

IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL NO. AAU 33 of 2009
(High Court Criminal Action No. HAC 121 of 2008)

BETWEEN : **SAKIUSA ROKONABETE**

Appellant

AND : **THE STATE**

Respondent

Coram : **Chandra RJA**

Counsel : **Appellant in person.**
Mr M. Korovou for the Respondent

Date of Hearing : **6 November 2012**

Date of Ruling : **7 June 2013**

RULING

1. This is an application for leave to appeal against conviction and sentence.
2. The Appellant was charged with a single count of the offence of Robbery with Violence contrary to section 293(1)(b) of the Penal Code (Cap.17).
3. Two rulings were delivered by the learned trial Judge, (a) Ruling on trial within trial whereby the Appellant's caution interview containing his confession was admitted and (3) Ruling on Representation whereby the trial was ordered to be continued as the Appellant had failed to secure counsel in good time before the trial.

4. The Assessors brought in a divided verdict (2 to 1) which was upheld by the learned trial Judge and the Appellant was convicted and sentenced.
5. The Appellant was given a custodial term of ten years, of which eight years was to be made concurrent to an existing sentence of thirteen years in another case and two years consecutive which in effect made it a custodial sentence of fifteen years for two separate violent robberies.
6. The Appellant in his application seeking leave to appeal against his conviction has set out the following grounds:
 - A) That the learned trial Judge erred in law and in fact in forcing the appellant to go on trial unrepresented.
 - B) That the learned trial Judge erred in law and in fact in failing to stay or adjourn the proceedings as to allow the appellant to get the outcome or result of his application for legal aid from the Legal Aid Commission.
 - C) That the Appellant stayed mute throughout the trial proper in protest of the decision made by the trial judge to proceed with the trial proper without letting the appellant to be legally represented.
 - D) That the entire trial was a one sided affair because the learned trial judge had no opportunity to hear the defence side of the case as the appellant stayed mute throughout the trial proper thus resulting in the entire trial being unfair, biased, null and void.
 - E) That the learned trial Judge erred in law and in fact in convicting the appellant on the evidence of confession alone when in fact the confession was challenged by the appellant on the reason that it was induced through police assault and threats.
 - F) That the learned trial judge erred in law and in fact when he overlooked the answers to questions 19 and 20 of the caution interview statement to determine the admissibility of the statement.

- G) That the learned trial judge erred in law and in fact by misdirecting himself and/or did adequately and/or properly direct himself the issue of burden and standard proof.
- H) That upon the evidence given in this case, there is no clear nor any direct evidence to prove the offence I am charged with.
- I) That the learned trial Judge erred in law and in fact in denying the appellant the right to a fair trial.

7. As regards his application for leave to appeal against his sentence he has urged the following grounds:

- 1) That the sentence of 8 years concurrent and 2 years consecutive imposed for a single offence is not only downright unlawful and wrong in principle but harsh, manifestly excessive and wrong in all the circumstances of the case.
- 2) That the learned trial judge erred in law and in fact in imposing sentence which is more severe than the one imposed in the initial trial before this retrial was ordered.

8. The Appellant was alleged to have committed the offence of which he was charged with on 25 April 2004 when he with others had robbed an elderly couple by breaking into their house at night armed, threatening them and robbing them of valuables including cash.

9. The Appellant was charged in the first instance in the Magistrate's Court of Suva and was convicted and sentenced to 7 years imprisonment on 25 February 2005.

10. The Appellant's appeal to the High Court was dismissed on 29 June 2005.

11. Thereafter the Appellant appealed to the Court of Appeal and the Court by judgment dated 29 May 2008 set aside his conviction and sentence and case was remitted to the Magistrate's Court for trial de novo before another Magistrate.
12. When the case was taken up before the Magistrate's Court the Appellant elected for a High Court trial.
13. The trial before the High Court was taken up on 14 September 2009 on amended charges and a ruling was given on representation on 15 September 2009.
14. The Appellant was convicted after trial on 18 September 2009 during which trial he was not represented and he stayed mute.
15. Before the trial commenced before the High Court the Appellant had been advised by the learned High Court Judge to obtain legal representation and was given sufficient time to do so. But the Appellant failed to get any legal representation and the learned Judge gave a ruling on same.
16. It is to be noted that the trial before the High Court was a trial de novo ordered by the Court of Appeal after the Appellant had been charged before the Magistrate's Court, convicted and sentenced in 2005.

Grounds of Appeal

1. The first ground of appeal relates to the fact that he was denied legal representation at the trial.

The learned High Court Judge in his ruling regarding representation has stated that the Appellant had been given ample opportunity to obtain legal representation and that he

neglected to do so. Considering the background to the case the trial of which commenced in the Magistrate's Court in 2005 and had gone up to the Court of Appeal and come back to the High Court for a trial de novo, the Appellant cannot be said to have been unfamiliar with the legal processes. He had been advised by Court to get legal representation and had given ample time to do so which he failed to make avail of.

It has been the position in the Common Law that the right to counsel is not an absolute right as has been held in **Dietrich v R** [1992] HCA 57. Therefore the Appellant's first ground of appeal fails.

2. The second ground of appeal was that the learned trial judge erred in law and in fact in failing to stay or adjourn proceedings until he knew of the outcome of his application for legal aid from the Legal Aid commission.

Awaiting the outcome of an application for legal aid by an accused cannot be a ground for staying proceedings in a trial specially in a case such as the present one which was really a trial which was gone through a second time and when the Appellant had been given sufficient time to get legal aid.

Therefore this ground too fails.

3. The third and fourth grounds relate to the fact that the Appellant chose to stay mute during the trial which prejudiced his position when he was not represented by Counsel.

It is the prerogative of an accused to stay mute during a trial. It is a choice which an accused has when facing a trial. In fact, the trial Judge had assisted the Appellant by questioning the witnesses when they gave evidence at the trial. In the present case, especially in the background when the trial had gone through once before and gone up in appeal to the High court and the Court of Appeal, staying mute cannot be considered as a ground on which the conviction can be challenged and these grounds of appeal fail.

4. The next two grounds of appeal E and F are as regards the evidence of his confession in that he had challenged the confession as it had been induced through police assault and threats.

The learned trial Judge gave a ruling on the *voire dire* inquiry and that was the basis of the admission of his confession and in his summing up gave adequate directions regarding same. Therefore these grounds are without merit.

5. Ground G relates to the summing up of the learned trial Judge regarding burden of proof. In his summing up to the Assessors the learned trial Judge has adequately directed the Assessors on the question of burden of proof. Therefore this ground too fails.

6. Ground H is to the effect that there was no clear direct evidence to prove the offence of robbery with violence. With the admission of the confession of the Appellant there was sufficient evidence to prove the offence alleged against the Appellant. Hence there is no merit in this ground.

7. The next ground is on the basis that the Appellant had been denied a fair trial. As stated earlier, the Appellant had been given a fair trial after giving him every opportunity to have representation and thereafter when the Appellant decided to stay mute, the learned Judge questioning the witnesses. Therefore there is no merit in this ground too.

8. As regards the grounds set out in relation to the sentence they have no merit as the learned trial Judge has considered the relevant legal principles in setting out the sentence.

Conclusion

The application for leave to appeal against conviction and sentence is refused.

Suresh Chandra
Resident Justice of Appeal

