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

CRIMINAL APPEAL NO. AAU0055 and AAUOO74/05 OF 2005
(High Court Criminal Case No. HAA0087 of 2005)

BETWEEN: **PAULA SAKEO and MOSESE BOLADRAU**

Appellants

A N D : **THE STATE**

Respondent

Coram: **Ward, President**
Eichelbaum, JA
Scott, JA

Hearing: **Tuesday 7 November 2006**

Counsel: **Appellants in person**
A Prasad for respondent

Date of Judgment: **Friday 10 November 2006**

JUDGMENT OF THE COURT

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[1] These appellants were convicted following trial, together with a third co-accused, in the Ba Magistrates' Court. The first appellant was convicted of two counts of robbery and one of unlawful use of a motor vehicle. He was sentenced to 7 years,

2 years and 6 months imprisonment respectively. The first and third counts were ordered to be served consecutively but the second count was concurrent. The second appellant was only charged with the first robbery and the unlawful use but the judgment of the learned magistrate shows that he too was convicted on all three counts and sentenced to the same penalties including two years imprisonment for the second count with which he had not been charged.

[2] Both appealed to the High Court against conviction and sentence and the appeals were dismissed. The High Court perpetuated the mistake over the second charge in respect of the second appellant.

[3] Various grounds of appeal were submitted to this Court but, as this is an appeal under Section 22 of the Court of Appeal Act, there can only be an appeal against conviction on a question of law. However, leave has been given for the first appellant to appeal on the ground that the learned judge erred in law in not finding that there should be a trial within a trial in the Magistrates' Court to determine the admissibility of confessions.

[4] The second appellant was given leave on the ground that the learned magistrate erred 'in relying on the caution interview which was inadmissible evidence as it was obtained by torture". As framed that is a ground of mixed fact and law but, when giving leave, the single judge granted leave on the same ground that had been allowed to the first appellant. The second appellant was also given leave on two other grounds but, in view of the conclusion we reach on the first ground, we need not consider them.

[5] The principal charge relates to an armed robbery of the ANZ Bank in Ba in 2003. It is not necessary to go into the details. The record shows that the appellants challenged the admissibility of the statements they had made under caution to the police on the grounds that they had been ill treated and their statements were consequently not voluntary.

[6] In his judgment, the learned judge summarised the appeal:

> *"The appellants throughout the hearing have maintained the allegations that they were assaulted in various ways which they alleged would lead to their confessions statements being involuntary and therefore inadmissible.*
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> *I have been taken to various parts of the record, various sections of cross-examination and various other parts of the evidence which is submitted support such a proposition. It is also submitted on behalf of the [first] appellant that the learned magistrate should have conducted a voir dire examination. However, I acknowledged that the Rules applicable to the Magistrates' Court are indeed very different to the High Court and there is no requirement nor in fact any ability for a separate and discreet hearing on the admissibility of the documents to be conducted in that jurisdiction.*
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> *The learned magistrate had the opportunity of seeing the accused throughout the hearing and of seeing the witnesses who gave evidence on behalf of the prosecution. She was in the position of being able to make an assessment of the accused and of the witnesses as they gave their evidence and as that evidence was tested under cross examination.*
> ...
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> *In the course of her quite extensive judgment the learned magistrate addressed the admissibility of the documents and addressed the test to be applied as set forth in The State v Ram Lingam. She has also addressed the Judges Rules and Section 27(1)(c) of the Constitution and having considered the test as prescribed has then ruled in favour of admitting the caution interviews in evidence."*

[7] In *Sakiusa Rokonabete v The State*, Criminal Appeal AAU 48/05, 14 July 2006, this Court ruled on the need to hold a trial on the voir dire when the admissibility of cautioned statements is challenged. It is accepted that the practice that had been followed prior to *Rokonabete's case* was the result of Practice Direction No 1 of 1983. In this case, the learned magistrate had given judgment on 29 June 2004 having conducted the trial in accordance with the procedure prescribed in the Practice Direction.

[8] The appeal was heard and judgment given on 22 July 2005. There can be no doubt that the High Court judge was also acknowledging the practice being used at the time.

[9] As was pointed out in *Rokonabete's case*, the Court of Appeal had previously ruled on the procedure set out in the Practice Direction in *Vinod Kumar v The State*, Criminal Appeal 24/00, 24 May 2001, and suggested a variation. However, it appears the procedure suggested in *Kumar's case* has never been followed. When the appellants first filed their appeals, they referred to *Kumar's case* but, in their latest submissions, they now rely on *Rokonabete's case*.

[10] Miss Prasad for the respondent concedes that we must now decide this appeal in the light of *Rokonabete's case*. That is clearly correct and we accept that the failure to hold a trial within a trial in order to determine the admissibility of the appellants' cautioned statements seriously prejudiced the appellants' trial.

[11] However, Miss Prasad seeks to distinguish the present case from *Rokonabete's case*. She points out that in *Rokonabete*, the court referred to a number of features which made the failure to hold a trial within a trial more serious. The matters she refers to are (a) the fact that the caution statement included confessions of other offences not the subject of the trial, (b) that the court had relied on the truth of the contents of the confession to determine admissibility, (c) that the appellant had been denied an opportunity to give evidence on admissibility without subjecting himself to cross examination on other issues and (d) that the magistrate had misdirected himself on the weight to be attached to an unsworn statement from the dock.

[13] Apart from (c), none were present in this case and Miss Prasad asks the Court, therefore, to apply the proviso to Section 23(1) of the Court of Appeal Act on the ground that no substantial miscarriage of justice has occurred. We cannot accept that would be appropriate.

[14] It is the third factor which determines this appeal. The procedure followed deprived the appellants of the opportunity to give sworn evidence on the question of admissibility without having to submit to cross-examination on the case as a whole. Whilst the Court in *Rokonabete* strongly criticised the other matters and, in respect of (a), stated it would have been sufficient in itself to allow the appeal, the Court concluded that the appeal had to be allowed, regardless of any other matters, because of the failure to hold a trial on the voir dire and rule on admissibility before any assessment of the evidence as a whole.

[15] That must also be the result here. By the time the magistrate was determining the admissibility of these statements, she had already heard the evidence in its entirety including the contents of the challenged statements and evidence based on the prosecution allegation that they were the truth. She pointed out, "Prosecution relies heavily on the admissions by Accused 1, 2 and 3 in their Interview under Caution by Police".

[16] The evidence included an unsworn statement by the first appellant and sworn evidence by the second. The inherent danger is well illustrated by the cross examination of the second appellant which included detailed questioning on the contents of the challenged confession.

[17] The magistrate referred to the decision of the second appellant and the other co-accused to make unsworn statements:

> *"Accused 1 and 2 elected to give unsworn evidence, as is their right. ... Both ... in choosing to give unsworn evidence illustrated they were not prepared to have the truth of their evidence challenged by cross-examination."*

[18] We consider that an unfortunate comment and one which goes close to inferring guilt from his decision. Whilst the right of the court to comment on the decision to remain silent is well established, authorities repeatedly condemn any comment which may be seen as suggesting the decision infers guilt; see, for example, *R v Bathhurst* [1968] 2 QB 90, 52 Criminal Appeal R 251, 257; *Waugh v R* [1950]

AC 203. In Fiji, the accused are told at the conclusion of the prosecution case that they may remain silent, make an unsworn statement or give evidence under oath and the same restriction on the nature of any comment should apply to a decision to make an unsworn statement.

[19] **Result:**

The appeals against conviction are allowed. The case against both appellants is remitted to the Magistrates' Court for rehearing by a different magistrate.

Ward, President

FIJI COURT OF APPEAL

Eichelbaum, JA

Scott, JA

Solicitors:

Appellants in person
Office of the Director of Public Prosecutions, Suva for the respondent