

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

CRIMINAL APPEAL NO. AAU 166 OF 2015
(High Court HAC 89 of 2010 [Lautoka])

BETWEEN : RAFAELE NOA *Appellant*

AND : THE STATE *Respondent*

Coram : Calanchini P

Counsel : Mr M Fesaitu for the Appellant
Mr S Babitu for the Respondent

Date of Hearing : 8 August 2019

Date of Ruling : 30 August 2019

RULING

[1] Following a trial in the High Court at Suva the appellant was convicted on one count of murder and one count of aggravated robbery. He was one of five accused tried on counts of murder and aggravated robbery. Each was convicted on at least one count and each

has applied for leave to appeal against conviction and/or sentence. There are 5 separate Rulings in respect of their applications.

- [2] On 1 December 2015 the appellant was sentenced to the mandatory sentence of imprisonment for life for murder. The trial Judge directed that the appellant serve a minimum term of 20 years before a pardon may be considered under section 237 of the Crimes Act 2009. For the conviction on the count of aggravated robbery he was sentenced to 13 years imprisonment and that sentences were ordered to be served concurrently.
- [3] The appellant filed a timely handwritten notice of appeal against conviction and sentence dated 7 December 2015. On 8 August 2019 the appellant applied in writing to abandon his appeal against sentence. That application is to be listed for hearing at the same time as the appeal against conviction in the event that leave is granted or alternatively on a date to be fixed.
- [4] This is the appellant's application for leave to appeal against conviction pursuant to section 21(1)(b) of the Court of Appeal Act 1949 (the Act). Section 35 of the Act gives to a judge of the Court of Appeal power to grant leave. The test for granting leave to appeal against conviction is whether the appeal is arguable before the Court of Appeal: **Naisua -v- The State** [2013] FJSC 14; CAV 10 of 2013, 20 November 2013.
- [5] On 12 July 2019 the appellant filed an amended notice of appeal relying upon the following grounds of appeal against conviction:

- “1. *The guilty verdict for the charge of murder is not supported by the totality of the evidence.*
2. *The learned trial Judge erred in law in not considered the locality to which the offence was committed, contrary to section 35(1) and 37 of the Criminal Procedure Act.”*

[6] In relation to the first ground the issue is whether there was sufficient evidence to convict the appellant on the count of murder. The five offenders had planned a night time home invasion for the purpose of stealing items and money belonging to the occupant(s). During the course of the robbery one of the occupants was murdered by strangulation by one of the group, assisted by two others. In his caution interview and charge statement the appellant admitted the aggravated robbery but denied any involvement in the murder. Both statements were admitted into evidence without challenge.

[7] It must be noted that none of the five offenders carried any weapon into the house. They were unarmed. The particulars of the offence allege that the five murdered the deceased. It was not alleged in the particulars that the appellant had aided or abetted. The particulars suggest that the appellant was charged as a principal offender. However it appears not to be disputed that at the time the deceased was murdered the appellant was in another room. It was not alleged that he had either strangled the deceased nor had he physically assisted the offender who had strangled the deceased.

[8] Under those circumstances culpability would appear to rest on the principle of joint enterprise, provision for which is made in section 46 of the Crimes Act 2009 which states:

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

[9] It is ultimately a question of fact for the trial judge to determine whether the person who strangled the deceased during the course of the illegal purpose (the robbery) went beyond what was tacitly agreed as part of the common purpose. It is arguable that he did so and that consequently the appellant is not liable for the consequences of the unauthorized act. It is arguable that the appellant did not realise that in the course of the robbery, being

unarmed as the perpetrators were, that one of them might use force with intent to kill or cause grievous bodily harm.

[10] More significantly, although not expressly raised is the issue of inconsistent verdicts. This appellant, although not present in the room when and where the appellant Navunicagi allegedly strangled the deceased, he was convicted on the count of murder along with Navunicagi and Tamanivakabauta. However the appellant Lilo who, in the words of the trial Judge in his judgment at paragraph 10:

“ ___ admitted he participated in the attack on the old man at the material time ___”.

was convicted of manslaughter only. Furthermore the appellant Vakabua was found not guilty of both murder and manslaughter apparently on the basis that he remained outside the house as “*look-out*.”

[11] The remaining ground of appeal is related to the place of trial. The particulars of the charges allege that the offending occurred in Lautoka. The trial took place in the High Court at Suva. Sections 35 and 37 of the Criminal Procedure Act 2009 make provision for issues of jurisdiction and place of trial. Even if there has been non-compliance with those provisions, section 278 of the Criminal Procedure Act indicates that any such breach is not fatal unless the breach has in fact resulted in a failure of justice. The onus is on the appellant to show that the failure to conduct proceedings in the Lautoka High Court resulted in a failure of justice. As the respondent indicates in its written submissions the appellant has not made reference in his submissions to any failure of justice resulting from the trial in the High Court at Suva rather than at Lautoka. This ground is not arguable before the Full Court.

[12] For the reasons stated leave to appeal against conviction is granted.

Orders:

- 1). *Leave to appeal against conviction for aggravated robbery is refused.*
- 2). *Leave to appeal against conviction for murder is granted but not on the issue of place of trial.*
- 3). *Application to abandon the appeal against sentence to be listed with the appeal against conviction for murder*



W. Calanchini

Hon Mr Justice W D Calanchini
PRESIDENT, COURT OF APPEAL