

IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL AAU 13 of 2011
(High Court HAC 111 of 2010)

BETWEEN : **MARIKA TUKANA** *Appellant*

AND : **THE STATE** *Respondent*

Coram : **Chandra RJA**

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

Date of Hearing : **19 June 2013**

Date of Ruling : **9 August 2013**

RULING

1. The Appellant with two others were charged before the Magistrate's Court at Suva under the extended jurisdiction (Criminal Procedure Decree, S.4(2) for the offence of Aggravated Robbery contrary to section 311(1)(a) of the Crimes Decree No.44 of 2009.
2. The Appellant was convicted and sentenced to a term of five years imprisonment with a non-parole period of four years.
3. In his application for leave to appeal against conviction the Appellant has urged the following grounds:
 1. That the court erred in law and in fact on its findings as there was no voir dire conducted to determine the admissibility of his confession, having regard to the

manner the Police had acted in eliciting his confession which was improper and in breach of his rights.

2. That the court erred in law and in fact in failing to ask him after the prosecution tendered his confession in court during trial whether he has any objection or not. Having regard that he was unrepresented and that it is the fundamental duty of the court to assist him in every opportunity.
3. That the court erred in law and in fact by failing to clearly inform him as an unrepresented person whether his confession was admissible or not.
4. That the court erred in law and in fact in accepting the evidence of dock identification which has been held by earlier authorities to be undesirable, unsatisfactory and should be avoided if possible.
5. That the court erred in law and in fact by allowing the prosecution to invite its witness to identify him for the first time in court. Having regard that the proper manner of identification which is required under the Turnbull warning was not complied by Police when he was arrested therefore.
6. That the court erred in law and in fact in accepting the evidence of identification for the first time in court. Taking into account that the correctness and ability of identification that was made by the complainant was not tested through the proper identification parade as ordered under the Turnbull warning.

7. That the trial was unfair and consequently violated his right to a fair trial as preserved under the International Covenant on Civil and political Rights (ICCPR) in light of the above stated grounds.
8. That the learned magistrate erred in law and in fact in finding him guilty by not considering his closing submission, and by stating in the judgment that he had not submitted any final submission which the Appellant had submitted to the court registry.
4. Grounds 1 to 3 in the application for leave to appeal are with regard to the leading of the confession in evidence and the failure to hold a voir dire inquiry. The Appellant was unrepresented and at the trial the confession of the Appellant had been led in evidence. The Appellant had cross examined the witness who produced the confession and questioned him about his being threatened before recording his statement.
5. In **Sakiusa Rokonabete v The State** [2006] FJCA 40 ;AAU 48 of 2005 (14 July 2006) it was held by the Court of Appeal that wherever the court is advised that there is challenge to the confession, it must hold a trial within a trial on the issue of admissibility unless counsel for the defence specifically declines such a hearing and when the accused is not represented, a trial within a trial must always be held. It was further held that if the accused is not represented, the court should ask the accused if he is challenging the confession and explain the grounds upon which that can be done.
6. The learned Magistrate in the present case has not held a voir dire inquiry and not followed the procedure as set out in **Rokonobete's** case by the Court of Appeal. Therefore the Appellant is entitled to have leave on grounds 1 to 3.

7. Grounds 4 to 6 relate to identification. The complainant had identified only the first accused when they had been produced before her at her residence where the robbery had taken place. Apart from that identification, no identification parade had been held regarding the identification of the Appellant and the other accused. The Appellant complains about dock identification. Usually dock identification is not desirable but where identification is not in issue it may be permitted. However the Appellant had been unrepresented and therefore it can be an arguable matter where the complicity of the Appellant and the other two accused has been established by the prosecution through the statements made by the Appellant and the other two accused.
8. This situation therefore brings about the question of proper identification and the manner in which the prosecution had proceeded as accepted by Court becomes arguable as urged in grounds 4 to 6.
9. Ground 7 is relating to the question of whether the Appellant had a fair trial which is the basis of International Covenant on Civil and Political Rights (ICCPR). However since this Covenant has not been ratified by Fiji the consideration of same does not arise. Anyhow, this ground is based on grounds 1 to 6 which have been considered by me as arguable grounds.
10. Ground 8 is regarding the failure of the learned Magistrate to consider the Appellant's closing submissions. Since I have considered grounds 1 to 6 as being arguable it would not be necessary at this stage to consider this ground and I would leave it to the full Court to consider whether the Appellant was prejudiced by the fact that the learned Magistrate had not considered his closing submissions.
11. Leave to appeal against conviction is allowed on grounds 1 to 6.

Order of Court

Leave to appeal against conviction is allowed.

Suresh Chandra
Resident Justice of Appeal