

IN THE COURT OF APPEAL, FIJI
[Criminal Appellate Jurisdiction]

Criminal Appeal No: AAU 0095 of 2008
(High Court Case No. HAC 118 of 2007)

BETWEEN : **AKUILA DROMUDOLE**

Appellant

AND : **THE STATE**

Respondent

Coram : **Calanchini, P**
A. Fernando, JA
Rajasinghe, JA

Counsel : **Mr. S. Waqainabete for the Appellant**
Ms. P. Madanavosa for the Respondent

Date of Hearing : **12 September 2016**

Date of Ruling : **30 September 2016**

JUDGMENT

Calanchini, P

1. I have read the draft judgment of Fernando JA and agree that the appeal should be dismissed.

Anthony Fernando, JA

2. The Appellant has appealed against his conviction for robbery with violence contrary to section 293(1)(b) of the Penal Code, cap 17. He had been charged before the High Court of Suva with three others for committing robbery of \$21,583.73, with violence, at the MH Supermarket, Tamavua, in the Central Division, on the 7th of July 2007.

3. The only evidence against the Appellant was his confession, the admissibility of which he had challenged. At the conclusion of the ‘Trial within a Trial’, the Learned Trial Judge had ruled that the confession was admissible. All four accused had been convicted after trial on the 10th of September 2008 by the learned Trial Judge on acceptance of the majority opinion of the Assessors and the Appellant had been sentenced to imprisonment of 14 years. The accused had represented themselves at the trial.
4. The Appellant’s application for Leave to Appeal against the conviction had been dismissed by a single Judge of the Court of Appeal under section 35(2) of the Court of Appeal Act, Cap 12.
5. The Appellant’s application for enlargement of time to appeal the decision of the single Judge of the Court of Appeal, by way of Special Leave, had been dismissed by the Supreme Court.
6. The Appellant had then applied for a Review of the decision by the Supreme Court under section 98(7) of the Constitution of Fiji. The Supreme Court by its decision dated 23rd October 2015 had granted him leave to pursue his appeal before the Court of Appeal, which was limited to the ground, that the Appellant did not receive a fair trial by reason of the failure of the trial Judge not exercising his judicial discretion to adjourn the proceedings for the Appellant to read, study and familiarise himself with the bundle of disclosures returned by the Legal Aid Commission on the day of the trial.
7. The ground of appeal referred to us necessarily involves three issues based on the Judgment of the Supreme Court Criminal Petition No. VAV 0013 of 2013 dated 23rd October 2015:

- i. Is there material on the Court Record to substantiate the allegation that there was in fact a ‘bundle of disclosures’ that was not made available to the Appellant until the last moment?
- ii. If that was the case does the proceedings of the case and the manner the Appellant had conducted his defence indicate in any way that he had been prejudiced in his defence?
- iii. Had the Appellant at any stage of the trial complained that his defence had been prejudiced as a result of the late disclosure which led to his inability to point out any inconsistencies in the evidence of the police officers by comparing them with their witness statements or by his inability to show whether there was a marked similarity in the confessional statements of the accused; save for asking for an adjournment at the commencement of the ‘Trial within Trial’?

In order to answer the above questions one has to look at the Court proceedings and the manner the Appellant dealt with the prosecution witnesses at the trial.

8. It is therefore of interest to take note of how the trial proceeded before the court as recorded in the High Court Record. I am of the view that we have to place reliance only on the Court Record, so far as proceedings are concerned. I have set out below in detail how the case proceeded:

- 8th August 2007 – The Appellant had first appeared before the Court in person and informed court that he will retain the services of a private lawyer.
- 28th August 2007 – The Appellant had appeared in person and said again he will retain the services of a private lawyer.
- 6th& 27th of September 2007 - the Appellant had appeared in person and had not been represented
- 5th October 2007 - the Appellant had been absent
- 12th October 2007 – the Appellant had appeared in person
- **14th November 2007 – the Appellant had informed Court that he will appear by himself and pleaded not guilty to the charge. The court record states “Additional evidence served on the Appellant”.**

- 21st and 29th of November 2007 – the Appellant had appeared in person
- 11th January 2008 - the Appellant had been absent
- 23rd January 2008 – the Appellant had been absent. Prosecutor had informed Court that that the Appellant had been arrested and was in remand
- 1st February 2008 - the Appellant had been absent and a bench warrant issued for his arrest
- 4th, 8th, & 9th February 2008 - the Appellant had been absent
- 3rd March 2008 - the Appellant had been absent
- **11th April 2008** – Appellant had appeared in person. A fresh plea had been taken as an Amended Information had been filed as result of a *nolle prosequi* been filed against one of the accused. The Appellant had informed court that he understands the charge and pleaded not guilty. Court had explained to him his rights. **He had informed Court he will apply for legal aid.**
- 18th April 2008 - the Appellant had appeared in person
- **19th May 2008 - the Appellant had appeared in person. Court had explained to him the procedure pertaining to Trial within a Trial and ordered that Objections for caution interview had to be filed by 29th May 2008**
- **29th May 2008 - the Appellant had appeared in person and filed Objection to caution interview.**
- **11th June 2008 – The Prosecutor had informed Court that the Appellant had filed his objections to caution interview.**
- 24th & 30th of June 2008 -the Appellant had appeared in person
- 11th July 2008 - the Appellant had been absent and a bench warrant issued for his arrest
- 28th July 2008 - the Appellant had appeared in person. The Prosecutor had asked that the case be adjourned to the 30th of July 2008 as she had filed additional evidence that day on the Appellant in relation to the ‘trial within a trial’
- 30th July 2008 - the Appellant had appeared in person. The Appellant had informed Court at 9.30 am that he is awaiting the Legal Aid Commission to process his application and thus sought an adjournment as he was not ready. Another accused person had also informed Court that he is awaiting the Legal

Aid Commission to process his application and that his disclosures are with the Legal aid Commission. The Appellant had not made such a statement. Although the Appellant had informed Court on the 11th of April 2008 that he will apply for legal aid there is no record of when in fact he applied for legal aid. At 10.50 am the Prosecutor had informed Court that the Appellant's and the other accused person's legal aid applications had been refused and the disclosures had been returned to them. Thereafter I find the following recorded in the court Record: "**Court** – LAC has rejected the applications of 2nd (*the Appellant*), 3rd& 4th Accused persons. Two accused persons are in remand pending trial. The accused persons have been given ample opportunity to secure legal representation. Since their legal aid applications have been refused, I would ensure they get a fair trial and that they understand the proceedings. Adjournment is refused. Trial will proceed." The court Record bears out at 2.15 pm the Appellant had said he needs more time to prepare and the Court had noted that it will give the Appellant time to prepare cross-examination.

- Thus it is clear that 'additional evidence' had been served on the Appellant on the 14th of November 2007. Up to this time the Appellant had appeared in person since he was first produced in Court. Therefore whatever evidence that was available prior to the 14th of November 2007 would also have been served on him. The Court Record does not bear out when the Appellant in fact applied for legal aid, although he had informed Court that he will apply for legal aid on the 11th of April 2008. All that the Court Record shows is that the Appellant had informed Court on the 30th of July 2008 that he is awaiting the Legal Aid Commission to process his application. It is important to note that on the 29th of May 2008, the Appellant had appeared in person and filed Objection to the caution interview. This is prior to the Appellant being informed that his application for legal aid had been refused.

9. It is also important to note the manner the Appellant had dealt with the prosecution witnesses at the 'Trial within a Trial' and the main Trial.

- At the 'Trial within a Trial' the police officer who arrested the Appellant had stated that he did not assault the Appellant and that the Appellant had co-operated when arrested. The Appellant's challenge that the police officer assaulted him and that the Appellant did not co-operate with him at the time of his arrest had been denied by the police officer. The police officer's evidence at the main trial and the Appellant's challenge to his evidence had been on the same lines.
- At the 'Trial within a Trial', the police officer who interviewed and recorded the caution statement of the Appellant had stated that he did not assault the Appellant, that the Appellant was explained his rights, that the Appellant was interviewed and that he had signed the statement in his presence. The Appellant had not challenged this evidence at the 'Trial within a Trial'. One does not need any disclosures to challenge this evidence in my view. At the main trial the Interviewing police officer had given the same evidence adding however that after the interview he retrieved the cash tills from information received from the Appellant. In his caution statement the Appellant has stated that the cash tills stolen had been opened at Ram Sami gravel road Tovata. The police had in fact recovered 4 cash tills from this area, which were later identified as the property of MH Superfresh, Tamavua by the acting manager and two cashiers of the Super Market. It is only at the main trial that the Appellant had challenged the Interviewing police officer's evidence saying that he was assaulted and the caution statement had been fabricated.
- The police officer who was the witnessing officer for the Appellant's caution statement had stated that the Appellant signed the Caution Statement and that he did not assault or threaten the Appellant. The Appellant's suggestion that his signature is not in the Caution Statement had been denied. There has been no other challenge to the police officer's evidence at the 'Trial within a Trial'. However at the main trial the Appellant had suggested that his statement was a fabrication, that he was assaulted by the police officer and that he was not taken to the hospital.
- The Visiting Medical Officer for prisons who looks after the inmates and conducts examination of the inmates does not speak of having examined the

Appellant. The Appellant had not asked any questions from him. There is no evidence before the Court that the Appellant had suffered any injuries.

- The police officer who charged the Appellant had stated that he explained all rights to him and that he did not assault, threaten or offer any inducement to the Appellant. The Appellant signed the charge and that he did not see any injuries on the Appellant. In the Statement Form of the Charge it is recorded as the Appellant having said “I wish to say that I have admitted that I was involved in the robbery at MH Superfresh, Tamavua and I also help the police to recover the 4 cash register. I want to apologise to the court for what I have done. That’s all I wish to say.” The Appellant’s challenge that what is in the Statement Form of the Charge is not the Appellant’s signature, that the evidence has been fabricated, that the Appellant asked him to be taken to the hospital has been denied by the police officer.
- The police officer who had the custody of the Appellant at the police station had stated that he did not notice any injury on the Appellant. The Appellant had not challenged his evidence.
- The Appellant’s evidence at the ‘Trial within a Trial’ had been to the effect: “The police statements in the interview are not mine. The police officers assaulted me when I denied the allegation. My signature was forged”. Under cross-examination by the learned prosecutor the Appellant had said that he was assaulted by timber. The ‘Disclosure Certificate’ and the ‘Bail Form’ both of which the Appellant is alleged to have signed had the same signature of the Appellant with the initials AD as found in the Caution Statement. But when shown the three documents the Appellant had admitted the signature only in the ‘Disclosure Certificate’ as his. The Appellant had to sign the ‘Bail Form’ to be on bail, but yet denied that the signature on it, is his. He had however admitted that the signature on the ‘Bail Form’ and the ‘Caution Interview’ appear to be the same.

10. The Court Record bears out that the ‘Trial within a Trial’ hearing which commenced on the 30th of July 2008 had been concluded on the 8th of August 2008. The police officers who were involved in the recording of the caution statement were called on

the 6th of August 2008. Thus even if the Appellant's position that he had received the disclosure documents on the 30th of July 2008 is to be accepted as true, he would have had 7 days to prepare his cross-examination of the witnesses involved in the recording of the caution statement.

11. The trial proper started on the 14th of August 2008 after the Trial Judge had ruled that the Appellant's confession statement was admissible in the trial and could be placed before the Assessors for their consideration. There was no further application by the Appellant and by this time, the Appellant would have had his disclosure documents which he claims he got on the 30th of July 2008, for two weeks. The trial was completed on 10th September 2008 and the trial Judge accepted the majority opinion of guilty by the Assessors.
12. The Appellant's position that he was never involved in the robbery, the case against him is a total fabrication and that his signature had been forged does not go along with the personal information about the Appellant found in the caution statement which at the hearing before us he admitted was elicited from him. He had in his caution statement stated where he is originally from, where he is presently staying, his father's name, where he is working, his mother's name, from where his mother comes from, whether she is working, how many siblings he has, their names, what each of them are doing, that he is schooling at FIT since 2006, and that he was studying electronics.
13. The Appellants position that he was never involved in the robbery, the case against him is a total fabrication and that his signature had been forged does not also go along with the manner he had chosen to cross-examine the prosecution witnesses who were eye-witnesses to the incident and who had not implicated him in anyway. The Appellant had cross-examined the Store Manager of Superfresh MH, Tamavua as to the number of robbers that came; another lady who was doing grocery shopping at the Super Market at the time of the robbery, as to whether she could identify the robbers and about the getaway vehicle, its colour and registration number; two cashiers at the supermarket about the tills; the witness who testified regarding the getaway car in which the robbers left after committing the robbery, about the colour of the van and its registration number. It is to be noted that a finger print of the Appellant found in

the getaway van had been matched against the criminal record of the Appellant although that evidence had had not been led due to its prejudicial effect.

14. In view of the facts enumerated in paragraphs 8-11 above I have no hesitation in holding that the issues (i) and (ii) raised at paragraph 7 above have to be necessarily answered in the negative. As regards the (iii) issue raised therein I do not find anything on record to even assume that the Appellant had at any stage of the trial been prejudiced as a result of the late disclosure.

15. I am therefore of the view that the Appellant had not been denied a fair trial.

Rajasinghe, JA

16. I agree with the findings and reasoning in the Judgment of A. Fernando, JA.

The Orders of the Court are :

1. *Leave to appeal is granted.*
2. *Appeal is dismissed.*



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



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Hon. Mr. Justice Anthony Fernando
JUSTICE OF APPEAL



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Hon. Mr. Justice T. Rajasinghe
JUSTICE OF APPEAL