

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 101 of 2022

STATE

vs.

- 1. RATU MAIKA BOLOBOLO**
- 2. INOKE RAIWALUI KIRIKIRIKULA**

Counsel: Ms. N. Ali for the State
Mr. T. Varinava for 1st Accused
Mr. K. Skiba for 2nd Accused

Date of Hearing: 28th June 2022
Date of Ruling: 28th June 2022

Ruling
On the Newton Hearing

Introduction

1. The accused persons are charged with a count of Aggravated Robbery. On 12th May, 2022 both accused pleaded guilty to the said count respectively. The summary of facts was tendered on 23rd of May, 2022. However, as there was a disagreement and dispute on paragraphs 6, 7, and 8 of proposed summary of facts, the prosecution amended and tendered to Court an amended summary of facts on 13th of June, 2022. The defence upon considering the said summary of facts informed this court that

they are disputing the fact referred to at paragraphs 7 namely, “tied both her hands tightly with a duct tape”. In view of this disagreement and on the request of the learned State counsel Newton hearing was set for the 28th June, 2022.

2. The Hearing

Newton hearing as it is now known is required where the defendant disputes some part of the prosecution facts (summary of facts) which would affect the sentence to resolve such issue. In **R v Newton** 77 Cr. App. R. 13, Lord Lane C.J held that where there is a plea of guilty but a conflict between the prosecution and the defence as to the facts, the trial judge should approach the task of sentencing in one of the three ways:

- a) a plea of not guilty can be entered to enable a jury to determine the issue, or
- b) the judge himself may hear evidence and come to his own conclusions, or
- c) the judge may hear no evidence and listen to the submissions of counsels, but if that course is taken and there is a substantial conflict between the two sides, the version of the defendant must so far as possible be accepted.

3. This Court has on the application of the parties decided to hear the evidence and come to a conclusion upon a Newton hearing with the agreement of all the parties. At such hearing evidence must be led in the ordinary way by counsel and the Court must direct itself on the ordinary standard of proof before accepting any version of the facts. This is consistent and is in conformity with the common law on the hearing of disputed facts on a sentence hearing. In **R v Tolera** (1999) 1 Cr. App. R. 29, Lord Bingham C.J said it was for the defendant to clearly state the matters in dispute and the grounds for such dispute.

In the present matter the disputed fact as stated on behalf of both the Accused persons is “the tying of the hands of the complainant with duct tape”, that which is denied by both of them.

Evidence

4. The complainant Ms. Suruj Mati was summoned and led at the said hearing. The Prosecution did lead to a great deal the incident through this witness. However, as much of it remained undisputed the parties were directed to concentrate on the disputed issue. According to witness Mati on 15th of March, 2022 she was at her home with her granddaughter at Nasinu. She had stepped out of the house and when she came in she had heard her granddaughter shouting for help. She had come in and seen 4 legs running towards her and then claims to have been punched on her back of the left shoulder, pushed down from her shoulders due to which she had gone down to her knees. Then she claims one of the persons had brought duct tape and put it around her face from half way down the nose down to the end of the neck. She also said that her hands were brought together in front of her and duct tape was wrapped around her wrists. Thereafter, she had also seen her granddaughter with duct tape around her mouth and the witness had been forced to hand over her handbag to the intruders. After the intruders left she had managed to lock the door and then struggled and been able to remove the duct tape from her mouth and also from the wrists. She also said that in view of the punch to the back of the shoulder she suffered and was in pain for several months and even now her neck area is painful. She explained the trauma she suffered due to this incident.

5. During cross-examination her statement was shown and it was elicited that in her first statement she had not mentioned the blow to the back of the left shoulder and that what she had told the police is that, “someone punched me from the back of the head and I fell to the ground face down”. The witness explained that she was in trauma when this statement was made and she had mentioned it in the second statement. Further, this statement does not specifically mention that the blow was to the back of the head but it was **from** the back of the head and explained what she meant was it was a blow from her behind and the upper shoulder area near the neck

was where the blow alighted. Further, in cross examination it was elicited that wrapping of the upper part of the nose with tape was not mentioned in the statement.

6. On a perusal of the statement it appears that she had only mentioned that the duct tape covered the mouth upto her neck. To that extent there is a difference (the failure to specifically mention the nose). This was not an issue as far as the amended summary of facts is concerned. Paragraph 7 only states that mouth upto the neck area was tied with duct tape. To that extent this matter raised during the hearing is not relevant. However, these minor differences to my mind if at all are insignificant additional facts this witness narrated whilst giving evidence today.
7. Be that as it may, the main issue of contest and in dispute is whether the hands were tied with duct tape. She was cross-examined on behalf of both accused by two learned counsel. There was no omission or contradiction on this issue of the hands being tied with duct tape. It appears that this fact had been stated in her first statement made on the 16th March, 2022. In the absence of any omission or contradiction the only inference that this court can draw is that her evidence on this point is consistent and that she had so stated this in her statements. The Newton hearing was on this matter. It was suggested on behalf of both the accused that they did not assault or punch or tie her hands with duct tape. This was denied.
8. In an inquiry of this nature the evidence led has to be considered in the same manner as in a trial. No doubt there were certain differences between her statements and her evidence today. For instance she referred to gray roofing iron strap in her statement which she did not refer to today. Punched on the back of the left shoulder is not directly mentioned in that form in her first statement. (This is not included in the amended summary of facts) and being covered up to the nose with duct tape too does not appear in the statement. Considering the age of the victim the trauma

she had suffered and the circumstances as narrated by her these differences certainly does not arise due to utterances of falsehood but due to natural frailties of a witness of this nature and this does not affect the credibility and the reliability of her evidence.

Conclusion

9. In the aforesaid circumstances the evidence that both her hands been tied with tape is cogent, consistent and prompt. Thus, I hold the fact her hands were tied with duct tape had been established beyond reasonable doubt by her evidence.

10. Apart from the complainant no other evidence was led and at the conclusion of her evidence neither of the accused did make any application nor did they give evidence. Thus, this inquiry was concluded only with the evidence of the complainant. In view of the aforesaid this Court determines the issue of the hands been tied with duct tape is proved on the required criminal standard, to the satisfaction of the Court.



K.M.G.H.Kulatunga
JUDGE

At Suva

28th June 2022

Solicitors

Office of the Director of Public Prosecutions for the State.

Legal Aid Commission for both the Accused