly founded on the evidence of the complainants and their family members who were present at the time of this crime took place, and the confession made by the Appellant in his caution interview. I am mindful of the fact that this offence was allegedly committed in 2009. However, the main civilian witnesses of the prosecution were available for the hearing, that was conducted in 2015. The learned counsel for the Respondent in her supplementary submissions informed the court that all the witnesses of the prosecution are still available to give evidence if a re-trial is ordered.
19. 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 retrial against the Appellant would serve the interest of justice.
20. I accordingly make following orders,
- i) The Appeal is allowed on the reasons discussed above,

- ii) The conviction entered against the Appellant on the 20th of April 2017 is set aside,
- iii) The sentence imposed against the Appellant on the 8th of May 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 Magistrate's court in Nadi on the 31st of January 2018.

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



At Lautoka  
24<sup>th</sup> January 2018

Solicitors

Office of the Legal Aid Commission for the Appellant.

Office of the Director of Public Prosecutions for the Respondent.

R.D.R.T. Rajasinghe  
Judge

*Judgment delivered  
on 24<sup>th</sup> January 2018.*

A.R. ALUTHAGE  
Judge