

IN THE COURT OF APPEAL, FIJI ISLANDS  
APPELLATE JURISDICTION

Criminal Appeal No: AAU0002/09

BETWEEN:

MANOA LAQERE

Appellant

AND:

THE STATE

Respondent

**Coram:** Goundar JA  
Calanchini JA

**Hearing:** 1<sup>st</sup> April 2010

**Counsel:** Appellant in Person  
Ms S. Hamza for State

**Date of Judgment:** 15<sup>th</sup> July 2010

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## JUDGMENT OF THE COURT

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- [1] Following a trial in the Magistrates' Court, the appellant was convicted of house breaking with intent to commit a felony, namely larceny, and act with intent to cause grievous harm. The offences arose from one incident and involved the same victim. The appellant was sentenced to a total sentence of six years imprisonment for both offences.
- [2] The evidence against the appellant was that he was positively identified by the victim and her neighbour, albeit in a dock identification, as the person who

committed the offences. At trial, the appellant raised the defence of alibi. He and his wife gave evidence that at the time the offences were committed he was at home. In his judgment, the learned trial Magistrate recognized the risks of relying on the identification evidence by directing his mind to the guidelines contained in *R v Turnbull* [1976] 3 All ER 549. After carefully assessing the evidence, the learned Magistrate accepted the identification evidence to be reliable. He rejected the alibi of the appellant and convicted him.

- [3] The appellant appealed against his conviction to the High Court. On 22 December 2008, the High Court confirmed the conviction and dismissed the appeal.
- [4] The appellant then filed an untimely appeal to this Court. The appeal was out of time by two days. On 23 February 2009, Byrne P granted leave to appeal but dismissed the application for lack of merits. We find these orders to be confusing. This may explain why the appellant has applied to the Full Court to appeal his conviction. The only difference is that he now seeks to appeal against his conviction on the ground of fresh evidence, which he did not raise as a ground of appeal in the High Court or in his application for leave before Byrne P.
- [5] The nature of the fresh evidence relied on by the appellant is a confession by a prisoner, Viliame Gauna. The appellant tenders a hand written note that is purported to be written by Viliame Gauna, without calling him to give evidence. The note reads:

"I, Viliame Gauna, hereby make a statement in regards to this matter in which this appellant namely Manoa Laqere is appealing. I wish to state that this man (Manoa Laqere) is innocent of the crime in which he is convicted and now appealing. I'm willing to testify on his behalf regarding this case for it was me and Saimoni Rokotunidau who broke into that house on that night. That's all I can say for now. Thank you.

Viliame Gauna."

[6] At the hearing of the appeal, the appellant did not press on any other grounds than the ground of fresh evidence.

[7] It has been pointed out many times that the powers of this Court on an appeal from the High Court sitting in its appellate jurisdiction are limited by the terms of section 22(1) and (1A) of the Court of Appeal Act:

“Any party to an appeal from a magistrates’ court to the High Court may appeal, under this Part, against the decision of the High Court in such appellate jurisdiction to the Court of Appeal on any ground of appeal which involves a question of law only.”

[8] The admissibility of evidence is always a question of law. The principles governing the admissibility of fresh evidence on appeal are settled. In *Swadesh Singh v State* CAV 7/05 the Supreme Court referred to the decision of the High Court of Australia in *Ratten v The Queen* (1974) 131 CLR 510 and said:

“The well established general rule is that fresh evidence will be admitted on appeal if that evidence is properly capable of acceptance, likely to be accepted by the trial court and is so cogent that, in a new trial, it is likely to produce a different verdict...”

[9] In the present case, the evidence of a confession by someone else to the offence that the appellant was convicted of was not available to him when he was tried in the Magistrates’ Court. The question is whether the evidence of a confession by a prisoner is so credible and cogent that, in a new trial, it is likely to produce a different verdict for the appellant. In *Ratten*, Barwaick C.J at page pp. 519-520 explained the court’s approach in deciding the credibility and the cogency of the fresh evidence on appeal:

“In this situation, the court must as before decide the credibility and the cogency of the fresh evidence in order to determine whether,

when the fresh evidence, if believed by the jury, is taken with the evidence given at the trial in that sense most favourable to the accused which reasonable men might properly accept, it is likely that a verdict of guilty would not have been returned. In considering the material before it for this purpose, the element of credibility will be satisfied if the court is of opinion that the evidence is capable of belief and likely to be believed by a jury. The court in this instance will not be directly acting upon its own view of the evidence but rather upon that view most favourable to an appellant, which in the court's view a jury of reasonable men may properly take."

[10] In a later case of *Gallagher v The Queen* [1986] 160 CLR 392, the High Court of Australia confirmed the approach in *Ratten* and held that unavailability of fresh evidence at the time of the trial will constitute a miscarriage of justice only if it considers that there is a significant possibility that the jury, acting reasonably, would have acquitted the accused of the charge if that evidence had been before it.

[11] The nature of the fresh evidence in *Gallagher* was similar to the one in the present case. In that case the court was skeptical of the evidence of a confession by a prisoner to the murder that the defendant was convicted following a trial. In dismissing the appeal, the High Court of Australia confirmed the following conclusion reached by Street C.J of the New South Wales Court of Appeal on the issue of the fresh evidence before that court:

"After carefully appraising the entirety of the evidence given by the witness in what I regard as the powerful context of his quite extraordinary and unexplained determination to persuade the Court that he was the guilty party, I am driven to the conclusion that he has come forward to give a false account directly involving himself as the guilty party. I have the distinct and clear impression that, so far from trying to promote the cause of the true administration of justice, the witness is seeking to pervert that course in the hope of including this Court to quash the appellant's conviction."

[12] Although we do not reach the conclusion that was reached in *Gallagher*, we approach the evidence of a confession by a prisoner in the present case with caution. Apparently, the confession was made after the appellant had exhausted his right of appeal in the High Court and a single judge of this Court found his application to lack merits. In our judgment the evidence is completely unreliable. The timing of the confession is crucial to our determination that the evidence is unreliable. If the appellant had not been charged and convicted, we think the prisoner would not have so eagerly confessed to the offences. In our judgment the evidence is unlikely to be believed by a reasonable tribunal of fact. We also conclude that the evidence is not of sufficient cogency to give rise to a significant possibility of the appellant being acquitted, if that evidence had been before the trial magistrate.

[13] For the reasons we have given, the appeal against conviction must fail. We therefore make the following orders:

- Leave is granted to appeal.
- The application to adduce fresh evidence is refused.
- The appeal against conviction is dismissed.



Hon. Mr. Justice Daniel Goundar  
Judge of Appeal

Hon. Mr. Justice William Calanchini  
Judge of Appeal