VILITATI VASUCA v STATE (AAU0011 of 2011)

COURT OF APPEAL — CRIMINAL JURISDICTION

CALANCHINI AP

12 September, 26 October 2012

[2012] FJCA 70

Criminal law — directions to assessors — summing up — leave to appeal against conviction and sentence — whether trial judge erred — prejudicial material — defence case — confession — voir dire — time spent on remand — arguable point — Court of Appeal Act ss 21(1)(b), (c), 26(1), 35(1) — Penal Code s 293(1)(b) — Sentencing and Penalties Decree s 24.

The appellant was convicted of two counts of robbery with violence, and was sentenced to 14 years" imprisonment, with a non-parole term of 11 years. He sought leave to appeal against conviction and sentence. The appellant, while being interviewed by police, confessed to being involved in the robbery, but in court he pleaded not guilty.

Held –

(1) The transcript shows that some prejudicial material was admitted into evidence during the course of re-examination of a prosecution witness. Whether the trial should have proceeded was a matter for the trial judge exercising his discretion to ensure that the appellant received a fair trial. The issue was reasonably and adequately dealt with by the trial judge in his summing up.

(2) During summing up, the trial judge indicated the approach that the assessors should adopt for assessing the admissions in the caution interview. The summing up was proper and fair.

(3) The trial judge has adequately performed his duty to alert the assessors to satisfy themselves as to the truthfulness of the extra-judicial confession or admission made by an accused.

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(4) At the voir dire relating to the admission of the confession into evidence, the only evidence upon which the judge could rely to determine whether the confession was voluntary was that called by the State. In his summing up the judge commented on the evidence given by the appellant during the trial and properly indicated that it was for the assessors to consider all the evidence, including the confession and the answers given by the appellant.

Cases referred to

Kelsey v R [1953] 1 SCR 220; *R v Jacobs and Others* 168 ER 257, cited.

Leave to appeal against conviction refused. Leave to appeal sentence granted in respect of ground concerning time spent on remand only.

Appellant in person.

S Puamau

T Qalinauci for the Respondent.

[1] Calanchini AP. The Appellant was charged with two counts of robbery with violence contrary to s 293 (1) (b) of the Penal Code Cap 17. The Appellant pleaded not guilty to both counts. Following a trial in the High Court the

assessors unanimously found the Appellant guilty on the first count and a majority found him guilty on the second count. The learned trial judge agreed with the opinions of the assessors and in his judgment dated 25 January 2011 convicted the Appellant on both counts. On the same day the Appellant was sentenced to a term of imprisonment of 14 years with a non-parole term of 11 years.

[2] In his sentencing decision the learned trial judge summarised the relevant facts. On 7 February 2009 at Saweni Lautoka, the Appellant with two others entered the domestic premises of the Kumar family where his two accomplices entered the bedroom of Mr and Mrs Kumar asking for gold and money. A small knife was brandished and Mr Kumar was held pinned to the bed while his legs were stomped on and a knife pointed against his stomach. One of the men was masked. A cane knife was produced and placed against Mr Kumar's stomach. The men grabbed gold, laptop, mobile and jewellery (property belonging to both Hemant Kumar and Pratima Kumar)-stuffing the loot in their clothing. The men then went into an elderly woman's room who was sick and starting beating her. This traumatic time in the house lasted for about 45 minutes before the group fled from the scene.

[3] It would appear that the Appellant was later arrested by Police for being drunk and disorderly. Acting on information, the Appellant was interviewed under caution by Police for the offences. During the interview the Appellant made confessions to being one of the party involved in the robbery at Saweni.

[4] Notice of Application for leave to appeal against conviction and sentence was filed on 9 February 2011. The notice was filed within the time prescribed by s 26 (1) of the Court of Appeal Act Cap 12. On 23 February 2012 the Appellant filed an amended notice and grounds of appeal. On 21 August 2012 a Notice of leave to amend Grounds of Appeal was filed by the Appellant. It purports to amend the grounds of appeal against both conviction and sentence. However these amended grounds refer only to the appeal against conviction. Although the Appellant stated in this notice that he was seeking leave to withdraw his previously filed amended grounds, it will be assumed that he intends to rely on the amended grounds previously filed on 23 February 2012 in respect of sentence.

[5] Pursuant to s 21(1)(b) and (c) of the Court of Appeal Act the Appellant must first obtain leave of the Court of Appeal in respect of any appeal against conviction and sentence. A single judge of the Court has jurisdiction under s 35(1) of the Act to exercise the powers of the Court in respect of any application for leave to appeal to the Court.

[6] The four amended grounds of appeal in the Notice filed on 21 August 2012 are as follows:

> *"1. **THAT** the Learned Trial Judge erred in law and in fact when his lordship's direction to the assessors during summing up did not affectively canvas the defence case, thereby encumbering the appellant's right to a fair trial.*
>
> *2. **THAT** the Learned Trial Judge erred in law when he failed to hold that there was no other independent evidence to support the appellant's confession.*
>
> *3. **THAT** the Learned Trial Judge erred in law when he failed to hold that the Appellant's confession taken or obtained through assault, threat and inducement.*
>
> *4. **THAT** the Learned Trial Judge's summing up on paragraph 19 is wrong and/or misdirection in a sense that it structured to lead the assessors to believe that the confession is admissible evidence against the appellant."*

[7] In the written submissions filed by the Appellant there was a ground of appeal raised that had not been expressly stated in any of the notices filed by the Appellant. The ground is:

> *'That the learned trial Judge erred in law and in fact when his Lordship wrongly and incorrectly allowed the continuation of trial when the prosecution advanced inadmissible evidence of bench warrants and pending cases before the assessors.'*

[8] It is apparent from a reading of the transcript that some prejudicial material was admitted into evidence during the course of re-examination of a prosecution witness. The re-examination properly sought to clarify the question of recognition raised by Counsel acting for the Appellant during the course of his cross-examination of the same prosecution witness. The transcript indicates that Counsel for the Appellant then raised the matter with the learned trial Judge. On page 38 of the transcript the learned trial judge stated:

> *"There is prejudicial material before the assessors because Mr T Terere you opened up the question of recognition and how was he recognised that allowed Mr Sovau to jump in at re-examination and ask the witness how he recognised. Led to questions of being wanted as a suspect on other cases.*
>
> *That is your fault Mr Terere and I will address the issue in my summing up."*

[9] True to his word, the learned trial judge in paragraph 21 of his Summing Up told the assessors:

> *'Before I leave you to deliberate, there is one matter that I must address you on. You are not to take into account any references to this accused being a wanted man in the Lautoka Police Station. This case is to be judged on the evidence brought before you in this Court and not on some prejudicially bad reputation that somebody says he has. Similarly, you are to disregard one Police Officer's evidence that this accused's name was mentioned in connection with the Saweni crime. Again, we are judging this case on the evidence we have heard here and on nothing else.'*

[10] Whether the trial should have proceeded in the circumstances of this case was a matter for the trial judge exercising his discretion to ensure that the Appellant received a fair trial. In my judgment the issue was reasonably and adequately dealt with by the learned trial Judge. As a result I have concluded that this ground of appeal is not arguable and that leave to appeal should be refused.

[11] The second ground of appeal claims that the learned trial Judge failed to effectively canvas the defence case during the course of the Summing Up. It should be noted that the learned Judge expressly stated in paragraph 17 that:

> *"The accused's case is that the admissions are untrue (and he shifts from saying that they were fabricated to saying that he made them under duress) but in any event that they are not true."*

[12] In paragraphs 18 and 19 of his Summing Up the learned trial Judge indicated to the assessors the approach that should be adopted in assessing the admissions in the caution interview. In paragraph 19 the learned Judge did no more than indicate to the assessors one issue that should be considered when determining the fate of the admissions. In my judgment the Summing Up was proper and fair. I have concluded that this ground does not raise an arguable point and leave to appeal is refused.

[13] The third ground of appeal claims that the learned trial Judge failed to warn the assessors of the danger of convicting a person upon the sole evidence of his confession.

[14] In a footnote to *R v Jacobs and Others* 168 ER 257 at 258 the following appears:

> *'But in the case of John Wheeling, tried before Lord Kenyon at the Summer Assizes at Salibury 1789 it was determined that a prisoner may be convicted on his own confession when proved by legal testimony, although it is totally uncorroborated by any other evidence.'*

[15] In *Kelsey v R* [1953] 1 SCR 220 the Supreme Court of Canada had reason to consider the role of the trial Judge in such circumstances. The majority judgment was delivered by Fauteux J who at page 227 observed:

> *'That the Appellant could be legally convicted of murder by a jury solely on his extra – judicial admissions, i.e. without any corroborating evidence, is not disputed. What is suggested and what for the success of this appeal on this point must be accepted, is that there was in this case a legal duty for the trial judge to warn the jury of the danger of doing so. No authorities or precedents in point were quoted on behalf of the appellant, nor was it possible to find anyone to support this contention.'*

[16] In a dissenting judgment Cartwright J said at page 231:

> *'I do not read these judgments as formulating a rule of law that, in cases in which the only evidence to connect one accused of murder with the crime consists of his unsworn extra-judicial admission, the trial judge must warn the jury that it is dangerous to convict _ _ _.*
>
> *In such cases, and especially when the accused has not given evidence, I think it is incumbent on the trial judge (i) to impress upon the jury the necessity of testing the truthfulness of the admissions by an examination of the other facts and circumstances proceed and (ii) to call their attention, not necessarily to all the circumstances, but to those mainly relied upon by the defence as tending to cast doubt upon the truthfulness of the confession.'*

[17] The need for the trial judge to alert the assessors to satisfy themselves as to the truthfulness of the extra-judicial confession or admission made by an accused was confirmed by this Court in *Sani and Another v The State* (unreported criminal appeal AAU 26 of 2004 delivered 18 March 2005). At paragraph 34 the Court said:

> *'Where the only evidence to link an accused person with the crime is a confession, the court should always look to see if there is any other evidence which confirms the account given in the confession. An apparent confession may not be true _ _ _.'*

[18] In my opinion the directions given by the learned trial judge to the assessors in paragraphs 18 and 19 of the Summing Up support the conclusion that the learned judge has adequately performed his duty. I would refuse leave to appeal on this ground.

[19] The fourth ground of appeal is concerned with the ruling of the learned trial judge on the voir dire. There are submissions by the Appellant on this ground of appeal that overlap and to some extent repeat issues that are connected to the previous ground.

[20] As for admitting the confession into evidence, the learned judge conducted a voir dire at the commencement of the proceedings. The State called witnesses to establish that the confession was voluntary. Although the witnesses were cross-examined by Counsel for the Appellant and accusations put to those witnesses, the Appellant did not give evidence during the voir dire. The Appellant did not call any evidence during the voir dire. The only evidence before the

learned judge and the only evidence upon which he could rely to determine whether the confession was voluntary was that called by the State.

[21] In his Summing Up the learned judge commented on the evidence given by the Appellant during the trial and properly indicated that it was for the assessors to consider all the evidence, including the confession and the answers given by the Appellant. There was nothing unfair in the directions given by the learned judge and I would refuse leave on this ground.

[22] In respect of ground 5, there was only one defence relied upon by the Appellant at the trial. That defence was concerned with the truthfulness of the confession. The trial judge adequately directed the assessors. The directions were fair and proper. I would refuse leave on this ground.

[23] So far as sentence is concerned, the State concedes that there is one arguable point in respect of the ground concerning time spent on remand. The issue arises under s 24 of the Sentencing and Penalties Decree 2009. Although there appears to be a difference of opinion as to the amount of time spent on remand (10 months or 5 months) I accept that there is an arguable point and leave to appeal sentence is granted on this ground only.

[24] In conclusion leave to appeal against convicted is refused and leave to appeal sentence is granted in respect of one ground only.

Leave to appeal against conviction refused. Leave to appeal against sentence granted