

IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 28 OF 2018

BETWEEN : **PONIPATE TARAI**

APPELLANT

A N D : **STATE**

RESPONDENT

Counsel : ***Ms. N. Mishra for the Appellant.***
: ***Mr. T. Tuenuku for the Respondent.***

Date of Hearing : ***04th of December, 2018***

Date of Judgement : ***31st of January, 2019***

JUDGEMENT

Background

The Appellant (will be referred to as the accused sometimes) was charged with one count of Robbery with violence contrary to section 293(1) (a) of the Penal Code, in the Magistrates' Court of Nausori. The particulars of the offence states;

“PONIPATE TARAI, on the 18th day of April 2009 at Waila, Nausori in the Central Division robbed MAMOOD ALI \$70.00 cash and immediately before such robbery did use personal violence on the said MAMOOD ALI”.

The accused has pleaded not guilty to the said charge and the matter has proceeded to trial. At the trial the prosecution has lead the evidence of three (3) witnesses. The accused has given evidence though has not called any witnesses on his behalf.

The learned Magistrate of Nausori, by his judgement dated 25th of September 2017, having convicted the accused has subsequently on the 08th of November 2017 has imposed a sentence of five (5) years and eleven (11) months imprisonment with a non-parole term of four (4) years and eleven (11) months.

The accused, being dissatisfied of the said judgement has appealed to this Court. The notice of appeal is dated 08th May 2018, and was received by the courts on 21st of May 2018. On the face of it, this appeal is out of time by 6 months. The appellant submits three grounds for the extension of time in his initial application. When the matter was taken up on the 04th of July 2018, it has been ordered to consider the application for extension of time together with the substantive appeal.

It seems that the accused has prepared and filed his papers of appeal consisting of 21 grounds, on the 08th of May 2018, without having a proper legal advice/assistance. Out of the said 21 grounds, 15 were against the conviction and 6 were against the sentence.

The accused having obtained legal assistance and being represented by the Legal Aid, has filed his amended grounds of appeal together with a supplementary affidavit sworn on 15th of October 2018.

By the said amended grounds, the appellant restricts his grounds to only two grounds and that is also only against the conviction. Therefore, I consider that the appellant has abandoned the rest of the grounds submitted by him before.

Firstly in consideration of the application for the extension of time, though none of the grounds were submitted by the appellant, by his amended grounds, it is apparent that he has made an application to the Court of Appeal in respect of the same on 11th of December 2017. Even though he has not proceeded with it, it indicates that he has tried to appeal before. That would have been just a 3 day delay. Therefore, it is clear that he has not thought of appealing after a considerable delay. Therefore, I decide to grant the extension of time sought by the appellant and consider the merits of this appeal.

The amended grounds of appeal urged by the appellant are;

- i. The learned Magistrate has erred in law and in fact when he failed to consider the issue of mistaken identity given the evidence of alibi raised in the appellant's caution interview and in evidence.

- ii. The learned Magistrate has erred in law and in fact when he did not address the issue of alibi raised by the appellant which had not been disproved by prosecution during the course of trial.

The urged 1st ground alleges that the magistrate has failed to consider the issue of mistaken identity, given the evidence of alibi raised in the appellants caution interview and evidence. The appellant concedes that the learned magistrate has duly considered the Turnbull principles, on identification of the accused. The allegation is limited in fact to the non-consideration of the alibi raised by the accused, in his caution interview as well as in the evidence.

First of all it should be remembered that contents of the caution interview is not evidence. Therefore, it is quite correct for the learned magistrate to not to have considered the contents of the caution interview.

Furthermore, section 125 (1) of the Criminal Procedure Act states;

125-(1) On a trial before any court the accused person shall not, without the leave of the court, adduce evidence in support of an alibi unless the accused person has given notice in accordance with this section.

It is apparent that the present appellant, who was the accused in the magistrate's court, did not give notice of an alibi as for the provisions of section 125 of the Criminal Procedure Act. Further, it is evident from the case record, that the accused did not obtain the leave of the court to lead evidence of an alibi.

Therefore, even though the accused has stated in his evidence of an alibi, the magistrate is quite correct in ignoring such illegal evidence.

In the light of the above I find no merit in this urged 1st ground of appeal.

The second urged ground of appeal alleges that the learned magistrate has failed to consider the failure of the prosecution to disprove the alibi raised by the accused.

It should be reiterated that the accused has legally failed to raise the defence of alibi, hence the prosecution need not have disproved such non raised defence.

Therefore, this ground needs no further consideration, and fails due to lack of merit.

The appellant has not urged any ground of appeal by his amended grounds, in respect of the sentence. Therefore the sentence needs no consideration.

Accordingly, I make the following orders.

1. The leave to appeal out of time granted.
2. The appeal is dismissed as it is devoid of any merit.
3. The judgement and sentence imposed by the learned magistrate is affirmed.



At Suva

31st of January, 2019

Solicitors: *Legal Aid Commission, Suva, for the Appellant*
 Office of the Director of Public Prosecutions, Suva, for the Respondent