

**IN THE COURT OF APPEAL**  
**ON APPEAL FROM THE HIGH COURT**

**CRIMINAL APPEAL AAU 115 OF 2011**  
**(High Court HAA 19 of 2011 Lbsa)**

**BETWEEN** : **ISIKELI MAIVATUSEI CANIOGO**  
*First Appellant*

**AND** : **ESAVA DUASUVA TAKIRUA**  
*Second Appellant*

**AND** : **THE STATE**  
*Respondent*

**Coram** : **Calanchini AP**

**Counsel** : **Mr P Lomaloma for the Appellants**  
**Ms M Fong for the Respondent**

**Date of Hearing** : **6 June 2013**

**Date of Decision** : **28 June 2013**

**DECISION**

[1] This is an application by the Appellants for leave to appeal against their convictions for aggravated robbery in the Labasa Magistrates Court on 19 April 2011.

[2] The Appellants and one other were charged with aggravated robbery contrary to section 311(1) (a) of the Crimes Decree in that on 6 March 2011 at Labasa they in company stole \$72.00 cash from Savneel Salendra Deo and immediately before committing the theft had used force to Deo.

[3] The offence of aggravated robbery carries a maximum sentence of 20 years imprisonment and is an indictable offence.

[4] It would appear that two days later on 8 March 2011 the Appellants together with the third offender appeared before a Resident Magistrate in the Magistrates Court at Labasa on the basis that they had been charged with an indictable offence which was to be heard by the High Court. This was done in compliance with section 35 (2) of the Criminal Procedure Decree which provides that:

*“All criminal cases to be tried by the High Court shall be:*

*(a) instituted in a Magistrates Court in accordance with this Decree; and*

*(b) transferred to the High Court in accordance with this Decree if the offence is:*

*(i) an indictable offence, or*

*(ii) an indictable offence triable summarily, and the accused has indicated to the Magistrates Court that he or she wishes to be tried in the High Court.”*

[5] The submissions filed on behalf of the Appellants state that without the benefit of consulting a legal practitioner the Appellants pleaded guilty at the first call before the Magistrates Court on 8 March 2011. The submission goes on to state that the matter was then transferred to the High Court on 1 April 2011. The procedure thus far would appear to be in compliance with section 35(2) (supra) and also with section 193(1) which states:

*“A magistrate has jurisdiction to accept a guilty plea for any offence (including an indictable offence) before a case is transferred to the High Court.”*

[6] Furthermore section 194 provides, so far as relevant, that:

*“If an accused person has:*

- (a) *entered a plea of guilty to an indictable offence and the plea has been recorded by the Magistrates Court; or*
- (b) *---*; *or*
- (c) *---*;

*The Magistrate shall order the transfer of the charges or proceedings to the High Court for sentencing or trial.”*

[7] However the role of the Magistrates Court is limited by section 193 (2) which states:

*“When accepting a guilty plea under (section 193(1)) the magistrate shall not proceed to conviction, but this shall be reserved for the High Court after the transfer of the case.”*

[8] Finally under section 193(3) an accused may reserve his plea until arraignment by the High Court.

[9] The proceedings were transferred to the High Court in a manner that was procedurally regular. The learned High Court judge acting under section 4 (2) of the Criminal Procedure Decree transferred the matter back to the Magistrates Court. It is appropriate to set out in full section 4 in order to understand the effect of the decision of a judge to transfer a case to the Magistrates Court:

*“4 - (1) Subject to the other provisions of this Decree:*

- (a) *any indictable offence under the Crimes Decree 2009 shall be tried by the High Court;*
  - (b) *any indictable offence triable summarily under the Crimes Decree 2009 shall be tried by the High Court or a Magistrates Court, at the election of the accused person; and*
  - (c) *any summary offence shall be tried by a Magistrates Court.*
- (2) *Notwithstanding the provisions of sub-section (1), a judge of the High Court may, by order under his or her hand and the seal of the High Court, in any particular case or class of cases, invest a magistrate with jurisdiction to try any*

*offence which, in the absence of such order, would be beyond the magistrate's jurisdiction.*

(3) *A magistrate hearing a case in accordance with an Order made under sub-section (2) may not impose a sentence in excess of the sentencing powers of the magistrate as provided for under this Decree."*

[10] One of the consequences of sub-section (2) is that when an accused has elected to be tried by the High Court (as for an indictable offence triable summarily) or has a right to be tried by the High Court (as for an indictable offence) a judge of the High Court can nevertheless invest a magistrate with jurisdiction to try the offence even when to do so would be beyond the jurisdiction of the Magistrates Court.

[11] Another consequence of section 4 is that under sub section (3) even though jurisdiction to try any offence can be invested in a magistrate, the jurisdiction to impose a sentence is not so wide since a magistrate may not impose a sentence that is beyond the jurisdiction given to a magistrate under the Decree (see for example section 7 of the Decree).

[12] The discretion given to a judge of the High Court under section 4(2) is unfettered in the sense that it can be exercised in any case whether indictable or indictable but triable summarily and regardless of whether a plea of guilty has been entered under section 193(1). The only matter that needs to be considered is the question of penalty under section 193 (3).

[13] As a result the proceedings returned to the Magistrates Court at Labasa. The affidavits filed on behalf of the Appellants state that the Appellants were convicted by the Resident Magistrate in Labasa on 19 April 2011. On 27 July 2011 the Appellants were sentenced to three years imprisonment with a non-parole period of two years. It would appear that on all three occasions in the Magistrates Court the Appellants appeared in person without legal representation.

[14] The Appellants then lodged appeals against convictions and sentences in the High Court. In a judgment delivered on 30 September 2011 the learned High Court Judge

declined to hear the appeals on the basis that he had no jurisdiction to do so since such appeals lie directly to the Court of Appeal.

- [15] In reaching that conclusion the learned High Court Judge indicated that he felt compelled to follow the practice adopted in previous appeals from the Magistrates Court exercising its invested or extended jurisdiction which have been heard and determined by the Court of Appeal.
- [16] There are two grounds of appeal. The first is that the learned High Court Judge erred when he declined to hear the appeals on the basis that an appeal from a magistrate exercising an invested jurisdiction under section 4(2) of the Decree lies to the Court of Appeal and not to the High Court. The issue is really whether the appeal falls under section 21 of the Court of Appeal Act Cap 12. In other words, was the conviction in the Magistrates Court exercising its invested jurisdiction a conviction on a trial held before the High Court?
- [17] On this ground the Appellants have raised a question of law which does not require the leave of the Court of Appeal.
- [18] The second ground of appeal is concerned with their convictions in the Magistrates Court exercising its invested jurisdiction. This will only be relevant to the Court of Appeal in the event that the Appellants are unsuccessful in relation to the first ground of appeal.
- [19] The question at the leave stage is whether the Appellants, having pleaded guilty, are able to establish an arguable ground that requires the consideration of the Court of Appeal. It must be stated at the outset that a plea of guilty does not deprive the Court of Appeal of jurisdiction to hear an appeal against conviction.
- [20] However an appellate court will only consider an appeal against conviction following a plea of guilty if there is some evidence on the record of equivocation or if the plea was entered as a result of a misunderstanding of the law or in the absence of a free and informed decision. (See **Nalave –v- The State** AAU 4 of 2006; 24 October 2008). In

the present case the grounds of appeal against conviction are set out in the Notice filed on 28 November 2011 as follows:

- a. ***THAT** the Appellants' guilty pleas were not unequivocal because they had been induced by Detective Constable Frederick Bull, a police officer, to plead guilty to the charge.*
- b. ***THAT** considering the seriousness of the charge and the age of the Appellants, the learned Magistrate erred when he took the Appellants pleas before they obtained legal advice.*
- c. ***THAT** the learned Magistrate erred when he failed to ask for the Caution Interview Statements of the appellants and the third accused and other evidence gathered to establish whether the evidence supported the charge before recording convictions against them.*
- d. ***THAT** the Caution Interview Statements of both Appellants and Oliva Malata (the other accused) showed that Oliva committed the offence in the presence of your Appellants who neither participated in or had prior knowledge of Oliva's intentions to rob the complainant therefore there was no common purpose and the Appellants pleas of guilty should not have been accepted."*

[21] So far as ground (a) is concerned, there is no indication in the record that the Appellants raised this issue at any of their court appearances after 8 March 2011. Although present in the High Court on 11 April 2011, in the Magistrates Court on 19 April 2011 and again on 27 July 2011, the record does not show that the Appellants complained that they had been induced to plead guilty. Leave to appeal on this ground is refused since the record does not establish that the guilty pleas were equivocal on the basis of inducement.

[22] So far as ground (b) is concerned, the Appellants allege an error on the part of the learned Magistrate in that pleas of guilty were taken before they had obtained legal advice.

[23] The record indicates that at the first mention on 8 March 2011 the Appellants were asked whether they wanted to exercise their right to Counsel. They indicated that they

would defend themselves. They also indicated that they pleaded guilty and that the guilty plea was being made without inducement or fraud. The charge was read to them in Fijian and they indicated that they understood the charge.

[24] There is authority for the proposition that with young accused that are not represented a Magistrate should be even more vigilant in Fiji that would be necessary elsewhere to ensure that justice is done. In particular it is appropriate and desirable that the prosecution provide the Magistrate with copies of the Appellants' police interview statements when the Appellants are not represented. When deciding whether it is safe to enter a conviction to a serious charge the Magistrate should read the statements and raise with each of the Appellants who may have provided an exculpatory explanation, whether each still maintained that line of defence. (See Nawaqa -v- The State [2001] 1 FLR 123 applying Iro v R (1966) 12 FLR 104).

[25] Ground (c) raises the issue of the Magistrate having entered convictions without calling for the caution interviews. Ground (b) and (c) raise arguable issues as to whether the pleas of guilty were equivocal.

[26] Ground (d) raises an issue concerning joint enterprise and common purpose. The definition of an offence committed by joint offenders in prosecution of common purpose is set out in section 46 of the Crimes Decree 2009.

*“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose, an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”*

[27] There was evidence that the Appellants and the third offender had decided to go into Labasa town in the early hours of the morning on the day of the offence. It may have been for an unlawful common purpose.

[28] However, in this case the Appellants have been charged with aggravated robbery under section 311 (1) (a). The charge was that each of them had committed robbery in company with the other accused. The offence of robbery arose as a result of one of

the three offenders having committed theft and immediately before committing that theft had used force on the victim. Even if it is accepted that the third offender punched the victim and then stolen his wallet, the presence of the two Appellants in the company of the third offender at the time of the robbery renders the offence a more serious offence in the form of aggravated robbery on the part of the two Appellants and the third offender.

[29] This is not a case where liability is dependent upon joint enterprise. This is a case where the presence of the two Appellants in the company of the third offender who punched the victim and stole his wallet is an element of the serious indictable offence of aggravated robbery. The fact that the offence was opportunistic, if not spontaneous, in nature does not decriminalise the actions committed by the third offender in the company of the two Appellants. From the victims point of view he was confronted by three youths, one of whom, in the company of the other two, punched him and then removed his wallet from his trousers. Under those circumstances leave to appeal is refused.

[30] In summary, the appeal to the Full Court will proceed on the following basis. The first ground of appeal raises a question of law only. That question is whether an appeal from the Magistrates' Court exercising invested jurisdiction lies to the High Court or the Court of Appeal.

[31] Secondly, the Appellants are granted leave to appeal against conviction on grounds (b) and (c) in the Notice of Appeal filed.

[32] Finally leave to appeal is refused in respect of grounds (a) and (d) of the said Notice of Appeal.

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**HON. MR JUSTICE W.D. CALANCHINI**  
**ACTING PRESIDENT**













