

IN THE FIJI COURT OF APPEAL
[On Appeal from the High Court of Fiji]

Criminal Appeal Nos: AAU0008, 0009 & 0035 of
2014
[High Court Case No. HAC84/09Ltk]

BETWEEN : **JOJI ROKETE**
JOSUA WAKA
JONETANI ROKOUA *Appellants*

AND : **THE STATE** *Respondent*

Coram : Hon Mr. Justice Daniel Goundar

Counsel : Mr. J. Savou for 1st and 2nd Appellants
3rd Appellant in person
Mr. M. Korovou for State

Date of Hearing : 16 June 2016

Date of Ruling : 23 June 2016

RULING

[1] In this ruling, I shall refer to the appellants by their last names. Rokete, Waka, Rokoua and a fourth accused, Mohan were jointly charged with one count each of murder, robbery with violence and unlawful use of motor vehicle. The charges arose from the same facts. It was alleged that the four accused persons were part of a joint enterprise to rob the victim in his home, and in the course of committing the robbery, the victim was killed. Apparently, the victim died from asphyxiation and suffocation caused by gag around nose and mouth. It was alleged that the perpetrators fled the scene in the victim's vehicle, which they later abandoned it. Following a trial in the High Court at Lautoka, Mohan was acquitted while the appellants were convicted on all three charges. The

appellants were sentenced to life imprisonment for murder, 14 years imprisonment for robbery with violence and 5 months for unlawful use of motor vehicle. Rokete and Waka were ordered to serve a minimum term of 18 years. Rokoua was ordered to serve a minimum term of 15 years. All terms were made concurrent. Rokete and Waka seek leave to appeal against both conviction and sentence. Rokoua seeks leave to appeal against conviction only. They have filed separate grounds of appeal.

Rokete's appeal

[2] Rokete filed his initial grounds on 4 April 2014. However, those grounds were abandoned when his counsel filed fresh grounds on 11 January 2016 - three grounds against conviction and one ground against sentence. The grounds in summary are:

- (i) The trial judge should have treated the prosecution witness, Tasvinder Singh's evidence with caution because his evidence was tainted with improper motive.
- (ii) The trial judge failed to direct on the elements of murder.
- (iii) The trial judge failed to direct on malice aforethought.
- (iv) The sentence is excessive and in conflict with section 14(2)(n) of the Constitution.

[3] On the night in question, Tasvinder Singh transported four men in his van to the address of the victim. Singh's evidence was that Rokoua had arranged with him to drive to the victim's address. After dropping the accused persons, Singh drove back to his base. The following day, Rokoua approached Singh and offered to pay \$200.00 for the hire of the van. Singh said Rokoua admitted that the victim died when they tied a cloth around his neck. Singh did not report the matter to police. There is no evidence to suggest that Singh was a party to the joint enterprise to rob the victim. He might have suspected that the four accused persons he dropped off were up to some illegal activity, but suspicion is not enough to impute improper motive. Singh could not have been charged with any of the offences that the appellants were charged with because he did not participate in those offences. There is no arguable ground to treat Singh's evidence with caution for improper motive. In any event, Singh did not implicate Rokete as one of the persons he had dropped off at the victim's address on the night in question. Ground 1 is unarguable.

- [4] Ground 2 raises a question of law, but I find the ground to be frivolous. The appellants were charged with murder contrary to section 199 of the Penal Code, Cap. 17. In paragraphs 25-28 of the summing-up, the trial judge fully explained the elements of murder as defined by section 199 of the Penal Code, Cap. 17. Since the prosecution pitched 'malice aforethought' at intention to kill, the trial judge gave further directions in paragraph 29 of the summing up to explain that element. Grounds 2 and 3 lack merits and are frivolous.
- [5] The ground against sentence is misconceived. The ground suggests that since there was no power to fix a minimum term for murder committed in 2009, the appellant was subjected to a more severe punishment in breach of the Constitution when the trial judge fixed the minimum term. The trial judge did have power pursuant to section 33 of the Penal Code, Cap. 17 to fix a minimum term for murder committed in 2009. This ground is unarguable.

Waka's appeal

- [6] In his Notice of Appeal dated 21 March 2014, Waka advanced twelve grounds against conviction and two grounds against sentence. However, at the leave hearing, his counsel did not pursue all fourteen grounds. For that reason, it is not necessary to reproduce all fourteen grounds in this ruling. I only deal with issues on which Mr. Savou made submissions.
- [7] The first compliant relates to the acquittal of Mohan. Mohan was found guilty by the assessors. But when the trial judge adjourned to consider his judgment, he found a medical report in the court file that showed that Mohan was chronically asthmatic. The only incriminating evidence against Mohan was his confession under caution. Mohan was unrepresented at trial. However, he challenged the admissibility of his confession on the ground that it was obtained unfairly in the circumstances when he was denied medication for his illness. To rebut this contention, the prosecution led evidence from Dr. Dragon

who upon examination of Mohan ruled out that he was chronically asthmatic. Based on Dr. Dragon's evidence, the trial judge ruled Mohan's confession admissible. But when the trial judge saw another medical report of Mohan in the court file but not led in evidence, the trial judge re-visited his earlier decision admitting the confession and decided not to give any weight to Mohan's confession. As a result, Mohan was acquitted. Waka's contention is that the same reasoning should have been applied to him because he was also medically examined by Dr. Dragon whose credibility was questionable according to the trial judge.

- [8] I accept Waka's submissions that the trial judge made an error in referring to a medical report which was not led in evidence. However, I do not think Waka was prejudiced by the error. Dr. Dragon's credibility was never tested when the trial judge learnt about Mohan's second medical report contained in the court file. So when the trial judge based his decision to acquit Mohan on evidence not led at trial, arguably the prosecution was prejudiced by that decision, and not Waka. Waka's conviction is based on the evidence led at trial, and Mohan's acquittal had no bearing on that decision. Ground 1 is unarguable.
- [9] Grounds 2-5 were argued together. Waka's main complaint is that the trial judge stopped his trial counsel from addressing the law on joint enterprise in his closing submissions. Without the court record, this complaint cannot be verified. However, I do not think Waka was prejudiced even if there is some truth in this complaint. It is not the function of the trial counsel to address the assessors on the law. Directing on the law is the function of the trial judge. The verdict is based in the judge's directions on the law, and not on the closing address of counsel. In that regard, the trial judge's directions on joint enterprise that is contained in paragraphs 16-25 and 30-32 are correct. For these reasons, grounds 2-5 are unarguable.
- [10] The remaining grounds (6-12) were argued on the basis that the trial judge lacked objectivity by preferring the prosecution's case and not adequately dealing with Waka's

defence. Waka's defence was alibi and that his confession was extracted by force by police. The trial judge dealt in detail with Waka's defence in paragraphs 53-54 of the summing up. The trial judge also made it clear that Waka did not have to prove anything and that the burden to prove his guilt rested on the prosecution throughout the trial. The trial judge dealt with both the prosecution and the defence case objectively. Grounds 6-12 are unarguable. Mr. Savou made no submissions on the grounds against sentence. The sentence for murder is fixed by law. The minimum term of 18 years is within the range for murder. Sentence appeal is unarguable.

Rokoua's appeal

- [11] At the leave hearing, Rokoua ably argued eight grounds of appeal against conviction. His first ground concerns Jasvinder Singh's evidence. His first contention is that Singh should have been treated as an accomplice, requiring accomplice warning. His second contention is that Singh should not have been allowed to do dock identification. As I have said earlier in my ruling that there was no basis for suggesting that the witness was a participant or in any way involved in the criminal offences that the appellants were charged with (*R v Black* [1982] 1 WLR 461). In paragraph 67 of the summing-up, the trial judge quite properly dealt with the dock identification of Rokoua by Singh. In any event, there was no need for such direction. The issue was not reliability of identification made by Singh. The issue was Singh's credibility when he said Rokoua admitted killing the victim when he came to pay the fare for hiring the vehicle the following day. Ground 1 is unarguable.
- [12] Ground 2 concerns the trial judge's directions on Subashni Lata's evidence. Ms Lata was called by Rokoua to impeach the character of Jasvinder Singh. Ms Lata who used to be in an intimate relationship with Singh gave evidence that Singh was a drug user and he always had money to spend. In paragraph 64 of the summing up, the trial judge directed the assessors to examine Ms Lata's evidence with care. Rokoua contends this direction diminished Ms Lata's evidence and shifted the burden of proof on the accused. I disagree. The reason the trial judge directed the assessors to examine Ms Lata's evidence with care

was because certain aspects of her evidence was speculative. There is no ground to suggest that the trial judge shifted the burden of proof on the accused by this direction. Ground 2 is unarguable.

- [13] Ground 3 concerns an alleged comment that the trial judge made when Subashni Lata was being cross-examined by the prosecutor. It is alleged that the trial judge made a comment to the effect 'you must miss all the money Mr. Tasvinder was giving you'. Whether the trial judge made this comment cannot be verified without the court record. If the comment was made, it was unwise, but the comment could not have affected the verdict because Ms Lata's evidence had very little probative value. Ground 3 is unarguable.
- [14] Ground 4 concerns failure to declare a mistrial when Rokou's bad character contained in Mohan's unedited caution interview was led in evidence. Whether to declare a mistrial is within the discretion of the trial judge. In this case, the trial judge decided to deal with the bad character evidence by directing the assessors to disregard it from consideration in the strongest terms as contained in paragraph 45 of the summing up. Ground 4 is unarguable.
- [15] Rokoua contends that in paragraph 71 of the summing up, the trial judge directed the assessors to make impermissible use of the caution interviews of the accused persons. I think this complaint is taken out of context. In paragraph 42 of the summing up, the trial judge gave clear direction to the assessors that anything said in the caution interview was only admissible against the maker and not against the co-accused. Ground 5 is unarguable.
- [16] Ground 6 concerns the trial judge inviting the victim's family to leave the courtroom during the reading of Rokete's caution interview. Although this was an unusual procedure, the procedure had no bearing on the convictions of Rokoua. Ground 5 is unarguable.

- [17] In ground 7, Rokoua contends that the trial judge failed to direct on the sworn evidence of Rokete. The trial judge fairly summarised Rokete's evidence in the summing up. Rokete's sworn evidence did not require any special direction. In any event, Rokete did not implicate Rokoua in his evidence. The weight to be attached to Rokete's evidence was a matter for the assessors and the trial judge. This ground is unarguable.
- [18] In ground 8, the appellant contends that the trial judge misdirected the assessors in paragraph 5 by telling them not to be concerned regarding lack of evidence of phone records (to confirm calls between Jasvinder Singh and Rokoua) as highlighted by defence counsel in her closing address. In my judgment, it is not improper for the trial judge to direct the assessors not to be concerned regarding matters that have not been led in evidence. Ground 8 is unarguable.
- [19] For these reasons, all three applications for leave must fail.

Result

Applications for leave refused.



A handwritten signature in black ink, appearing to read "Daniel Goundar".

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Hon. Mr. Justice Daniel Goundar
JUSTICE OF APPEAL

Solicitors:

Office of the Legal Aid Commission for 1st and 2nd Appellants
3rd Appellant in person
Office of the Director of Public Prosecutions for State