IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISCELLANEOUS JURISDICTION

HAA NO. 9 OF 2016

BETWEEN : ANUR KUMAR

Appellant

AND : STATE

Respondent

Counsel : Mr Iqbal Khan for Appellent
Ms. S Kiran for Respondent

Date of Hearing : 11th of May 2016
Date of Ruling : 2nd of June 2016

JUDGMENT

Introduction

1. Appellant had been charged in the Magistrates' court for one count of Assault Causing Actual Bodily Harm, contrary to Section 275 of the Crimes Decree. The Appellant had pleaded not guilty for the offence, hence the matter was proceeded to hearing. At the conclusion of the hearing, the learned Magistrate found him guilty for the offence and convicted him accordingly. Subsequent to the conviction, the Appellant was sentenced for twelve months of imprisonment period.

2. Having being aggrieved with the said conviction and the sentence, the Appellant filed this appeal on the following grounds *inter alia;*

Appeal against conviction

i) The Learned Trial Magistrate misdirected and/or wrongly directed himself on the question of burden of proof and by such failure there was a substantial miscarriage of justice.

ii) The Learned Trial Magistrate erred in law and in fact in shifting the burden of proof when he stated that "in view of the Accused's case, the Court finds that the accused had not in fact put up a defence to the charge through his evidence" and as such there has been a substantial miscarriage of justice.

iii) The Learned Trial Magistrate erred in law and in fact when he had considered the evidence and the demeanor of witnesses and their reaction to cross examination when the Prosecution witnesses had given evidence over 4 months ago and it would be difficult for the Learned Trial Magistrate to recollect the demeanor and the evidence of witnesses after 4 months and as such there was a substantial miscarriage of justice as the inordinate delay carried a real risk of injustice (per the decision of Court of Appeal in the case of Shan Muga Vellu vs. Shila Wati Prasad Civil Appeal No. ABU0040 of 2004).

iv) The Learned Trial Magistrate erred in law in not adequately directing/misdirecting himself the previous inconsistent statements made by the main Prosecution witness and as such there has been a substantial miscarriage of justice.

v) *The Learned Trial Magistrate erred in law and in fact in not taking into consideration the appellant's explanation as to the injuries suffered by the Complainant was caused by accident and that he had no intention to injure the complainant.*

vi) *The Learned Trial Magistrate erred in law and in fact in not directing himself to the possible defence on evidence and as such by his failure there was a substantial miscarriage of justice.*

vii) *The Learned Trial Magistrate erred in law and in fact in not assisting the Appellant who was unrepresented regarding the cross examination of the Complainant in detail and such failure amounted to a substantial miscarriage of justice.*

Appeal Against Sentence

i) *The Appellant appeal against sentence being manifestly harsh and excessive and wrong in principle in all the circumstances of the case.*

ii) *The Learned Trial Magistrate erred in law and in fact in taking irrelevant matters into consideration when sentencing the Appellant and not taking into relevant consideration in particular that the Appellant had paid the full amount that was the subject matter of the charge.*

iii) *The Learned Trial Magistrate erred in law and in fact in passing sentence of imprisonment for 12 months was disproportionately severe punishment contrary to Section 25 of the Constitution of Fiji (1998) (Section 11 (1) of the 2013 Constitution of Fiji).*

iv) The Learned Trial Magistrate erred in law and in fact in not taking into consideration the provisions of the Sentencing and Penalties Decree 2009 when he passed the sentence against the Appellant.

v) The Appellant reserves his right to add/argue to the above grounds of appeal upon receipt of the Court records in this matter.

3. During the course of the hearing of this Appeal, the court invited the attention of the learned counsel of the Appellant and the Respondent on the issue of admissibility of the caution interview of the Appellant in evidence. The court found that the Appellant was unrepresented during the hearing and the prosecution has tendered the caution interview of the Appellant in evidence without conducting a voir dire hearing. Accordingly, I allow the Appellant to file additional grounds of appeal to that extent, which the Appellant filed. The Additional grounds of the Appellant are that;

i) The learned trial Magistrate erred in law and in fact when he failed to inform the Appellant who was unrepresented of his right to have the voluntariness of the alleged confession tested on the Voir Dire and as such there has been a substantial miscarriage of justice.

ii) The Learned Trial Magistrate erred in Law and in fact is not properly assisting the Appellant who was unrepresented to make an informed decision on whether to waive the right to challenge the voluntariness of the alleged confession on the Voir Dire and the failure to do so cause substantial miscarriage of justice.

iii) The Learned Trial Magistrate erred in law and in fact to advise the Appellant who was unrepresented of a number of rights relevant to trial proper and by such failure caused a substantial miscarriage of justice.

4. The learned counsel for the Appellant and the Respondent consented that the court should first determine the issue of not conducting a voir dire hearing in order to determine the admissibility of the caution interview in evidence.

Background

5. The Appellant was unrepresented during the hearing in the Magistrate's court. The prosecution has called two witnesses, including the victim. The second witness of the prosecution is the investigation officer. He has conducted the caution interview of the Appellant and tendered the caution interview of the Appellant in evidence. According to the record of the proceedings in the Magistrate's court, the learned Magistrate has not conducted a voir dire hearing in order to determine the admissibility of the caution interview in evidence. Instead of that, the learned Magistrate has only explained the Appellant that the prosecution was intending to produce the caution interview of the Appellant in evidence. The learned magistrate has then asked the Appellant whether he wishes to challenge the caution interview statement, for which the Appellant replied as "No". The learned Magistrate has then decided to proceed the hearing without conducting a voir dire hearing.

6. The learned Magistrate in paragraph 16 of his judgment has specifically found that there was no evidence to suggest that the caution interview was conducted in breach of the rights of the Appellant. He found that there was no evidence to

suggest that the police has used any violence or unfair and unjust treatment on the accused. He has further concluded that there was no challenge by the accused person on the voluntariness of the caution interview. Having stated that, the learned Magistrate has concluded in his judgment that the caution interview of the accused person was admissible in evidence.

7. The learned Magistrate has specifically stated in paragraph 17 of his judgment that he does not rely on the caution interview statement for the proof of the elements of the charge. However, I find that the learned Magistrate in the same paragraph of his judgment has considered the caution interview in order to determine whether the Appellant had not taken any defence to the allegation in his caution interview.

The Law

8. Having discussed the background of this appeal, I now draw my attention to the applicable legal principles pertaining to the issue under review in this ruling.

9. 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".

10. 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 Gounder 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".

11. Lord Griffiths in **Lam Chi-Ming and others v R (1991) 3 All ER 172)** having discussed the recent developments in English cases found three main objectives in rejecting of improperly obtained confessions. His Lordship held that;

"Their lordships are of the view that the more recent English cases established that the rejection of an improperly obtained confession is not dependent only upon possible unreliability but also upon the principle that a man cannot be compelled to incriminate himself and upon the importance that attaches in a civilised society to proper behaviours by the police towards those in their custody. All three of these factors have combined to produce the rule of law applicable in Hong Kong as well as in England that a confession is not admissible in evidence unless the prosecution establish that it was voluntary".

12. Accordingly, it appears that the principle of rejection of an improperly obtained confession is founded on three main grounds,

i) Unreliability of the confession,

ii) Rights against self-incrimination,

iii) To prevent undesirable police conduct on the person in their custody.

13. The rights against self- incrimination has been embodied in Article 13 (1) (d) of the Constitution, where it states that a detained or arrested person should not be compelled to make any confession or admission that could use in evidence.

14. 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.

15. 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.

16. Having discussed the legal principles pertaining to the admissibility of the confession or admissions in evidence, I now turn onto discuss the applicable procedure in conducting trial within a trial.

17. 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. Having concluded that the *"Practice Direction No 1 of 1983"* issued by the then Chief Justice is no longer be followed by the Magistrate's court, the Fiji Court of Appeal in **Rokonabete (supra)** 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.

18. 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.*

19. Having outlined the applicable procedure in conducting voir dire hearing, the Fiji Court of Appeal in **Rokonabete (supra)** has then discussed the responsibility of the Magistrate in conducting the 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.

20. The guideline enunciated in **Rokonabete** (supra) has further been confirmed and adopted by the 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).**

21. In view of the guideline expounded in **Rokonabete (supra)** the trial magistrate must conduct a trial within a trial if the accused is unrepresented and the prosecution proposes to give his confession in evidence. Moreover, the ruling of the trial within a trial must be given before the principle trial proceeds further.

22. In this instant case, the learned Magistrate has only asked the Appellant whether he wishes to challenge the caution interview. In view of the record of the proceedings in the Magistrate's court, it appears that the learned Magistrate has not explained the Appellant that he could challenge the admissibility of the

caution interview in evidence and the ground upon which he could do such. Instead, the learned Magistrate has merely asked the Appellant whether he wishes to challenge the caution interview.

23. The learned counsel for the Respondent submitted that the judgment of the learned Magistrate is mainly founded on the credibility of the evidence of the complainant, hence the admission of caution interview in evidence has not prejudicially affected the Appellant's right of a fair and just trial. Furthermore, the learned counsel urged that the Appellant has specifically stated that he does not wish to challenge the caution interview. The Appellant has not cross examined the Investigation Officer in to the effect of voluntariness or any undue conduct during the recording of his caution interview.

24. I do not concur with the above stated submissions made by the learned counsel of the Respondent. It is the responsibility of the court to ensure that the unrepresented accused person gets a fair and just hearing. In order to admit the confession made by the accused person in evidence, the court must first satisfy that the accused made his confessionary statement voluntarily and under fair and just circumstances. Hence, the learned Magistrate is required to conduct a voir dire hearing in order to determine the admissibility of the caution interview in evidence before he proceed further in the trial proper.

25. Moreover, I find that the learned Magistrate has considered the contents of the caution interview in order to evaluate the defence of the Appellant. Hence, it appears that the contents of the caution interview has been considered by the learned Magistrate in his deliberation.

26. In view of the reasons discussed above, it is my opinion that the failure of the learned Magistrate to conduct a trial within a trial has denied the Appellant a fair and proper trial, resulting the subsequent conviction and the sentence unsafe, invalid and erroneous.

27. Having concluded that the conviction 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 Decree.

28. Justice Waidyarathne 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".

29. It appears that the prosecution case is mainly founded on the evidence of the complainant and the caution interview of the Appellant. I am mindful of the fact that the admissibility of the caution interview in evidence need to be determined. The allegation is founded on a transaction which took place between the

complainant and the Appellant. Hence the evidence of the complainant is the main foundation of the prosecution case. Accordingly, I am satisfied that the prosecution has a quality and strong case against the Appellant. Meanwhile, I consider the fact that the Appellant has spent 3 months of his imprisonment, which could be considered as a mitigatory factor in the event if he is found guilty in a re-trial.

30. Having considered the reasons discussed above, it is my opinion that the strength of the prosecution case 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. I accordingly quash the conviction of the Appellant and set aside the sentence. I further order an immediate re-trial before another Resident Magistrate in the Magistrate's court of Lautoka.

31. 30 days to appeal to the Fiji Court of Appeal.

R. D. R. Thushara Rajasinghe

Judge

At Lautoka
2nd of June 2016

HIGH COURT OF FIJI
LAUTOKA

Solicitors : Messrs Iqbal Khan and Associates for Appellant

Office of the Director of Public Prosecutions for Respondent