

IN THE FIJI COURT OF APPEAL

SUVA, FIJI

CRIMINAL JURISDICTION

[Criminal Appeal No. AAU 0006 of 2009]
(HAA 104/08)

BETWEEN : SAINIVALATI VEITOGAVI

APPELLANT

AND : THE STATE

RESPONDENT

**BEFORE THE HONOURABLE
PRESIDENT OF APPEAL : Mr. JUSTICE JOHN E. BYRNE**

COUNSEL : Ms S. VANIQI for the Appellant

: Ms P.MADANAVOSA for the Respondent

**Date of Hearing and: 18th June, 22nd July and 21st October 2009
Submissions**

Date of Ruling : 8th December 2009

**RULING ON APPLICATION FOR LEAVE TO
APPEAL OUT OF TIME**

- [1] On the 28th of July 2008, the Appellant was convicted in the Suva Magistrates Court on one count of Robbery with Violence contrary to Section 293(1)(b) of the Penal Code Cap 17 and one count of unlawful use of a motor vehicle, contrary to Section 292 of the Penal Code Cap 17.

- [2] The charge against the Appellant was that with others on the 7th of August 2003 at Lami he robbed one Rakesh Pal of Sixty Four Thousand Seven Hundred and Fifty Nine Dollars and Seventeen Cents (\$64,759.17) cash at the property of J. S. Hill and Associates and immediately before and after such robbery used personal violence on Rakesh Pal.

- [3] On the 28th of July 2008 he was convicted on both charges and sentenced to three and a half (3 ½) years imprisonment on the robbery with violence count and four (4) months imprisonment on the charge of unlawful use of a motor vehicle. Both sentences were ordered to be served concurrently effective from 28th July 2008.

- [4] He appealed to the High Court and on the 20th of February 2009 his appeal both against conviction and sentence was dismissed.

- [5] He now applies for leave to appeal to this court on a question of law only, namely that the Learned Magistrate erred in law when he failed to put the right of counsel to the appellant. This ground was never argued before the High Court.
- [6] In the Magistrate's Court the appellant claimed on a *Voir Dire* that a confession he made to the police admitting his guilt had not been made voluntarily.
- [7] The learned Magistrate rejected this claim and later convicted the Appellant.
- [8] In convicting and passing sentence on the appellant the learned Magistrate stated that the facts were not disputed by the appellant, who was a taxi driver hired by the other accused persons and paid for his services.
- [9] Furthermore the appellant admitted taking part as a pick-up drop-off driver who had knowledge of the robbery. The taxi fare was \$10.50 but the appellant received \$300 as his share. He knew that the van used in the robbery was stolen and was going to be used in the robbery.

[10] The appellant followed instructions to ensure the success of the robbery. It is also relevant to note that before he was convicted the case had been before the Magistrate's Court for four (4) years. The respondent argues that in that time when he attended Court regularly he would have known about the right to obtain legal representation even though in his case the right to counsel was not mentioned to him by the Magistrate.

THE RIGHT TO COUNSEL

[11] Every accused person has the right to a fair trial. It is daunting for most persons to be on trial and have to make a statement or give evidence. As Murphy, J said in his dissenting judgment in *McInnis v. The Queen (1979) 143 C.L.R. 575 at P 585* "It must be overwhelming to attempt to cross-examine, address a Jury and use other forensic skills". Despite the attempts nowadays to make the atmosphere in a Court of Law free from as much tension as the circumstances will allow, nevertheless there can be no doubt that any person on trial, and particularly one who is unrepresented, must suffer some strain.

[12] Without legal representation there must always be a risk that a fair trial does not ensue.

[13] In *Suren Singh and Others (unreported) Criminal Appeal No. 079 of 2000*, Shameem, J said at Page 6 of her Ruling **"The absence of proper representation may lead to a finding that a hearing was not fairly conducted. The person responsible for communicating the right of the accused to counsel is the Magistrate before whom the accused first appears"**.

[14] It is not disputed that the Learned Magistrate did not tell the appellant of his right to counsel. The question I have to decide is whether by failing to do so the appellant was deprived of the right to a fair trial. In *McInnis v. The Queen (supra)* Mason, J said at page 582-583, **"Certainly in some of the cases attention is given to the manner in which the accused conducts his defence. But I do not think that this attention indicates that the calibre of the accused's forensic performance is a critical factor in the making of the decision. The question is primarily to be resolved by looking to the nature and strength of the Crown Case and the nature of the Defence which is made to it. If the Crown Case is overwhelming then the absence of counsel cannot be said to have deprived the accused of a prospect of acquittal. If the accused in such a case has presented his defence with skill, that may constitute some confirmation that conviction was inevitable in any event"**.

[15] In the instant case, I consider that the State case against the appellant was almost overwhelming.

[16] The appellant was not a taxi driver who was hired by the other accused simply to drive them to the scene of the crime and wait until the robbery had been effected. At all material times the appellant knew what his companions intended to do and, for his part he received not the ordinary taxi fare of \$10.50 but \$300 from the proceeds of the robbery.

[17] In my judgment even if he had been represented the result would have been the same because of the strength of the prosecution case against him.

I accordingly refuse leave to appeal.

Dated at Suva this 8th day of December, 2009.



A handwritten signature in cursive script, reading "John E. Byrne", is written over a horizontal dotted line.

JOHN E. BYRNE
PRESIDENT, FIJI COURT OF APPEAL