SAKIUSA ROKONABETE v STATE (AAU0048 of 2005S)

COURT OF APPEAL — CRIMINAL JURISDICTION

WARD P, BARKER and HENRY JJA

4, 14 July 2006

Evidence — admissibility — complaint evidence — robbery with violence — whether interview and charge statement admissible in evidence — Court of Appeal Act ss 22, 23(1) — Penal Code s 293(1)(b) — Police and Criminal Evidence Act 1984.

The Appellant was one of four men who broke into the home of the victims in the early hours of the morning, wearing masks and armed with iron bars. They threatened the victims, ordered them to stay in their bed and assaulted the husband when he attempted to move. They ransacked the house for about an hour and took cash and some other items. They told the victims not to report the matter to the police and then broke the telephone line and left.

The Magistrates Court convicted the Appellant of robbery with violence and sentenced him to 6 years' imprisonment. During the trial, the Appellant who was unrepresented, cross-examined the interviewing officers on the basis that they had assaulted him to make him confess. The officers denied the cross-examination. At the close of the prosecution case, the court explained the Appellant's right to give sworn evidence, to remain silent or to make an unsworn statement from the dock. The Appellant gave an unsworn statement and called no witnesses. The learned magistrate made no ruling on admissibility during the trial. Three weeks later, the magistrate found that the Appellant's confession in his interview statement was admissible in evidence. The Appellant's appeal in the High Court was dismissed. The issue was the admissibility of the Appellant's interview and charge statement.

Held — The value of an unsworn statement was generally less than the evidence given under oath and subjected to cross-examination. It was still part of the evidence and the court must consider it with the remainder of the evidence. The magistrate's first statement was a serious error and the subsequent comment did not remedy it. The Appellant's interview and charge statement were not admissible in evidence because:

(1) The record of interview was admitted in its entirety and yet the most cursory glance showed that it not only included a confession to this offence but also to seven other offences unconnected to that being tried and not the subject of any charge in this trial. The magistrate referred to the confession giving an account of the "series of crimes". How or why those were admitted was difficult to understand but the prejudicial effect was such that the appeal should have been allowed for that reason alone. When an accused was unrepresented, it was the duty of the prosecution to ensure that such situations did not arise. Those other offences should have been deleted from the confession or other steps taken to ensure they were not brought to the attention of the court.

(2) In both the Magistrate Court and the High Court, there was undue, if not exclusive, concentration on the truth of the statements in the confession in order to determine whether they had been manufactured by the interviewing police officers. That approach was an error. The primary issue for determination was whether the statements were voluntary and did not result from the use of threats or force, yet, if the magistrate's comments on the truth of the statements were excluded, there was nothing else to indicate he has considered the strength or nature of the Appellant's allegations of threats and assault by the police.

(3) The Appellant was deprived of the right to give evidence on oath on the crucial issue of voluntariness without subjecting himself to cross-examination on other issues. That was the very reason for the voir dire procedure.

(4) The Appellant chose to make an unsworn statement from the dock and his reference to the offence upon which he was being tried was simply a denial of any knowledge.

Appeal allowed.

Cases referred to

Vinod Kumar v State [2001] FJCA 15, considered.

Appellant in person

D. Goundar for the Respondent

[1] Ward P, Barker and Henry JJA. The Appellant was convicted in the Suva Magistrates Court of an offence of robbery with violence, contrary to s 293(1)(b) of the Penal Code. He was sentenced to 6 years' imprisonment. He appealed to the High Court against conviction and sentence. Both appeals were dismissed.

[2] The offence was serious. The prosecution case was that the Appellant was one of four men who broke into the home of the victims in the early hours of the morning, wearing masks and armed with iron bars. They threatened the 59 year old man, Intiaz Ali Maqbool and his 54 year old wife, ordered them to stay in their bed and assaulted the husband when he attempted to move. They ransacked the house for about an hour and took cash and some other items. They told the victims not to report the matter to the police and then broke the telephone line and left.

[3] This is an appeal from the High Court in its appellate jurisdiction. In such a case, s 22 of the Court of Appeal Act limits the appeal to any ground which involves a question of law only. The Appellant sought to appeal on a number of grounds in which he challenged the magistrate's findings of fact. Section 22 prevents this court from considering them and this appeal is limited to the single ground that the Appellant was denied a fair trial because, having challenged the manner in which the record of interview was taken by the police, the magistrate failed to hold a trial within a trial to determine its admissibility.

[4] During the trial in the Magistrates Court, the Appellant, who was unrepresented, cross-examined the interviewing officers on the basis that they had assaulted him to make him confess. It was denied by the officers. At the close of the prosecution case, the court explained Appellant's right to give sworn evidence, to remain silent or to make an unsworn statement from the dock and the Appellant elected to make an unsworn statement and called no witnesses. His statement is recorded as:

> Sakiusa Rokonabete — serving prisoner. I do not know anything about this case. I was threatened by the police, I was frightened, so I gave the evidence as read in court by the police. At Tuirara, I was assaulted on the head and sustained injury. As a result I made a confession. I am still serving.

[5] The learned magistrate made no ruling on admissibility during the trial. In a reserved judgment 3 weeks later, he found:

> The accused was interviewed by Acting Cpl Tadrau on the 09/05/04, whereby he admitted in his interview statement, that he and two other boys, whose name is Ladro and Vilimoni, were responsible to the breaking-in to the homes of Maqbool, Steven and Mohan in that area.
>
> He gave a "detail account" of how they committed the series of crimes in that area, and mentioned the items taken, and what had happened to them.
>
> The "detail account" of how crimes were committed and how they were committed and the manner of disposal of stolen items are too detailed, in order for the Interviewing Officer to be able to manufacture them.

> Therefore, I am satisfied that the confession given by the accused in his interview statement is admissible.

He then set out the written charge statement of the accused and continued:

> I am also satisfied with the confession by the accused, as appeared in his charge statement and is admissible.

[6] The issue of the admissibility of the interview and charge statement was raised in the appeal to the High Court and the learned judge dealt with it in his judgment in the following passage:

> [The Appellant] disagreed with the learned Magistrate's decision on admissibility of his confessional statement but could point to no error of law in that regard rather he believed that the exercise of discretion to admit was wrong …
>
> In my view the confessional statement was accurately considered by the learned Magistrate in his judgment. The learned Magistrate observed and I agree that the claim to these admissions being beaten out of the accused is unbelievable. The confession and charging statements are too detailed as to time, place, circumstance, lay out, disposal of the stolen items and details of accomplices for the interviewing officer to have manufactured them. The appellant could point to no error of law in the admissibility of the confession and the charging statement. Accordingly, this ground is rejected.

[7] The general proposition of law that the prosecution must prove beyond doubt that any confession made to the police was obtained fairly applies in all criminal trials. If the voluntariness of the statement is challenged, the prosecution must prove to the same standard that the accused's allegations are not true.

[8] For many years Fiji followed the practice in England whereby any challenge to the admissibility of a statement was determined by a trial on the voir dire limited to that issue. At the conclusion of the trial within a trial, a ruling was made and the trial proper continued. Counsel for the Respondent has advised this court that this practice was altered by Practice Direction No 1 of 1983, issued by the then Chief Justice:

> Trials within trials should no longer be held in Magistrates Courts.
>
> Where it is alleged that an accused has voluntarily made a statement under caution leave to adduce it should be given even if it appears that its admissibility may be disputed.
>
> When considering the evidence against an accused for the purpose of preparing their judgment, magistrates should first determine whether they are satisfied that the prosecution have established that the statement is admissible in law ie that it has been proved that the accused made the statement and that he made it voluntarily. If not so satisfied magistrates should then exclude the contents of the statement from the case against the accused.

[9] We do not consider that procedure is correct. We appreciate the somewhat artificial situation when a trial within a trial is held before a tribunal which is the judge both of fact and law but the purpose of trial within a trial is to allow the accused person to challenge any confession, including giving sworn evidence of the circumstances he alleges render the statement inadmissible, without having to expose himself to the need to give evidence in the actual trial. The procedure suggested in the Practice Direction prevents that separation.

[10] Similarly, in considering the admissibility of an alleged confession, the contents of the confession are generally not relevant and the court should only read them when there is a specific need to do so which should be made clear in the ruling. Neither is the truth of the contents a matter to be considered at that stage. Our concern about the procedure set out in the Practice Direction is that

both these protections are lost because, by the time the magistrate is considering the admissibility of the confession, he has already heard all the evidence in the case. This may be seen as influencing his final determination of the question of admissibility.

[11] The position under common law in the English courts prior to the passing of the Police and Criminal Evidence Act 1984, was that a court trying the question of admissibility of a challenged confession should not consider the contents of the confession unless it was directly relevant to the determination of admissibility. There are strong reasons why that should be the practice and this case shows the danger of failing to observe that rule.

[12] English authorities have also prevented the court or the prosecution from asking the accused in cross-examination on the voir dire whether the contents of the statement are true. To allow such a question would bring in an issue which is separate from the question of whether the statement was made voluntarily. If it was induced by some improper practice by the interviewing authorities, it is not admissible irrespective of whether or not those improper methods appear to have revealed the truth. The procedure in the Direction means that, by the time the admissibility of the confession is considered by the court, the accused will, if he has gone into the witness box, have been examined as to the truth of any confession he has made.

[13] The procedure the magistrates are directed to follow in the Practice Direction will have the result that, before deciding on the admissibility of the confession, the court will not only know the contents, including whether or not its truth is challenged, but also the full prosecution and defence cases.

[14] More critically, any accused challenging admissibility on the grounds that the confession was not voluntary will almost certainly need to give sworn evidence of his grounds of challenge. On the other hand, there may be good reasons why he does not wish to give similar sworn evidence on the issues relating to his guilt or innocence. The procedure in the Practice Direction means he does not have the opportunity to reach separate decisions on those matters.

[15] It appears, however, that the procedure in the Direction has generally been followed ever since. It was considered by this court in the case of *Vinod Kumar v State* [2001] FJCA 15 (*Kumar*) and the court concluded:

> The prosecution advised the Chief Magistrate that the Court was bound by a direction from the Chief Justice which provided that trials within trials should no longer be held in Magistrates Courts. The direction went on to provide a procedure which was to be followed in cases where previously a trial within a trial might have been held. This provides that the prosecution is to call all its witnesses. After all witnesses for the prosecution have been called the defendant is to be given the opportunity to give evidence if he wishes exclusively on the taking of the caution statements. He can then be examined and cross-examined only on matters concerning the taking of the statement. The defendant may also call witnesses to give evidence before the court exclusively on the taking of the caution statement. This procedure contains an important safeguard for an accused person. An accused may give evidence as to the admissibility of the statement without losing the right to make an unsworn statement for the dock or to decline to give evidence in the case generally. Unfortunately in this case the procedure laid down by the Chief Justice was not followed.
>
> The prosecution led its evidence but the appellant was given no opportunity to give evidence relating exclusively to the taking of the statement. Not does any ruling appear to have been given as to the admissibility of the statement although this was plainly put in issue by the request of the Defence for a trial within a trial.

[16] While the court there clearly recognised the need to allow the accused person to challenge admissibility without needing to give sworn evidence and face cross-examination on the main issue, it can be seen that, although the court has ascribed the procedure to the Practice Direction, it does not appear in it. There is no mention of any procedure which allows the accused person to give evidence limited to issues of admissibility. On the contrary, the procedure in the Direction excludes any such step.

[17] In any event, the procedure outlined in *Kumar* was not followed by the magistrate in the present case and we have been advised from the bar table that it is not followed in any cases; the magistrates courts have apparently taken the view that the 1983 practice still applies.

[18] The Practice Direction appears to have been drafted to try and avoid the duplication of evidence that arises when a trial within a trial is held in a magistrates court trial. However, it fails to address the right of the accused person to have the admissibility of the confession determined before he has to decide whether to give evidence in his defence. We accept that a magistrate is able to hear evidence and then, if necessary, exclude it from his mind when later reaching a conclusion on the evidence as a whole but the court must also bear in mind the right of the accused to see he is being tried fairly.

[19] Counsel for the Respondent concedes that the Practice Direction cannot be supported and has helpfully referred the court to authorities from other jurisdictions to demonstrate how the courts there have dealt with the problem where the magistrate is the judge both of fact and law.

[20] Under the common law, a court faced with a challenge to the admissibility of a confession was under a duty to ascertain that issue separately from the remainder of the prosecution evidence and the court had a discretion to decide, in the particular circumstances of the case, whether a trial within a trial was necessary. However, unless the defence sought not to have one, it became an almost invariable practice to do so. Since the passing of the Police and Criminal Evidence Act, the English magistrates courts have been obliged to hold a trial within a trial whenever there is a challenge to the admissibility of the statement. The Australian and New Zealand courts have followed a similar practice for many years.

[21] We are satisfied that *Practice Direction No 1 of 1983* must no longer be followed in the Magistrates Courts.

[22] Clearly the position is different from a trial by judge and jury. In most common law jurisdictions, challenges in jury trials to the voluntariness and admissibility of a confession result in a trial within a trial in the absence of the jurors. We note that the High Court follows the practice of jury trials and holds a trial within a trial in the absence generally of the assessors. However, the procedure in a trial with assessors under our law is in reality closer to that in the Magistrates Court than it is to that of a court holding a jury trial. In the latter, the jury is the sole judge of fact and the judge is the judge of law.

[23] The purpose of excluding the jurors is to allow the judge to determine the admissibility as a question of law without the risk that the jurors will hear matters which may be inadmissible. In Fiji, the assessors are not the sole judges of fact. The judge is the sole judge of fact in respect of guilt and the assessors are there only to offer their opinions based on their views of the facts. It is sensible to exclude them, as is done for jurors and for similar reasons, while evidence which may be excluded from the trial of the case is led. However, the judge is in a

similar position to a magistrate. He hears the evidence in the trial within a trial and, if he concludes that it is inadmissible and must be excluded, he will have to continue with the trial having put it out of his mind. We see no sensible reason why the magistrates should not follow the same procedure.

[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 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.

[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.

[26] We are conscious of the time that such a procedure will consume and we consider that there is scope for one variation from the procedure followed in trials with assessors. If the magistrate allows the statement to be admitted it will not be necessary to rehear the evidence on the matters already raised in the trial within a trial. However, even in such a case, it will necessary to call at least some of the witnesses from the trial within a trial to read the contents of the hitherto challenged document.

[27] Counsel for the Respondent has suggested that the failure to hold a trial on the voir dire was not sufficient to have caused a miscarriage of justice and therefore the court may consider applying the proviso to s 23(1) of the Court of Appeal Act. He points out that the magistrate and judge both found that the details of the statement were such that it could not have been fabricated.

[28] We cannot accept that proposition for a number of reasons. The proviso allows the court to dismiss the appeal if, notwithstanding that the point raised in the appeal must be decided in the Appellant's favour, the court considers no substantial injustice has occurred. The learned High Court judge pointed out:

> The learned magistrate considered the confession and found that it was fairly obtained without inducement or duress *and largely upon its content* convicted the appellant. [Our emphasis.]

Any error in the manner in which the admissibility of the confession was considered by the court must give rise to a possibility of substantial injustice.

[29] There are a number of matters which are of concern in this regard. First, the record of interview was admitted its entirety and yet the most cursory glance shows that it not only includes a confession to this offence but also to seven other offences unconnected to that being tried and not the subject of any charge in this trial. The magistrate, in the passage set out in [5] above, referred to the confession giving an account of the "series of crimes". How or why those were admitted is difficult to understand but the prejudicial effect was such that the appeal should have been allowed for that reason alone.

[30] When an accused is unrepresented, it is the duty of the prosecution to ensure that such situations do not arise. Those other offences should have been deleted from the confession or other steps taken to ensure they were not brought to the attention of the court.

[31] Second, in both courts below, there was undue, if not exclusive, concentration on the truth of the statements in the confession in order to determine whether they had been manufactured by the interviewing police officers. That approach was an error. The primary issue for determination was whether the statements were voluntary and did not result from the use of threats or force yet, if the magistrate's comments on the truth of the statements are excluded, there is nothing else to indicate he has considered the strength or nature of the Appellant's allegations of threats and assault by the police.

[32] Third, the Appellant was deprived of the right to give evidence on oath on the crucial issue of voluntariness without subjecting himself to cross-examination on other issues. That, as we have pointed out, is the very reason for the voir dire procedure.

[33] Fourth is an issue which was not raised in either appeal. The Appellant chose to make an unsworn statement from the dock. It is set out in [4] above. His reference to the offence upon which he was being tried was simply a denial of any knowledge. In his judgment the magistrate stated:

> The accused chose to give his statement without an oath, and this court is not entitled to attach any weight to it.

Having set out the terms of the statement from the dock, he continued:

> This court found it difficult to attach any credence at all, to the accused's unsworn statement. Having carefully considered the evidence preferred in the court by the prosecution and also the unsworn statement given by the accused, this court is satisfied …

and he then finds the accused guilty of the offence charged.

[34] Clearly the value of an unsworn statement will generally be less than evidence given under oath and subjected to cross-examination but it is still part of the evidence and the court must consider it with the remainder of the evidence. The magistrate's first statement was a serious error and the subsequent comment did not remedy it.

[35] The appeal against conviction is allowed and the case must be remitted to the Magistrates Court for trial by a different magistrate.

[36] The Appellant also sought to appeal against his sentence. Our decision makes that irrelevant but we would state that on appeal from the High Court in its appellate jurisdiction under s 22, an appeal against sentence may only be on the ground that the sentence was unlawful or passed in consequence of an error of law. The grounds advanced by the Appellant do not fall within either category.

Orders

(1) Appeal against conviction allowed.
(2) Conviction set aside and case remitted to the Magistrates Court for trial de novo before another magistrate.

Appeal allowed.