SAULA LALAGAVESI v STATE (AAU0035 of 2011)

COURT OF APPEAL — CRIMINAL JURISDICTION

MARSHALL, GOUNDAR and BASNAYAKE JJA

28 February, 8 March 2012

Criminal Law — appeals — rehearing — accomplice warning — whether arguable point — corroboration — whether question of law only — jurisdiction — Court of Appeal Act s 22(1) — Criminal Justice and Public Order Act s 32 — Penal Code s 293(1)(b).

The appellant appealed against his conviction for robbery with violence, and the appeal was dismissed by the High Court. He was granted leave to appeal against conviction only on the ground that the Magistrate failed to direct himself as to whether the relevant prosecution witness was an accomplice.

Held –

(1) The statutory appeal from the Magistrates' Court was by way of rehearing. That meant that if the Court of Appeal addressed the accomplice issue and gave a correct opinion thereon, it does not matter that the learned Magistrate failed to direct himself on whether the prosecution witness was an accomplice. Since the Court of Appeal correctly found corroboration in the course of hearing the appeal, there is no arguable point left for a further appeal, whether or not it is a question of law only.

(2) Since the corroboration point in this case is not a question of law only, there is no jurisdiction in this Court of Appeal to hear the appeal and it must be dismissed *in limine* for lack of jurisdiction.

R v Makanjuola; R v Easton [1995] 1 WLR 1348, applied.

Appeal dismissed in limine for lack of jurisdiction.

Cases referred to

Peniasi Tirikula v The State Crim App No AAU0012 of 2009, approved.

Ole Jitoko v State Crim App No AAU0011 of 2010, cited.

Ilaisa Sousou Cava v The State Crim Appl No CAV 0007 of 2010; *R v Hinds* [1962] 46 Crim App R 327, considered.

M. Savou for the Appellant.

M Korovou for the Respondent.

[1] Marshall JA. Early in the morning of 4th August 2008 Nalin Kumar, who was 32 years old at the time, was looking for a customer or customers to hire his 7 seater carrier vehicle. He was parked outside Sunita's Photo Studio in Lautoka. A Fijian lady, later identified as Ms Seraseini Finau approached him at about 7.30 am. Ms Seraseini got into the van and directed Nalin Kumar towards Maravu Street. She told him she wanted to go to the Rotuman Church in Maravu Street and pick some flowers. Then she would require transport to a village funeral which she intended to attend. On arrival at the church it was closed. After ten minutes Ms Seraseini said she wished to relieve herself. She alighted from the vehicle and at the same time two Fijian boys were approaching. Nalin Kumar did not like the look of them, so he shouted to Ms Seraseini to be careful. However the two were not interested in robbing Ms Seraseini; their target was Nalin Kumar, his wallet, his bunch of keys and his mobile phone worth $850. One of

the two he knew. This person was not hiding his face and was known to Nalin Kumar as Navitalai Tui. The other person was wearing a mask. Navitalai grabbed his leg and started pulling him from the van while the man with the mask held him from his neck. Nalin Kumar was punched and was injured. He shouted for help. He fell to the ground for a second time and his keys and other property were stolen. When a pastor from the Rotuman church responded to his shouting, the two boys ran away. During all this Ms Seraseini stood watching the proceedings. Suspicious that she had set him up for this robbery, Nalin Kumar, when he had succeeded in restarting the vehicle, took her to the police station where the matter was reported and a criminal complaint made.

[2] Ms Seraseini gave evidence before Resident Magistrate Mr Rangajeeva Wimalasena at Lautoka Magistrates Court on 8th May 2010. She said that two boys she knew, Navi and Saula, had come to the home of her friend Baki with whom she was temporarily staying. They had come on the previous night at about 10.00 pm. She agreed to their request to engage a van and get it to stop at the Rotuman Church where Navi and Saula would attend and rob the driver. She had witnessed all that went on at the robbery while she was standing at the roadside. She saw the grabbing, the punching, the struggle and the stealing of the property. She heard Nalin Kumar shouting and saw the pastor arriving whereupon Navi and Saula ran away. She was quite sure that it was Saula who asked her to decoy the van to the Rotuman church. She was quite sure that it was Saula at the robbery with Navi because knowing him she recognised him. The mask was partly able to be seen through. She identified Saula as the person who requested her to decoy a van driver and as the person wearing the mask who with Navi perpetrated the robbery with violence. She recognized Saula as Saula Lalagavesi who was D1 in the trial before the Resident Magistrate.

[3] On 29th June 2010 the Resident Magistrate convicted Saula Lalagavesi on one charge of robbery with violence contrary to Section 293(1)(b) of the Penal Code and sentenced him to imprisonment for a term of 6 years and 3 months with eligibility for parole after serving 5 years. It was proved that Saula Lalagavesi had 41 previous convictions and had admitted 38 of them.

[4] On 10th March 2011 Justice Paul Madigan heard an appeal against conviction at the High Court in Lautoka by Saula Lalagavesi. There was no appeal against sentence.

[5] Dismissing the appeal against conviction on 17th March 2011, Justice Madigan reviewed all relevant grounds and matters. On the point raised by Saula Lalagavesi before this Court of Appeal he said:

> *"[11] The appellant's third ground is difficult to make out. He appears to be saying that as the Fijian lady was complicit in the offence by having arranged the van to be 'in situ', she was therefore an 'accomplice' and the learned Magistrate should have as a result given himself an accomplice warning and looked for corroboration outside her evidence.*
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> *[12] If that be the appellant's argument then it is misconceived. First there is nothing contained in the record that would go in any way to suggest that PW2 was an accomplice of the two men charged with robbery. She had been held by the Police on the day of the offence for questioning however she was never charged and there is no suggestion that she was giving evidence in this trial under immunity as the appellant appears to claim.*
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> *[13] Secondly, even if she was an accomplice and even if she was giving evidence under immunity, there is an abundance of corroboration in the evidence of PW1. The only part of her evidence not corroborated is her recognition of the appellant which has*

as discussed supra been analysed and accepted by the Magistrate. Not only did she recognize the appellant at the scene, she was able to give evidence that it was he who actually suggested the van robbery; the night before."

[6] When an application for leave to appeal against conviction and sentence came before me on 20th October 2011 I said:

"2. Section 22(1) of the Court of Appeal Act stipulates that an appeal is only available if it involves "a question of law only". Now that involves problems. The only ground eligible is that the learned Magistrate failed to consider whether PW2 was an accomplice. This is a misdirection but is it a question of "mixed fact and law" or "law only"?

3. Saula Lalagavesi argues two points. There was no identification parade. But PW2 knew him and had known him for at least one year. So it was recognition. The Magistrate warned himself on identification. I refuse leave on the identification and Turnbull point. It is not arguable.

4. Saula Lalagavesi's other point is arguable. The robbery with violence took place at 7.00 am on 4th August 2008 on the driver of a passenger for hire vehicle on the road outside the Rotuman Church in Lautoka. PW2 says she was asked by the two accused the night before to hire a van and tell the driver to stop at the Rotuman Church so that she could pick flowers for a funeral. At the agreed place the two accused were present and committed the robbery. Was she telling the truth when she identified Saula Lalagavesi as one of the two perpetrators?

5. Madigan J thought that PW2 was not an accomplice. But the point is that Magistrate Rangajeeva Wimalasena did not direct himself on the point at all. It is not mentioned in the record.

6. In my view it is arguable that the learned Magistrate misdirected himself on whether PW2 was an accomplice. Whether it is a point of "law only" is debatable. But it should be considered by a full Court of Appeal. …

7. There is no error of law in the sentence. I refuse to give leave to appeal on sentence.

ORDER

8. I order

(1) That Saula Lalagavesi be given leave to appeal against conviction on the ground only that the learned Magistrate failed to direct himself as to whether PW2 was an accomplice."

[7] Before I turn to jurisdiction I will give my opinion on this question. The answer is that the statutory appeal from the Magistrates Court is by way of rehearing. This means that if Justice Paul Madigan addressed the accomplice issue and gave a correct opinion thereon, it matters not that the learned Magistrate failed to direct himself on whether PW2 was an accomplice.

[8] Judge Madigan's paragraph 13 is set out at paragraph 5 above. In it he quite correctly points out that PW2 (Ms Seraseini Finau) gave evidence that was fully corroborated by Nalin Kumar on the facts of the robbery itself which she witnessed. So, there is very clear material supporting evidence that is from a source quite independent of Ms Seraseini or anyone participating in the robbery with violence. That being so it was simply a matter for Magistrate Rangajeeva Wimalasena and then on appeal Justice Paul Madigan to decide whether they believed Ms Seraseini when she gave evidence that Saula Lalagavesi was the perpetrator at the scene of the robbery wearing a mask. Both clearly did so. The point on which leave was given cannot succeed even if this Court has jurisdiction to entertain it.

Jurisdiction of the Court of Appeal to hear this appeal

[9] The issue upon which this appeal turns is whether there is any available ground which is a question of *"law only"*. I referred to this as *"debatable"* when giving leave. But since then the Supreme Court judgment in *Ilaisa Sousou Cava v The State* Criminal Appeal No CAV 0007 of 2010 was given on 14th November 2011. It deals with the meaning of *"a point of law only"*. It cites the case of *R v Hinds* (1962) 46 Crim App R 327 in the Court of Appeal in England and concludes that the intention of the legislature in England and in Fiji was that a ground of appeal raising mixed fact and law is not an appeal on a *"point of law … only"*.

[10] I am quite sure that if Magistrate Wimalasena failed to self direct himself on corroboration in respect of Ms Seraseini's evidence, it is not a *"question of law … only"*. Quintessentially corroboration and the rules that invite enquiry as to whether an accomplice's evidence be independently supported, before the tribunal of fact either believes the uncorroborated evidence or believes the corroborated evidence are questions of mixed law and fact. After various calls by appeal judges for the repeal of corroboration on the ground of complication in exposition and non-comprehension on the part of jurors, the Criminal Justice and Public Order Act 1994 was passed in England. By s 32 the requirement of a corroboration warning in respect of accomplices and complaints in sexual offences was abrogated.

[11] The position in Fiji is that legislation has abolished the warning in the case of complaints in sexual offences. But the accomplices warning is still required. If it were abolished the new rules of situations where supporting evidence is required as stated by Lord Chief Justice Taylor in England in *R v Makanjuola; R v Easton* [1995] 1 WLR 1348 at 1351 would apply in Fiji.

[12] In my decision dismissing the appeal of Peni Tirikula in *Peniasi Tirikula v The State* Criminal Appeal No. AAU0012 of 2009 of 27th May 2011. I called for abrogation by decree of the accomplice rules in Fiji. I do so again. It would assist the administration of the Criminal law in Fiji if this were done.

[13] But since the corroboration point in this case is not *"a question of law only"* there is no jurisdiction in this Court of Appeal to hear Saula Lalagavesi's appeal and it must be dismissed *in limine* for lack of jurisdiction. See also the judgment of the Court of Appeal in *Ole Jitoko v The State* Criminal Appeal No. AAU0011 of 2010 with judgment delivered on 8th March 2012.

[14] However *"the question of law only"* must arise from the situation reached after the High Court judge has concluded Saula Lalagavesi's appeal by way of rehearing. As explained above, Justice Paul Madigan correctly found corroboration in the course of hearing the appeal. So for that reason there is no arguable point left for a further appeal whether or not it be a *"question of law only"*. That is a second route to the conclusion that this Court of Appeal has no jurisdiction to entertain this appeal of Saula Lalagavesi.

[15] **Goundar JA.** I agree with the judgment, the reasons and the proposed order of William Marshall JA.

[16] **Basnayake JA.** I also agree with the judgment, the reasons and the proposed order of William Marshall JA.

Marshall JA. *ORDER OF THE COURT*

[17] The order of this Court is

(1) the appeal of Saula Lalagavesi be dismissed *in limine* for lack of jurisdiction under the Court of Appeal Act.

Appeal dismissed.