

IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL NO. AAU 13 OF 2011
(High Court HAC 111 of 2010)

BETWEEN : **MARIKA TUKANA** *Appellant*

AND : **THE STATE** *Respondent*

Coram : **Calanchini P**
Chandra JA
De Silva JA

Counsel : **Mr. S. Waqainabete for the Appellant**
Mr. V. Perera for the State

Date of Hearing : **28 November 2014**

Date of Judgment : **5 December 2014**

JUDGMENT

Calanchini P

1. I agree that the appeal against conviction be allowed, the conviction quashed and the matter be set down for re-trial.

Chandra JA

1. This is an appeal against conviction of the Appellant who was charged with two others and who was convicted by the Magistrate's Court of Suva acting on the extended jurisdiction of the High Court on a charge of Aggravated Robbery contrary to section 311(1)(a) of the Crimes Decree 2009.
2. The Appellant was sentenced on 13 January 2011 to 5 years imprisonment with a non-parole period of 4 years.
3. The Appellant in his amended notice of appeal set out the following grounds of appeal against his conviction:
 - i. *That the learned Magistrate erred in law and in fact when he did not hold a voir dire inquiry when there was a challenge to his confession in the caution interview.*
 - ii. *That the learned Magistrate erred in law and in fact when he failed to consider that the Appellant was not identified by the complainant when they were produced before the complainant's residence where the robbery had taken place.*
4. On 15 May 2010 at about 2.00 a.m. the complainant had returned home from the Bowling Club. After sometime she had heard movements from the porch and a sound like someone fiddling with the door. She had thought that it was her son and opened the door. Thereupon three Fijian young men had forced their way in. She had started screaming and the first youth had started attacking her, she had fallen, and had continued to attack her standing on her back. The other two had gone into the bedrooms. She had been dragged into the bedroom and they had asked for money and threatened to kill her. The first youth had forced her to remove the rings on her finger threatening that he would chop her hand off if she didn't. She had removed the three rings and given them to him. They had switched on the light and had ransacked the room and had kept on demanding to know where she kept her money. They had been in the room for about three minutes and had taken her Pulsar watch and mobile phone which had a red sticker on the back.

Her landlord who had heard her screams telephoned the Police and on hearing the landlord screaming, the three young men had left. The Police came to their home at about 5 or 6 a.m. with one suspect and two others. She had recognized him as one of the young men who had come that morning. The 1st suspect had given the names of the other two accused and they were arrested subsequently. All three suspects had been caution interviewed.

5. At the trial the 1st accused pleaded guilty and the trial proceeded against the 2nd (the Appellant) and 3rd accused. The complainant in her evidence when cross examined stated that she could not recall the two faces of the two accused (Appellant and the 3rd accused) present in court and that she could recall only the face of the 1st accused (who had pleaded guilty). She further stated that she could remember just one but not the other two. The caution interview statements had been led in evidence and the Police Officer who recorded them had been cross-examined by the 2nd and 3rd accused on the basis that they had been threatened and assaulted. No voir dire inquiry had been held by the Magistrate.

6. **The First Ground of Appeal**

It was submitted on behalf of the Appellant that the confession of the Appellant was challenged when the Police Officer who recorded the statement gave evidence. The learned Magistrate has in his judgment at paragraph 19 stated: "He stated that he was forced in his caution interview, which was denied by PW3 in his evidence."

7. The Appellant was unrepresented and he had cross-examined the prosecution witnesses and given evidence on oath denying his involvement in the commission of the offence.
8. In **Rokonabete v. The State** [2006] FJCA 40; AAU 0048/2005S (14 July 2006) the Court of Appeal stated:

"[20] Under the Common Law, a court faced with a challenge to the admissibility of a confession was under a duty to ascertain that issue separately from the remainder of the prosecution evidence and the court had a discretion to decide, the particular circumstances of the case, whether a trial within a trial was necessary. However, unless the defence sought not to have one, it became an almost invariable practice to do so. Since the passing of the Police and Criminal Evidence Act, the English Magistrate's Courts have been obliged to hold a trial within a trial whenever there is a challenge to the admissibility of the statement. The Australia and New Zealand courts have followed a similar practice for many years.

[24] Whenever the court is advised that there is a 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. When the accused is not represented, a trial within a trial must always be held. At the conclusion of the trial within a trial, a ruling must be given before the principal trial proceeds further. Where the confession is so crucial to the prosecution case that its exclusion will result in there being no case to answer, the trial within a trial should be held at the outset of the trial. In other cases, the court may decide to wait until the evidence of the disputed confession is to be led."

9. Counsel for the Respondent conceded that the learned Magistrate should have held a voir dire inquiry when the confession was challenged.
10. Since the learned Magistrate had failed to hold a voir dire inquiry and proceeded to accept the confession of the Appellant, this ground of appeal succeeds.

The Second Ground of Appeal

11. In the second ground of appeal, the Appellant submits that the Appellant had not been identified by the complainant.
12. The complainant had only identified the 1st accused who pleaded guilty.

13. The 2nd and 3rd accused had not been taken to the residence of the complainant where the robbery had taken place. It was only the 1st accused and two others who had been taken there by the Police.
14. The complainant when cross examined by the Appellant had taken some time to answer and stated that she could not recall the faces of the two persons present in the dock.
15. When cross examined by the 3rd accused the complainant, had said that she could remember just one and that she could not remember the other two.
16. From this evidence it is clear that the complainant, who was the principal witness had failed to identify the Appellant. He had not been taken to the house of the complainant with the 1st accused. He was seen by the complainant only when he was in the dock at the trial. She had failed to identify him when he was in the dock.
17. The learned Magistrate in his judgment at paragraph 25 and 26 stated:

"25. Though PW1 was not able to correctly identify all three boys who came to rob her house that night, she gave correct descriptions of the accused. Upon her information PW2, carried out his investigation and arrested the 1st accused and recovered the stolen mobile phone from his custody.

26. The 1st accused revealed the details of his accomplices, which led to the arrest of the 2nd and 3rd accused persons. Both 2nd and 3rd accused persons admitted their involvement in this robbery in their caution interviews. In line with this evidence, I am of the view that the prosecution established the 2nd and 3rd accused persons involvement in this robbery."

18. It is clear from the above that the learned Magistrate has based the involvement of the Appellant in the robbery solely on the caution interview statement.


19. It was submitted by Counsel for the Respondent that since the learned Magistrate has found the Appellant guilty on the basis of the caution interview that this ground of appeal has no merit.
20. As stated in respect of ground 1, the learned Magistrate failed to hold a voir dire inquiry in respect of the caution interview statement of the Appellant.
21. The caution interview statement in the absence of holding a voir dire inquiry was inadmissible in this case. It cannot be used to establish the identity of the Appellant. In the absence of the caution interview statement there is no evidence to establish the identity of the Appellant.
22. Therefore the learned Magistrate has erred in establishing the identity of the Appellant by making use of the caution interview statement, and this ground of appeal succeeds.

Conclusion


23. As both grounds of appeal succeed, the conviction of the Appellant cannot stand and is set aside.
24. Since the error in the judgment of the learned Magistrate is based on the failure to hold a voir dire inquiry, the recourse available on setting aside the conviction of the Appellant is to send the case back for a re-trial.
25. The Appellant was sentenced to a term of 5 years imprisonment with a non-parole period of 4 years on 13th of January 2011. The Appellant has almost completed his non-parole period and the further period that he would have to serve is only a few months. In those circumstances, the Director of Public Prosecutions should consider these matters in deciding whether the Appellant should be re-tried.

Orders of Court

- (1) The conviction of the Appellant is set aside and quashed. A re-trial is ordered.



Hon. Mr Justice Calanchini
PRESIDENT, COURT OF APPEAL



Hon. Mr Justice Chandra
JUSTICE OF APPEAL





Hon. Mr Justice De Silva
JUSTICE OF APPEAL