IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO. HAA 052 OF 2018

BETWEEN: **PENI TUKAI** **APPELLANT**

A N D: **STATE** **RESPONDENT**

Counsel: Mr. A. Chand for Appellant
Ms. S. Serukai for Respondent

Date of Hearing: 25th March 2019
Date of Judgment: 03rd July 2019

J U D G M E N T

Introduction

1. The Appellant had been charged in the Magistrate's Court of Nausori with one count of Burglary, contrary to Section 312 of the Crimes Act and one count of Theft contrary to Section 291 (1) of the Crimes Act. The Appellant had pleaded not guilty to those two offences, hence, the matter had proceeded to the hearing. At the conclusion of the hearing, the learned Magistrate found the Appellant guilty to those two counts and convicted to the same accordingly. He has then sentenced the Appellant to a period of imprisonment of twenty five (25) months with a non-parole period of sixteen (16) months. Aggrieved with the said conviction and the sentence, the Appellant files this appeal on the following grounds *inter alia*:

Against Conviction

1. *That the Learned Magistrate erred in law when he allowed to proceed with the hearing without the appellant's case record or case disclosures for the good defence of his case resulting in the unfair conviction imposed by the Magistrate thereby causing a miscarriage of justice.*

2. *That the Learned Trial Magistrate erred in law and facts when he placed too much emphasis or weight in the evidence of PW3 who was an accomplish to the crime allegedly committed and this has caused a grave risk in the conviction and a substantial miscarriage of justice has occurred along the way. It is submitted that although this ground is a question of law, but the appellant has submitted why and how the court's decision to accept the witness statement at the hearing when it knows very well the contents and veracity of the statement.*

3. *That the Learned Trial Magistrate erred in law regarding circumstantial evidence and or that he failed to apply the proper test for guilt of the appellant in a circumstantial case. It is submitted that leave be allowed to argue this ground of Appeal as appellant will argue other issues in this ground once the transcript is made available to the appellant.*

Against Sentence

1. *That the Learned Trial Magistrate erred in law when he acted upon wrong principle; allowed extraneous or irrelevant matters to guide him; mistook the facts, and failed to consider some relevant consideration.*

2. *The Trial Magistrate without any concrete evidence imposed a unduly*

harsh sentence since there was no aggravating factors to connect the appellant or any link associated with it to find him guilty and the sentence imposed.

2. Having carefully perused the record of the proceedings in the Magistrate's Court and the judgment of the learned Magistrate, I found the caution interview of the Appellant has been tendered in evidence by the prosecution with the consent of the Appellant during the course of the hearing. The Appellant was unrepresented in the proceedings in the Magistrate's Court and no trial within a trial was conducted in order to determine the admissibility of the caution interview in evidence. I accordingly invited the Appellant and the learned counsel for the Respondent to make submissions to determine whether the admission of the caution interview in evidence is correct. The Appellant obtained the assistance of the Legal Aid Commission in order to make his submissions on this matter.

Right of Appeal to a Higher Court

3. I first draw my attention to determine whether the learned Magistrate has erred in admitting the caution interview in evidence without conducting a trial within the trial. Before that I must make some observation about the conduct of this proceedings.

4. Section 250 (1) of the Criminal Procedure Act states that:

"Upon receiving a petition of appeal, the Magistrate against whose order, sentence, ruling or decision the appeal is brought must ensure that the petition of appeal the record of the proceedings in the Magistrates' court is forwarded to the Chief Registrar of the High Court within 28 days."

5. Accordingly, it is the duty of the Magistrate and not the Registry of the Magistrate's Court to forward the record of the proceedings in the Magistrate's Court to the Chief Registrar of the High Court within 28 days. Section 250 (1) of the Criminal Procedure Act has specifically stated that the Magistrate must ensure the forwarding of the record of the proceeding in the Magistrate's Court. In doing that the Magistrate must ensure to forward

the complete record of the proceedings including all the necessary documents and exhibits tendered during the course of the hearing as it would definitely assist the High Court to determine the appeal in a comprehensive manner.

6. Section 14 (2) (o) of the Constitution of the Republic of Fiji 2013, has stipulated that every accused person who is charged with an offence has a right of appeal to a higher court. The right of appeal is a vital cog in the wheel of the fair trial, which is one of the corner stones of the rule of law.

7. Hence, the appellate court, in this case the High Court, has an indispensable judicial responsibility to provide an inclusive and just hearing of appeal in order to protect the right of an appeal as enunciated under Section 14 (2) (o) of the Constitution. In order to do that the access to the proceedings that has taken place in the lower court has a significant importance as it would allow the appellate court to properly comprehend and then determine the appeal grounds in a comprehensive manner. Thus, section 250 (1) of the Criminal Procedure Act has specifically entrusted the duty upon the Magistrate to ensure to forward the record of the proceedings in the Magistrate's Court to the High Court within 28 days.

8. In this Appeal, the record of the proceedings does not contain the copy of the caution interview which has been tendered in evidence by the prosecution during the hearing in the Magistrate's Court as prosecution's exhibit 3. The learned Magistrate has discussed the contents of the caution interview in his judgment. Having made several inquiries through the office of Chief Registrar of the High Court, I did not receive any positive response from the learned Magistrate about the missing copy of the caution interview of the Appellant. The nature of the contents in the caution interview is the focal point to determine whether the learned Magistrate has erred in admitting the caution interview without having a trial within the trial, thus making the hearing as an unfair proceedings.

9. Accordingly, I find the forwarding of an incomplete record of the proceedings in the Magistrate's Court has prevented the Appellant to enjoy his right of appeal to the higher Court as stipulated under Section 14 (2) (o) of the Constitution.

10. The absence of the caution interview in the record of the proceedings in the Magistrate's Court, prevents the court to properly comprehend the nature of the contents in the caution interview. Hence, I have to determine the correctness of the admission of caution interview in evidence based upon two presumptions. The first presumption is that the caution interview contents the confession of the Appellant. The second presumption is that the caution interview contents only the exculpatory explanation of the Appellant regarding the allegation.

11. I now take my attention to the first presumption. Any statement made by the accused outside the court, whether written or oral, is considered as hearsay evidence against him. The exception to that hearsay rule is the admissions made by the accused in such a statement. A statement made by an accused which contains an admission is always admissible as a declaration against interest of the accused and is evidence of the facts admitted.

12. Section 13 (1) (d) of the Constitution states that:

> *"Every person who is arrested or detained has the right not to be compelled to make any confession or admission that could be used in evidence against that person,"*

13. Moreover, Section 14 (2) (k) of the Constitution has stipulated that:

> *"Every person charged with an offence has the right not to have unlawfully obtained evidence adduced against him or her unless the interest of justice requires it to be admitted;"*

14. Accordingly, any statement made by the accused, which contains an admissions, is always being admitted in evidence through a judicial scrutiny. The accused could always challenge the admissibility of the confession in evidence on the grounds of voluntariness and the fairness. If the accused challenges the admissibility of the confession in evidence, the court is required to conduct a trial within a trial, which is known as *voir dire* hearing in order to

determine whether the accused made the confession voluntarily and/or under the fair and just circumstances.

15. The Fiji Court of Appeal in **Rokonabete v The State [2006] FJCA 40; AAU0048.2005S (14 July 2006)** has outline the circumstances under which the court should hold the *voir dire* hearing, where the Fiji Court of Appeal held that:

> *"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 nor represented, a trial with 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."*

16. Accordingly, the court must hold a trial within a trial if the accused is unrepresented and the prosecution relies on the caution interview made by the accused which contains a confession, in evidence.

17. The appellant was unrepresented during the hearing in the Magistrate's Court. The caution interview of the appellant was tendered by the prosecution in evidence with the consent of the appellant. There is no specific mention about the contents of the caution interview in the judgment. Moreover, neither the record of the proceedings nor the judgment has made any reference about the purpose of tendering the caution interview in evidence. According to the Rokonabate guideline, the learned Magistrate is required to conduct a trial within a trial in order to determine the admissibility of the caution interview in evidence if it contains an admissions to the offence.

18. The learned Magistrate has failed to conduct a trial within a trial before he admitted the caution interview of the appellant in evidence. Hence, I find the admission of the caution interview of the appellant in evidence is wrong, if it contains any admission.

19. I now take my attention to the second presumption, that the caution interview does not contain any confession, but only the exculpatory explanation or the excuses of the appellant.

20. According to the Judgment of the learned Magistrate dated 22nd of August 2018, he has discussed the explanations given by the Appellant in his caution interview when he considered the defence of alibi taken by the Appellant. The learned Magistrate has found the explanation given by the Appellant in his caution interview is different from the evidence given in the court. (*vide Paragraphs 22 and 24 of the Judgment*).

21. As I stated above, any statement made by the accused outside the court is not allowed to adduce in evidence against the accused as it amount to hearsay evidence. The exception to this rule is an admission made by the accused outside the court.

22. The Court of Appeal (Criminal Division) of England in **Storey and Anwar v R (1968) 52 Cr. App. R 334)** has discussed the evidentiary value of a statement made by an accused which contains the explanation and excuses and no direct admission to the alleged offence. In Storey, the Appellant was charged with another for possession of large quantity of cannabis. Those cannabis was found in her apartment. The Appellant had been a call girl. The Appellant had stated in the statement made to the police during the investigation that the said cannabis was brought into her apartment by the second accused, who was her client and requested her permission to do a business with one of his friends. The prosecution relied on her statement in evidence as part of the prosecution's case. At the conclusion of the case for the prosecution, the counsel for the Appellant made an application that there was no case to answer, which the learned trial Judge refused. One of the grounds in the appeal was that the learned trial Judge erred in refusing the application for no case to answer as if the facts states in the Appellant's statement were true, it would represent a complete answer to the charge.

23. Widgery LJ in **Storey (supra)** held that:

> *"We think it right to recognise that a statement made by the accused to the police, although, it always forms evidence in the case against him, is not in itself evidence of the truth of the fact stated. A statement made voluntarily by an accused person to the police is evidence in the trial because of its vital relevance as showing the reaction of the accused when first taxed with the incriminating facts. If, of course, the accused admits the offence, then as a matter of shorthand one says that the admission is proof of guilt, and, indeed, in the end it is. But if the accused makes a statement which does not amount to an admission, the statement is not strictly evidence of the truth of what was said, but is evidence of the reaction of the accused which forms part of the general picture to be considered by the jury at the trial."*

24. According to the above passage of Widgrey LJ in **Storey (supra)**, a statement of an accused which does not contain an admission is not evidence of the truth of the facts but it could be used as evidence of the reaction of the accused when he was encountered with the allegation.

25. The Court of Appeal of England in **R v Pearce (1979) 69 Cr App R 365, CA)** has summarized the principles of admissibility of the statement made by the accused outside the court in evidence in an inclusive manner, where Lord Chief Justice held that:

i) A statement which contains an admission is always admissible as a declaration against the interest and is evidence of the facts admitted. With this exception a statement made by an accused person is never evidence of the facts in the statement.

ii)

a) A statement that is not an admission is admissible to show the attitude of the accused at the time when he made it. This however is not to be limited to a statement made on the first encounter with the police. The preference in Storey to the reaction of the accused

'when first taxed' should not be read as circumscribing the limits of admissibility. The longer the time that has elapsed after the first encounter the less the weight which will be attached to the denial. The judge is able to direct the jury about the value of such statements,

b) A statement that is not in itself an admission is admission if it is made in the same context as an admission, whether in the course of an interview, or in the form of a voluntary statement. It would be unfair to admit only the statements against the interest while excluding part of the same interview or series of interviews. It is the duty of the prosecution to present the case fairly to the jury; to exclude answers with are favourable to the accused while admitting those unfavourable, would be misleading,

c) The prosecution may wish to draw attention to inconsistent denials. A denial does not become an admission because it is inconsistent with another denial. There must be many cases however where convictions have resulted from such inconsistencies between two denials.

iii) Although in practice most statements are given in evidence even when they are largely self-serving, there may be a rare occasion when an accused produces a carefully prepared written statement to the police, with a view to it being made part of the prosecution evidence. The trial judge would mainly exclude such a statement as inadmissible.

26. According to the above comprehensive guideline, a statement made by the accused outside the court, could be admissible in evidence only on the following instances, that:

i) If the statement contains admissions or confessions, then the admission or the confession in the statement could be used against the accused as evidence of the truth of facts admitted,

ii) A Statement made to the police, which contains no admissions or

confessions, could be used as evidence of the accused's reaction when he was encountered by the police. The statement is not an evidence of the truth of facts stated in it. It is an evidence of the behaviour of the accused when he is encountered with the allegation by the police,

iii) Mixed Statement, which contains admissions and also the exculpatory explanation or excuses. If the prosecution relies on the mixed statement, the court is allowed to take into consideration whole of the statement including the admissions as well as the exculpatory explanation in order to determine whether the statement contains admissions or confession and then the truthfulness of such admissions or confessions,

iv) Prosecution could use such statement made by the accused which contains the denial of the allegation, in order to draw the attention of the inconsistent with another denial. Under this circumstances, the denial in the statement does not become an evidence of the facts stated in the statement, and it is only an evidence of inconsistency,

v) The accused is not allowed to use a statement which contains self-serving statement in order to prove his consistency. Under the rules of evidence, such statements are considered prior consistent statements and are inadmissible. (**Kumar v State [2014] FJCA 151; AAU0126.2013 (19 September 2014)**,

27. The guidelines enunciated in **R v Pearce (supra)** could be adopted into the jurisdiction of Fiji as a guidance in relation to the admissibility of the statements made by the accused outside the court in evidence.

28. **Rokonabete v The State (supra)** only deals with the confessions made by the accused. Therefore, the Rokonabete guidelines apply only to the first (i) and the third (iii) instances as mentioned in the paragraph 28. I now proceed to determine whether the court is required to conduct a trial within a trial in order to admit in evidence the statements made by the

accused outside the court which contain no admissions or confessions as stated under the (ii) and (iv) instances in paragraph 28.

29. Only the admissions or the confession in the statement is admissible as a declaration against the interest of the accused and become evidence of the truth of facts as admitted in the statement. The contents of the confession is an evidence against the accused. It could incriminate the accused to the alleged offence.

30. However, the statement, which contains no confession and only consists with self-serving explanation or excuses are not the evidence of the truth of the facts as stated in it. It is only used as evidence of the behaviour of the accused when he is confronted with the allegation and/or evidence of inconsistent denial. Therefore, contents of such documents are not evidence of the truth of the facts. Such documents do not come within the meaning of confession and admissions as stipulated under Section 13 (1) (d) of the Constitution. Therefore, it is my considered opinion that the court is not required to hold a trial within a trial in order to determine the admissibility of such documents in evidence.

31. The absence of the copy of the caution interview in the record of the proceedings in the Magistrate's Court prevents the court to properly comprehend the nature of the contents in it. Neither the record of the proceedings nor the judgment have mentioned whether the caution interview contains admissions or merely an exculpatory explanation of the Appellant. Furthermore, there is no record in the proceeding about the purpose of the prosecution in tendering the caution interview in evidence.

32. I am mindful of the fact that the learned Magistrate has not mentioned or discussed about any confession made in the caution interview in his judgment. He has only discussed about the explanation given by the Appellant in his caution interview when the defence of alibi was considered in the judgment. However, it is not sufficient to assist this court to reach a conclusion about the nature of the contents in the caution interview.

33. In view of the reasons discussed above, the benefit of this ambiguity of the caution interview must be given in favour of the Appellant. I accordingly allow this appeal and quash the conviction.

34. I now turn on to discuss the appropriate remedy pursuant to section 256 (2) of the Criminal Procedure Act.

35. Justice Waidyarathne in **Josateki Cama and others v The State (Criminal Appeal No AAU 61 of 2011)** has expounded the scope of the discretionary power of the court to order a retrial. His Lordship observed that:

> *"It had been held that the exercise of the discretion to order a retrial requires the consideration of several factors, some of which may favour a retrial and some against it.*
> *Public interest to prosecute offenders without terminating criminal proceedings due to a technical error by the trial judge and the availability of sufficient evidence against the accused are factors that could be considered in favour of an order for a new trial. Considerable delay between the date of offence and the new trial and the prejudice caused to the appellant due to non-availability of evidence at the new trial may favour an acquittal of the appellant."*

36. It appears that the prosecution case is mainly founded on the evidence of two witnesses as they had been with the Appellant during this alleged incident. I am mindful of the fact that the admissibility of the caution interview in evidence need to be properly determined if the prosecution wishes to rely on it. Accordingly, I am satisfied that the prosecution has a strong case against the Appellant. Meanwhile, I consider the fact that the Appellant has already spent more than 10 months of his imprisonment, which could be considered as a mitigatory factor in the event if he is found guilty in the re-trial.

37. Having considered the reasons discussed above, it is my opinion that the strength of the prosecution case and the interest of justice have outweighed the prejudicial impact on the accused if an order of retrial is granted. Hence, I find a re-trial against the Appellant would serve the interest of justice.

38. The orders of the court are that:

a) The appeal is allowed,
b) Convictions for the offences of Burglary and Theft are quashed and the Sentence is set aside,
c) An immediate re-trial is ordered before another Resident Magistrate.

39. Thirty (30) days to appeal to the Fiji Court of Appeal.

R.D.R.T. Rajasinghe
Judge

At Suva
03rd July 2019

Solicitors
Office of the Legal Aid Commission for the Appellant.
Office of the Director of Public Prosecutions for the Respondent.