

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

CRIMINAL APPEAL NO. AAU 10 OF 2017
(Magistrates Court No. 474 of 2016 at Suva)

BETWEEN : **IOSEFO BAINIVALU**
ROBERT TUITUBOU

Appellants

AND : **THE STATE**

Respondent

Coram : **Calanchini P**

Counsel : **Ms S Ratu with Ms N Mishra for the Appellants**
Ms J Prasad for the Respondent

Date of Hearing : **29 October 2019**

Date of Ruling : **27 November 2019**

RULING

[1] The appellants were convicted on their pleas of guilty by the Magistrates Court at Suva exercising extended jurisdiction on one count of aggravated robbery. On 25 January

2017 each appellant was sentenced to 8 years 11 months imprisonment with no non-parole period fixed.

[2] The appellants filed a timely joint notice of appeal against conviction and sentence. The appellants filed an amended notice of appeal on 13 June 2018 which related only to the appeal against conviction.

[3] This is the appellants' application for leave to appeal pursuant to section 21(1) of the Court of Appeal Act 1949 (the Act). Section 35(1) of the Act gives to a judge of the Court of Appeal power to grant leave. The 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.

[4] The only ground of appeal against conviction is:

“The learned Magistrate erred in law and in fact when he convicted the appellants when there was no evidence from the summary of facts to substantiate that immediately before committing the said offence (robbery) the appellants used force on the complainant.”

[5] Although neither side was able to provide a copy of the summary of facts, the submissions proceeded on the basis that the reference to the summary of facts by the Magistrate in his sentencing decision was sufficient for the purposes of the leave application. In paragraph 4 of his decision the Magistrate noted:

“4. The summary of facts states that the defendants in a co-ordinated operation stole the mobile phone from the victim while he was taking pictures in Suva. The first defendant impeded any pursuit of the second defendant by the victim.”

[6] The appellants submission is that there was no material fact in the summary to establish the element of force that is needed to distinguish theft from robbery. Section 310(1) of the Crimes Act 2009 states:

“1. A person commits an indictable offence (which is triable summarily) if he or she commits theft and

(a) _____

(b) at the time of committing theft, or immediately after committing theft, he or she

(i) uses forces on another person; or

(ii) threatens to use force then and there on another person:- with intent to commit theft or to escape from the scene.”

[7] In my judgment the summary of facts as it appears in the Magistrates’ sentencing decision is sufficient to establish that one of the appellants threatened to use force by raising his elbow in front of the complainant to enable the other appellant to escape from the scene immediately after the mobile phone had been stolen. The necessary elements of theft and the use of force that are required for robbery were part of the summary.

[8] There is a second submission filed on 17 June 2019 by the appellants in person. The appellants claim that one of them (Bainivalu) played no part in the theft and that he had tried to protect the complainant. They claim that as a result the evidence did not support either a robbery or an aggravated robbery conviction. This submission falls outside the one ground of appeal against conviction upon which the appellants relied and was not taken up by counsel at the leave hearing. This submission is rejected.

[9] As there has been no formal notice of abandonment of the sentence appeals filed and having read the appellants submissions on sentence, I am prepared to consider the application for leave to appeal against sentence. The test for leave to appeal sentence is whether there is an arguable error in the exercise of the sentencing discretion: **Naisua –v- The State** (supra).

[10] The learned Magistrate has relied upon the Supreme Court decision of **Wallace Wise –v- The State** [2015] FJSC 7; CAV 4 of 2015, as the basis for his sentencing decision. However it must be recalled that the facts in that case concerned a night time home invasion that shocked and terrified the occupants. The facts of the present case can obviously be distinguished. There is an arguable error in the exercise of the sentencing

discretion on the basis of the decision of this Court in Tawake -v- The State [2019] FJCA 182; AAU 13 of 2017, 3 October 2019.

Orders:

1. *Leave to appeal against conviction is refusal.*
2. *Leave to appeal against sentence is granted.*



W. Calanchini

Hon Mr Justice W D Calanchini
PRESIDENT, COURT OF APPEAL