

IN THE COURT OF APPEAL  
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL AAU 17 OF 2015  
(High Court HAA 13 of 2014)  
(Magistrates Court No.389 of 2011 at Lautoka)

BETWEEN : PITA NAINOKA

Appellant

AND : THE STATE

Respondent

Coram : Calanchini P

Counsel : Ms S Nasendra for the Appellant.  
Mr V Perera for the Respondent

Date of Hearing : 6 July 2015

Date of Ruling : 13 July 2015

RULING

[1] This is an application for an enlargement of time to file an application for leave to appeal. The Appellant was convicted on 10 May 2014 on one count of aggravated burglary by the Magistrate Court at Lautoka. He was one of three persons convicted for the same offence by the Court on that day. One of the other two co-offenders,

Sairusi Soko, has also applied for leave to appeal out of time. His application was heard at the same time as the present application and is the subject of a separate Ruling.

- [2] The Appellant was sentenced on 20 May 2014 to a term of imprisonment of 2 years with a non-parole term of 20 months. A timely appeal to the High Court was dismissed for want of jurisdiction on 17 October 2014. The application before this Court was dated 27 October 2014 but was not filed until 3 February 2015. Since the appeal process had been commenced within time, albeit in the wrong court, the Respondent did not take issue with the delay.
- [3] As a result the application proceeded as a hearing for an application for leave to appeal against conviction only. Although the Appellant had initially applied for leave to appeal against conviction and sentence, Counsel indicated that the application for leave in respect of sentence was not proceeding and was to be marked as withdrawn.
- [4] The Appellant and his two co-offenders were convicted of the offence of aggravated burglary at the office of a non-government organization known as the Foundation for Rural Integrated Enterprises and Development (FRIEND). They had with them tools used for burglary and upon entering the premises they had tied the security officer. The office area had been ransacked by the intruders and as a result there was damage to the premises totalling \$782.00.
- [5] The evidence upon which the prosecution relied included the evidence from a witness (Ratudradra) who had travelled by bus with the three co-offenders on the day in question. He claimed to have left them before they entered the premises. His evidence confirmed the identity of the three co-offenders and stated that he saw them entering the premises. One of the co-offenders called an alibi witness. The Magistrate accepted the evidence of the prosecution witnesses and convicted the Appellant and his 2 co-offenders.
- [6] The three grounds of appeal upon which the Appellant sought to rely in support of his application were:

- “1. *The learned Magistrate erred in law when he failed to direct himself to treating Kitione Ratudradra as an accomplice thereby causing a substantial miscarriage of justice.*
2. *The learned Magistrate erred in law when he failed to warn himself of the danger of accepting accomplice evidence thereby causing a substantial miscarriage of justice.*
3. *The learned Magistrate erred in law when he convicted the Appellant solely on the accomplice evidence without any corroboration thereby causing a substantial miscarriage of justice.”*

[7] Although all 3 grounds are described as errors of law only, it is clear that grounds 1 and 3 also involve questions of fact and evidence which need to be considered in the process of determining whether leave should be granted. Ground 2 may well raise a question of law and to that extent leave is not required and nor is the issue raised vexatious or frivolous.

[8] Grounds 1 and 3 raise arguable points concerning the evidence of the witness Ratudradra and whether his involvement with the three convicted persons was sufficient for him to be classified as an accomplice. The Respondent concedes that the grounds raise arguable points.

[9] I am satisfied that leave to appeal against conviction should be granted. This appeal is to be listed with AAU 133 of 2014 being the appeal filed by the co-offender Sairusi Soko. There is no need to prepare two separate records. The one record may cover both appeals and both file numbers can appear with the names of both Appellants on the one record.

Orders:

1. *Leave to appeal against conviction is granted.*
2. *To be listed with AAU 133 of 2014.*



*W. Calanchini*  
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Hon. Mr Justice W. D. Calanchini  
PRESIDENT, COURT OF APPEAL