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

CRIMINAL APPEAL NO.AAU 50 of 2020
[High Court at Suva Case No. HAC 299 of 2017S]

BETWEEN : **ILAITIA SARAI**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Appellant in person**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **25 January 2023**

Date of Ruling : **31 January 2023**

RULING

[1] The appellant had been charged as the 02nd accused with others in the High Court of Suva for having committed two acts of AGGRAVATED ROBBERY contrary to section 311 (1) (a) of the Crimes Act 2009 on 25 September 2017 at Sports City, Suva in the Central Division.

[2] At the trial the appellant had been tried in absentia. After the summing-up, the assessors had expressed a unanimous opinion that the appellant was guilty of both counts. The Learned High Court Judge had agreed with the assessors and convicted the appellant accordingly and sentenced him on 14 May 2019 to 12 years of imprisonment on the each count to run concurrently with a non-parole period of 11 years (his sentences to run from the day of his arrest). The appellant had been arrested on 02 June 2020 in Kadavu.

[3] The facts as narrated in the sentencing order are briefly as follows:

> 2. *The brief facts were as follows. The female complainant was Ms. Roseline Mudaliar (PW1). She was on 25 September 2017 employed as a teller for Real Forex Exchange Office at Sports City, Suva in the Central Division. At 8.30 am, she opened the main door of the Real Forex Exchange Office at Sports City. She had just started work. She then went into her office, which was separated from the customer area by a counter and glass partition. Suddenly Accused No. 2 and 3 came through the main office door. Another two were on guard outside the office.*
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> 3. *Accused No. 3 climbed over the counter and glass partition, and went into PW1's office. He opened the office door, and let Accused No. 2 into the same. The two then threatened PW1 not to raise the alarm, or they will kill her. They demanded money. They punched PW1 on the head and back. They then forced PW1 to open the office's safe. The two then stole the items mentioned in count no. 1 from the office safe. They also stole PW1's properties as itemized in count no. 2. The two then fled the crime scene, with the others outside the office.*

[4] The single judge allowed enlargement of time to appeal only against conviction only on the following ground of appeal:

> *'The learned trial judge erred in law by allowing the prosecution to tender the cautioned interview statements of the appellant in evidence without conducting a trial within a trial in order to determine the admissibility of the cautioned interview statement of the appellant on evidence.'*

[5] The issue is whether the trial judge was bound to conduct a *voir dire* inquiry even when the appellant was being tried in absentia before his cautioned statement was admitted in evidence. Section 288 of the Criminal Procedure Act provides statutory sanction for *voir dire* inquiries to Judges and Magistrates and accordingly, a *voir dire* must only be conducted after the accused has pleaded to the information.

[6] **Rokonabete v The State** [2006] FJCA 40; AAU0048.2005S (14 July 2006) laid down some guidelines as to when and how to conduct a *voir dire* inquiry.

> *'[24] Whenever the court it advised that there is challenge to the confession, it must hold a trial within a trial on the issue of admissibility unless counsel for the defence specifically declines such a hearing.* ***When the accused is not represented, a trial within a trial must always be held****.*

At the conclusion of the trial within a trial, a ruling must be given before the principal trial proceeds further. Where the confession is so crucial to the prosecution case that its exclusion will result in there being no case to answer, the trial within a trial should be held at the outset of the trial. In other cases, the court may decide to wait until the evidence of the disputed confession is to be led.

[25] It would seem likely, when the accused is represented by counsel, that the court will be advised early in the hearing that there is a challenge to the confession. When that is the case, the court should ask defence counsel if a trial within a trial is required and then hear counsel on the best time at which to hold it. If the accused is not represented, the court should ask the accused if he is challenging the confession and explain the grounds upon which that can be done.'

[7] ***Rokonabete*** deals with two situations. When the accused is represented by counsel and when he is unrepresented *i.e.* when the accused appears in person. In either situation, when the trial court is informed that there is a challenge to the confession a *voir dire* must be held to determine its admissibility. If the accused is represented and his counsel does not wish to challenge the confession a *voir dire* hearing need not be held. If, however, the accused is unrepresented a *voir dire* must always be held which means that even if an unrepresented accused does not challenge his confession the trial court should still hold a *voir dire* inquiry to test its voluntariness and to be satisfied that there are no general grounds of unfairness that adversely affect its admissibility.

[8] ***Rokonabete*** does not appear to leave any room for the trial judge to do away with a *voir dire* inquiry when the accused is unrepresented irrespective of his desire to challenge it or not. When and if an unrepresented accused raises no challenge to his confession being admitted in evidence, he may not be fully cognizant of the consequences of the admission of his confession in evidence and even the procedure of challenging it. In my view, in order to ensure a fair trial the trial judge should explain to an unrepresented accused the consequences that will flow from his confession being used in evidence against him and his right to challenge its admissibility and how he should set about doing it.

[9] ***Rokonabete*** also has not dealt specifically with a situation where a confession of an accused is sought to be admitted in evidence in his absence. Nevertheless, if the court is bound to hold a *voir dire* inquiry when the accused is unrepresented, one can argue that logically there is no basis for the court to circumvent it when the accused is absent from court. The High Court in **Ravouvou v State** [2018] FJHC 79; HAA130.2017 (23 January 2018) had held that

> *'17. If the prosecution proposes to adduce the confession made by the accused in his caution interview in evidence, in a trial which is conducted in the absence of the accused pursuant to Section 14 (2) (h) (i) of the Constitution, the trial court must conduct a trial within a trial, in order to determine the admissibility of the caution interview of the accused in evidence.'*

[10] This is a question of law only to be decided by the full court.

[11] ***Rokonabete*** has laid down the common law practice when the admissibility of a confession is to be challenged and seems, to some extent, to have followed **Ajodha v The State** [1982] AC 204; [1981] 3 WLR 1; [1981] 2 All ER 193, PC where the accused were present in court at the trial. Lord Bridge *inter alia* said:

> *'Particular difficulties may arise in the trial of an unrepresented defendant, when the judge must of course, be especially vigilant to ensure a fair trial. No rules can be laid down, but it may be prudent, if the judge has any reason to suppose that the voluntary character of a statement proposed to be put in evidence by the prosecution is likely to be in issue, that he should speak to the defendant before the trial begins and explain his rights I the matter.'*

[12] However, even **Ajodha v The State** (supra) does not seem to have dealt with the situation that has arisen in the present appeal *i.e.* where the accused was absent and his confession had been admitted without a *voir dire* inquiry.

[13] Thus, the trial judge at paragraph 29 seems to have left it to the assessors to judge the voluntariness of the appellant's confession *vis-à-vis* only the weight and value to be attached but not the admissibility. Thus, at no stage has there been a decision by the

trial judge (or at least the assessors themselves) as to the voluntariness and then, the admissibility of the confession which is the only evidence against the appellant.

Bail pending appeal

[14] The legal position is that the appellant has the burden of satisfying the appellate court firstly of the existence of matters set out under section 17(3) of the Bail Act namely (a) the likelihood of success in the appeal (b) the likely time before the appeal hearing and (c) the proportion of the original sentence which will have been served by the appellant when the appeal is heard. However, section 17(3) does not preclude the court from taking into account any other matter which it considers to be relevant to the application. Thereafter and in addition the appellant has to demonstrate the existence of exceptional circumstances which is also relevant when considering each of the matters listed in section 17 (3). Exceptional circumstances may include a very high likelihood of success in appeal. However, an appellant can even rely only on 'exceptional circumstances' including extremely adverse personal circumstances when he fails to satisfy court of the presence of matters under section 17(3) of the Bail Act [vide **Balaggan v The State** AAU 48 of 2012 (3 December 2012) [2012] FJCA 100, **Zhong v The State** AAU 44 of 2013 (15 July 2014), **Tiritiri v State** [2015] FJCA 95; AAU09.2011 (17 July 2015), **Ratu Jope Seniloli & Ors. v The State** AAU 41 of 2004 (23 August 2004**),** **Ranigal v State** [2019] FJCA 81; AAU0093.2018 (31 May 2019), **Kumar v State** [2013] FJCA 59; AAU16.2013 (17 June 2013), **Qurai v State** [2012] FJCA 61; AAU36.2007 (1 October 2012), **Simon John Macartney v. The State** Cr. App. No. AAU0103 of 2008, **Talala v State** [2017] FJCA 88; ABU155.2016 (4 July 2017), **Seniloli and Others v The State** AAU 41 of 2004 (23 August 2004)].

[15] Out of the three factors listed under section 17(3) of the Bail Act 'likelihood of success' would be considered first and if the appeal has a 'very high likelihood of success', then the other two matters in section 17(3) need to be considered, for otherwise they have no direct relevance, practical purpose or result.

[16] If an appellant cannot reach the higher standard of 'very high likelihood of success' for bail pending appeal, the court need not go onto consider the other two factors under section 17(3). However, the court may still see whether the appellant has shown other exceptional circumstances to warrant bail pending appeal independent of the requirement of 'very high likelihood of success'.

[17] The appellant was granted enlargement of time only on the issue of law raised under the first ground of appeal. Even if the full court were to hold that there had been substantial miscarriage of justice by the trial judge not holding a *voir dire* inquiry, still the result would most likely to be a new trial where the DPP would eventually decide whether to proceed with a trial *de novo* or not. If the appellant is properly convicted in any new trial, the judge will take the period of incarceration that he has undergone so far in the matter of sentence. The Registry was directed to finalize the certification of records for the full court hearing by preparing a supplemental record containing the ruling in the appellant's appeal delivered on 25 July 2022. The appeal record is already available for the co-appellant in AAU 174/2019 which can be used for this appellant as well. The appellant had filed Form 3 on 25 July 2022 seeking to abandon his sentence appeal.

[18] Though, it is now not technically required, I shall still consider the second and third limbs of section 17(3) of the Bail Act namely '*(b) the likely time before the appeal hearing and (c) the proportion of the original sentence which will have been served by the appellant when the appeal is heard'* together.

[19] Since his arrest upon the warrant, the appellant has so far served 02 years and 07 months of imprisonment and a possible sentence for aggravated robbery of a commercial establishment is much longer. If the Registry acts diligently and expeditiously to have the appeal records ready for the full court hearing there is a chance that his appeal will be heard by the full court along with that of his co-accused in AAU 174 of 2019 without an undue delay.

[20] It should be placed on record that this court delivered the last bail pending appeal ruling only on 25 July 2022 refusing the appellant's application for bail. This is his second application for bail pending appeal in the space of 06 months.

Order of the Court:

1. Bail pending appeal is refused.

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL