

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE MAGISTRATES COURT
Exercising extended jurisdiction

CRIMINAL APPEAL NO. AAU 105 OF 2015
(Magistrates Court No. 714 of 2010 at Suva)

BETWEEN : **SAILOAMA VODO**
Appellant

AND : **THE STATE**
Respondent

Coram : **Calanchini P**

Counsel : **Mr T Lee for the Appellant**
Mr L Burney for the Respondent

Date of Hearing : **15 July 2019**

Date of Ruling : **16 August 2019**

RULING

[1] Following a trial in the Magistrates Court at Suva exercising extended jurisdiction the appellant together with two others (Mikaele Waqa and Asaeli Veiyaqavi) was convicted on two counts of aggravated robbery. The appellant was subsequently sentenced to 9 years imprisonment with a non-parole term of 6 years.

[2] This is the appellant's timely (conceded by the State) application for leave to appeal against conviction pursuant to section 21(1)(b) of the Court of Appeal Act 1949 (the Act). In the case of a ground of appeal involving an error of law only, leave is not required under section 21(1)(a) of the Act. Section 35(1) of the Act gives to a single judge of the Court power to grant leave. The present test for granting leave to appeal against conviction is whether the appeal is arguable before the Court of Appeal: **Naisua -v- The State** [2013] FJSC 14; CAV 10 of 2013, 30 November 2013.

[3] On 4 July 2019 the appellant filed an amended notice of appeal setting out the following grounds of appeal:

"1. ***THAT*** the admissibility of the caution statement was erroneous in law and fact and cannot be supported by having regard to the totality of the evidence of the trial-within-trial and the trial proper, in particular, to the following:

- (a) Admitting the caution statement of Mr. Vodo when there was evidence of injuries recorded in the Cell Book and that Mr. Vodo was taken to hospital.
- (b) Accepting Mr. Veiyyagavi's evidence as unreliable without independently assessing the totality of the evidence.
- (c) Putting on record that Mr Vodo's alibi witness "is serving prisoner like the 1st accused in Naboro Prison" thus drawing the inferences that the alibi witness circumstances makes him an unreliable witness.

2. ***THAT*** the conviction was unreasonable and cannot be supported by having regard to the totality of the evidence at trial, in particular, to the following:

- (a) Causing a miscarriage of justice by convicting the Appellants solely on the confession obtained in the Caution Interview.
- (b) Causing a miscarriage of justice by convicting the Appellants on a defective charge."

- [4] Although the Respondents written submissions addressed the grounds set out in an amended notice of appeal filed on 9 October 2017, Counsel addressed all grounds of appeal in his oral submissions at the hearing of the leave application.
- [5] The first ground of appeal is essentially concerned with the decision of the Magistrate to admit into evidence the caution interview made by the appellant. It must be recalled that the complainants were not able to identify any of the alleged offenders. The only evidence upon which the State relied related to the confessions in the caution interview. Admissibility was challenged on the ground that the confession was not made voluntarily. It is not disputed that there was evidence of injuries recorded in the cell book and there was evidence that the appellant had been taken to hospital. The learned Magistrate has made no reference to this evidence let alone attempted any analysis of the evidence. This ground is arguable.
- [6] A second ground is raised in relation to the manner in which the Court considered the statements of the co-accused in their caution interviews concerning the appellant. This ground is also arguable. There may be an issue concerning the evidence of the alibi witness whose identity is not clear from the judgment.
- [7] A further ground raises the issue of the appellant being convicted on the basis of his confession/admissions in the caution interview alone. Whether the learned Magistrate has properly turned his mind to the issue of convicting the appellant on the basis of his admissions alone is arguable: See **Vasuca -v- The State** [2012] FJCA 70; AAU 11 of 2011, 26 October 2012.
- [8] The remaining issue raised by the grounds of appeal relates to the claim that the charge was defective. There were two counts of aggravated robbery alleged against the appellant. The first was aggravated robbery under section 311(1)(a). This offence equates to robbery in company. To succeed on this count the prosecution must establish beyond reasonable doubt that the appellant with others robbed the complainant. Under section 310 of the Crimes Act 2009 robbery involves theft accompanied by force or

threats of force. In the particulars of the offence there is no reference to the use of force or threats of force. The particulars in effect allege no more than theft in company.

[9] The second count of aggravated robbery is brought under section 311 (1)(b). This offence equates to robbery involving the presence of an offensive weapon. The particulars of the offence refer to both robbery in company and the use of force. There is no reference to the presence of an offensive weapon. The effect of these technical deficiencies in the wording of the particulars of the offences should be considered by the Court of Appeal.


[10] The two grounds of appeal against conviction are put forward on the basis that each constitutes a miscarriage of justice under section 23(1) of the Court of Appeal Act. The first ground of appeal alleges that the summing up was not fair, objective and balanced in the sense that the defence case and the appellant's evidence were not sufficiently explained to the assessors. It must be noted that the submissions appear to suggest that it is the opinions of the assessors that determine the outcome of the trial. However, under section 237 of the Criminal Procedure Act 2009 the trial Judge ultimately decides both questions of fact and law. The opinions of the assessors provide guidance for the judge. Both the summing up and the judgment will be considered to determine whether the issues raised by the appellant should be placed before the Court of Appeal.

[11] For all of the above reasons leave to appeal against conviction is granted.

Order:

Leave to appeal against conviction is granted.





Hon Mr Justice W D Calanchini
PRESIDENT, COURT OF APPEAL