IN THE COURT OF APPEAL
AT SUVA

APPELLATE JURISDICTION

CRIMINAL APPEAL NO. AAU 0053 OF 2011

BETWEEN : **1. NOA MAYA**

2. MESAKE LIGAVAI

APPLICANTS

AND : **THE STATE**

RESPONDENT

COUNSEL : **Applicants in Person**

Ms M. Fong for Respondent

Date of Hearing : **03 July 2013**

Date of Ruling : **12 July 2013**

RULING

[1] The applicants were jointly charged with one count of robbery with violence contrary to section 293(1) (b) of the Penal Code in the High Court at Lautoka. The first applicant was convicted after a trial and was sentenced to 11 years and 3 months' imprisonment with a non-parole period of 9 years. The second applicant was convicted after he pleaded guilty to the charge and was sentenced to 9 years' imprisonment with a non-parole period of 7 years.

[2] This is an application for leave to appeal pursuant to section 21 of the Court of Appeal Act.

[3] The first applicant appeals both his conviction and sentence. He filed numerous grounds of appeal, but at the hearing of this application, he relied upon the grounds of appeal filed on 14 February 2013. The first ground reads:

> "That the caution and charge interviews were wrongly admitted after Voir Dire".

[4] At trial, the first applicant challenged the voluntariness of his confession made under caution. The learned trial judge quite properly held a *voir dire* in the absence of the assessors to determine the admissibility of the applicant's confession. The first applicant elected to remain silent at the *voir dire* hearing. The trial judge accepted the prosecution evidence and held the applicant's confession was made voluntarily and without oppression. No criticism can be made to the learned trial judge's ruling on the applicant's confession.

[5] The second ground reads:

> "That the Trial Judge erred in law in failing to draw his mind to the Legal test and principles governing the voluntariness and admissibility of the confessional statements in the Voir Dire ruling."

[6] In *Suresh Sani and Deo Raj v The State* (Criminal Appeal No. AAU0026 of 2004S) the Court of Appeal outlined the relevant principles regarding the admissibility of a confession at paragraph [19]:

> The judge's duty is to determine whether the confessions were made voluntarily and the burden is on the prosecution to prove they were voluntary to the usual criminal standard of proof beyond reasonable doubt. In order to do so the judge must hear the evidence relating to that issue including any evidence by the accused and any defence witnesses and rule on it. Inevitably that decision requires a determination of the credibility and truthfulness of the witnesses. If the judges rules, at the end of a trial within a trial in which the accused has given evidence of the allegations, that the confessions are admissible, the burden of proof means that it must follow that the defence evidence has been rejected.

[7] As can be seen from the *voir dire* ruling at paragraphs [3] and [4], the trial judge applied the correct principles in admitting the applicant's confession in evidence:

> The test of the admissibility of statements made by the accused to persons in authority is whether they were voluntary, obtained without oppression or unfairness and breach of his common law rights. The burden of proving voluntariness, fairness, lack of oppression and observance of fundamental rights rests on the prosecution and all matters must be proved beyond reasonable doubt. Evidence of assault, accepted by the Court would be sufficient to raise a reasonable doubt as to voluntariness.
>
> Where there are common law rights (previously enshrined in the Constitution) it is for the prosecution to prove that those breaches did not prejudice the accused's rights in custody. Because he is unrepresented I have considered the possibility of breaches of his rights in addition to his allegations of assault.

[8] The third ground reads:

> "That the learned trial Judge erred in law in failing to warn and direct the Assessors on the dangers of convicting on uncorroborated and confessional statements".

[9] In *Kelsey v R* (1953) 16 CR 119, the Supreme Court of Canada held that a trial judge was under no legal duty to warn the jury of the danger of convicting an accused solely on the basis of his confession. In *Chandra Wati v Reginam* 8 FLR 70, the Court of Appeal adopted the following passage from the English case of *Rex v Sykes* 8 Cr. App. R. 233 at page 236:

> I think the Commissioner put it correctly; he said: 'A man may be convicted on his own confession alone; there is no law against it. The law is that if a man makes a free and voluntary confession which is direct and positive, and is properly proved, a jury may, if they think fit, convict him of any crime upon it.

[10] The fourth ground reads:

> "That the charge and the information was defective and does not accord with one another with the summary of facts and thereby the conviction is fatal and unsafe."

[11] The charge against the applicants read:

<u>Statement of Offence</u>

> **ROBBERY**: Contrary to Section 293(1)(a) of the Penal Code, Cap.17.

Particulars of Offence

NOA MAYA, MESAKE LIGAVAI and MANASA **VOLAU** with another, on the 11th day of September, 2007 at Lautoka in the Western Division, being armed with offensive weapons, robbed PRAKASH GARANA s/o Anaksi Garana of a DVD deck and television valued at $7000.00, 4 22ct gold chains valued at $2,163.00, 4 bangles valued at $3,000.00, a PBS decode valued at $549.00 and $150.00 in cash, all to the total value of $9,362.00, the property of the said Prakash Garana.

[12] The rules for drafting of charges at the time were governed by the Criminal Procedure Code. Section 119 of the Criminal Procedure Code provides:

> Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

[13] The applicants were charged contrary to section 293(1) (a) of the Penal Code. Section 293(1) (a) states:

> Any person who -
>
> (a) being armed with any offensive weapon or instrument, or being together with one other person or more, robs, or assaults with intent to rob, any person;

[14] The charge against the applicants clearly complied with the provisions of the Penal Code and the Criminal Procedure Code and was not defective.

[15] For the reasons given, I am not persuaded the grounds of appeal against conviction are arguable.

[16] The next three grounds relate to sentence as follows:

1) That the sentence was passed in consequences of an error of law.

2) That the Learned Trial Judge erred in law by using the sentencing guideline for Robbery with Violence in the Robbery whilst they were two (2) district offences with different maximum term of imprisonment.

3) That the sentence of eleven (11) years three (3) months is manifestly harsh and excessive.

[17] The errors alleged in the first and second grounds of appeal are vague and unclear. The applicants were convicted of only one offence of robbery with violence under the Penal Code.

[18] The learned trial judge took into account the tariff established by guideline cases on robbery with violence under the Penal Code (*Basa* AA 0024/04, *Rokonabete* HAC 118/07) and *Rasaqio* HAC 115/2007). Using 9 years as a starting point, the leaned judge added 3 years for the following aggravating factors:

(i) Group invasion.

(ii) Brandishing (but not use of) pinch bars.

(iii) An act of violence on the ears of a female in the house.

(iv) Invasion at night.

[19] After noting that the first applicant had nothing to offer in mitigation, the learned judge further reduced the sentence to reflect the remand period and arrived at a final sentence of 11 years and 3 months' imprisonment for a serious home invasion robbery.

[20] The second applicant filed similar grounds of appeal against sentence. He pleaded guilty to the charge and was sentenced to 9 years' imprisonment with a non-parole period of 7 years.

[21] The sentencing remarks of the learned judge fairly reflect a discount of 3 years given to the second applicant for pleading guilty. Clearly, the sentences reflect the criminality involved and I am not persuaded that there is an arguable ground to interfere with the learned judge's sentencing discretion.

[22] The applications for leave to appeal against conviction and sentence are refused.

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DANIEL GOUNDAR
JUDGE

Solicitors:

Applicants in Person
Office of the Director of Public Prosecutions for Respondent.