

IN THE COURT OF APPEAL, FIJI
[On Appeal from the Magistrates' Court]

CRIMINAL APPEAL NO: AAU0086/2015
[Magistrates' Court Case No. 318/13]

BETWEEN : **MAIKA VAKATAWABAI**

Appellant

AND : **THE STATE**

Respondent

Coram : Hon. Mr. Justice Daniel Goundar

Counsel : Mr S Waqainabete for the Appellant
Mr S Vodokisolome for the Respondent

Date of Hearing : 18 October 2017

Date of Ruling : 27 October 2017

RULING

- [1] This is an appeal from the extended jurisdiction of the Magistrates' Court. The appellant was charged with one count of conspiracy to commit an aggravated robbery contrary to section 49 of the Crimes Act 2009. The charge alleged that the appellant conspired with others to commit aggravated robbery in and around Suva area. Following a trial, he was convicted and sentenced to 6 years, 2 months imprisonment with a non-parole period of 5 years.
- [2] The initial Notice of Appeal dated 5 July 2015 was filed in person by the appellant. The appeal is timely. Subsequently, the grounds of appeal were amended after the appellant engaged legal representation. The appellant seeks leave to appeal against both conviction and sentence on the following grounds of appeal:

- (i) The learned Magistrate erred in law when he failed to consider in his Voir Dire Judgment whether or not the confession was truly made by the Appellant before considering whether the confession was made voluntarily or not its truth.
- (ii) The learned Magistrate erred in law when he failed to warn itself in its Judgment about the unreliability of the dock identification without laying prior foundation through a photo identification parade unless with your Appellants objection.
- (iii) The learned Magistrate erred in law when he failed to consider the fact that while the Applicant was with this offence, there was no one charged for the offence of aggravated robbery.
- (iv) The learned Magistrate erred in law when the Appellant was found guilty of the charge of conspiracy to commit aggravated robbery but was sentenced for the offence of aggravated robbery.

Voluntariness and the truth of the confession

- [3] The error alleged in ground one is confusing. It appears that the complaint is that the learned magistrate did not consider in his judgment whether the appellant did in fact make the confession before considering whether the confession was true.
- [4] Voluntariness of the appellant's confession was an admissibility issue that the learned magistrate was obliged to determine in a voir dire. The learned magistrate complied with that obligation and ruled the confession admissible after holding a voir dire. After ruling the confession admissible, the learned magistrate was required to consider in his judgment whether the confession was in fact made by the appellant and whether the confession was true before he could rely on it to convict the appellant. In his judgment, the learned magistrate briefly referred to his voir dire ruling on the issue of voluntariness, but he did not expressly direct his mind whether the appellant in fact made the confession and that the confession was true before relying on the confession to convict the appellant. This ground is arguable.

Dock identification

- [5] There was no dock identification evidence led at the trial. The judgment contains no reference to any identification evidence. The ground is misconceived because the conviction was solely based upon the appellant's confession.

No one charged with the substantive offence

- [6] The appellant was charged with conspiracy to commit aggravated robbery. The appellant's contention is that he could not be convicted of conspiracy to commit aggravated robbery without someone being convicted of aggravated robbery.
- [7] Conspiracy is defined by section 49(1) of the Crimes Act 2009. The section requires proof of the following elements:
- Two or more people had entered into an agreement.
 - The conspirators intended that an offence would be committed pursuant to the agreement.
 - The conspirators committed an overt act pursuant to the agreement.
- [8] It is clear that conviction for conspiracy is not depended upon proof of commission of the substantive offence. A person can be convicted of conspiracy without someone being charged or convicted of the substantive offence. Ground three is misconceived.

Whether the appellant was sentenced for uncharged offence?

- [9] The appellant submits that he was sentenced for aggravated robbery when he was convicted for conspiracy to commit robbery with violence. Section 49 (1) of the Crimes Act 2009 states that a person who conspires with another person to commit an offence punishable by imprisonment for more than 12 months ...is punishable as if the offence to which the conspiracy relates had been committed.
- [10] Section 311 of the Crimes Act 2009 states that aggravated robbery is punishable by 20 years imprisonment. This maximum sentence that applied to the appellant was 20 years imprisonment. The tariff for aggravated robbery is 10-16 years imprisonment. The learned Magistrate imposed a sentence below the tariff. This ground is unarguable.

Result

[11] Leave to appeal against conviction granted on ground one only.

Leave to appeal against sentence refused.



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Hon. Mr. Justice Daniel Goundar
JUSTICE OF APPEAL

Solicitors:

Office of the Legal Aid Commission for the Appellant

Office of the Director of Public Prosecutions for the State