

IN THE COURT OF APPEAL
[On Appeal from the High Court]

CRIMINAL APPEAL NO. AAU0046 of 2012
[High Court Case No. HAC 22 of 2008 Ltk]

BETWEEN : **THE STATE**
Appellant

AND : **1. JOAPE DRAUNA**
2. TEVITA KAMA
3. TEMO LUTUMAILAGI
Respondents

Coram : Goundar JA

Counsel : Mr. M. Delaney for the Appellant
Mr. S. Sharma for the 1st Respondent
Mr. S. Waqainabete for the 2nd Respondent
Ms N. Nawasaitoga for the 3rd Respondent

Date of Hearing : 14 April 2014

Date of Ruling : 6 June 2014

RULING

- [1] The respondents were jointly tried in the High Court at Lautoka on a charge of robbery with violence. The third respondent faced an additional charge of murder. At the close of the prosecution case, the trial judge upheld a no case to answer submission on the robbery with violence charge and acquitted the respondents on that charge. The trial continued against the third respondent on the murder charge. He was convicted of murder and sentenced to life imprisonment.
- [2] The State seeks leave to appeal against the respondents' acquittals on the robbery with violence charge pursuant to section 21(2) of the Court of Appeal Act. The appeal was filed out of time, and therefore, the State also seeks an enlargement of time to appeal.
- [3] Both applications can be conveniently dealt together.

- [4] The acquittal order was made on 28 February 2012. However, the proceedings against the third respondent did not come to an end until 1 March 2012 when he was sentenced to life imprisonment for murder.
- [5] On 26 June 2012, the State filed an application for an enlargement of time to appeal against the acquittals of the first and second respondents. The third respondent was not joined in that application. After realizing that they had inadvertently overlooked to join the third respondent, on 6 March 2013, the State applied to join the third respondent by filing an amended notice of appeal.
- [6] Appellate courts determine an application for an enlargement of time to appeal by considering the following factors:
- (i) The reason for the failure to be within time.
 - (ii) The length of the delay.
 - (iii) Whether there is a ground of merit justifying the appellate court's consideration.
 - (iv) Whether there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?
 - (v) If time is enlarged, will the Respondent be unfairly prejudiced? (*Kumar and Sinu v The State* (unreported CAV1 of 2001; 21 August 2012).
- [7] Counsel for the State has filed detailed and helpful submissions addressing all the above factors. The State fairly accepts that the delay is excessive but argues that the prejudice suffered by the State and to the proper administration of justice as a result of a clearly defective ruling outweighs the consideration of any prejudice to the respondents arising from the delay.
- [8] The third respondent is serving life imprisonment for murder. He has appealed against his conviction and that appeal is pending for hearing (Appeal No. AAU11 of 2012). The

prejudice to him is negligible. However, the first and second respondents say that they have moved on with their lives after their acquittals and that any further criminal proceedings will adversely affect them. I accept that some prejudice is inevitable because the first and second respondents' personal circumstances changed with the passage of time after they were acquitted.

- [9] The real question for this Court is whether the appeal by the State has merits and that grave injustice will be caused to the administration of justice if the appeal is not heard.
- [10] The gist of the State's grounds of appeal is that the trial judge misconstrued the test for no case to answer in the High Court as established by case authorities like *Sisa Kalisoqo v R Cr. App. No.52 of 1984*, *State v Mosese Tuisawau Cr. App. No. 1990* and *State v George Shiu Raj Cr. App. No. AAU0081 of 2005S*. According to these cases, the test for no case to answer in the High Court is whether there is some relevant and admissible evidence, direct or circumstantial, touching on all the elements of the offence. The weight and reliability of the evidence does not form part of the test.
- [11] The trial judge gave a 6-page ruling on no case to answer. At paragraphs 6 to 9 the trial judge sets out the law on no case to answer. In citing the cases, the trial judge refers to cases on no case to answer test in the Magistrates' Court, but then finally he gives an appearance of acceptance that the test is whether there was no evidence that it was the accused who had committed the offence.
- [12] The trial judge then concludes that there was no evidence that any money was stolen because the prosecution witnesses gave no evidence of any missing money. Of course the prosecution witnesses could not account for any missing money because the victim was killed in the robbery. Only the victim could have accounted for the missing money.
- [13] In response to the prosecution's submission that they were relying on the respondents' confessions to prove that theft had occurred, the trial judge stated:

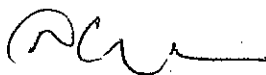
“Admitting the statements made during the caution interview does not mean the case is proved, the prosecution should prove the confession. It does not mean that they have to prove all of the confession but the salient and important factors must be proved by independent evidence.”

- [14] After giving the above reasons, the trial judge found the respondents not guilty of robbery with violence and acquitted them of the charge.
- [15] In my judgment, the no case to answer ruling contains basic errors. Firstly, the trial judge seems to think that the no case to answer tests in the Magistrates’ Court and the High Court are the same. Secondly, the trial judge erroneously thinks or at least appears to be thinking that a confession has to be proved by independent evidence. Thirdly, the trial judge erroneously concludes that there was no evidence when there was a confession made by the respondents.
- [16] In these circumstances, I accept the State’s submission that grave injustice will be caused to the administration of justice if the trial judge’s ruling is not corrected. Despite the lengthy delay, I grant the State an extension of time to appeal against the respondents’ acquittals on the robbery with violence charge.
- [17] I further grant the State leave to appeal against acquittals pursuant to section 21 (2) of the Court of Appeal Act.

Result

- [18] Extension of time granted.
Leave to appeal against acquittals granted.




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Hon. Justice D. Goundar
JUSTICE OF APPEAL