

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE MAGISTRATES COURT
Exercising extended jurisdiction

CRIMINAL APPEAL NO. AAU 81 OF 2016
(Magistrates Court No. 1246 of 2015 at Suva)

BETWEEN : **JEKOPE USA** *Appellant*

AND : **THE STATE** *Respondent*

Coram : **Calanchini P**

Counsel : **Mr M Fesaitu for the Appellant**
Mr S Tivao for the Respondent

Date of Hearing : **21 August 2019**

Date of Ruling : **25 September 2019**

RULING

[1] Following a trial in the Magistrate Court at Suva exercising extended jurisdiction of the High Court the appellant was convicted on one count of aggravated robbery. Although there was another person involved in the offence that person has not been apprehended. On 4 July 2016 he was sentenced to 10 years imprisonment with a non-parole term of 8 years.

[2] This is the appellant's timely application for leave to appeal against conviction pursuant to section 21(1)(b) of the Court of Appeal Act 1949 (the Act). Section 35(1) of the Act gives to a single Judge of the Court of Appeal power to grant leave. The test for granting leave is whether the appeal is arguable before the Court of Appeal: **Naisua –v- The State** [2013] FJSC 14; CAV 10 of 2013, 20 November 2013.

[3] On 20 March 2019 the appellant filed an amended notice of appeal relying on the following grounds of appeal:

- “1. *The learned trial Magistrate erred in law and in fact when he convicted the appellant without adequately assessing the totality of the evidence.*
2. *The learned trial Magistrate erred in law and in fact when he failed to discuss the principal (sic) on identification and how the prosecution managed to discharge their burden on the same.*
3. *The learned Magistrate erred in law and in fact in not adequately addressing the issue of alibi as it was the defence by the appellant during the trial.”*

[4] Counsel submitted as part of ground one's challenge that the learned Magistrate failed to mention the number of witnesses called for the prosecution. However in paragraphs 2 – 4 of his judgment the Magistrate adequately summarises the evidence of the two prosecution witnesses. There is a proper identification of the elements of aggravated robbery in paragraphs 10 and 11 of the judgment. The Magistrate has considered all the evidence given by the witnesses and in my view it is unnecessary for this ground to be considered by the Court of Appeal as it is unarguable.

[5] Ground 2 raises the issue of identification. The learned Magistrate has considered the law and the evidence in a thorough manner that in my judgment has been more than fair to the appellant. The ground is not arguable.

- [6] Ground 3 raises the issue of alibi upon which the defence was based. This issue has been considered in paragraphs 13 – 16 of the judgment. The Magistrate accepted the complainant’s evidence as being reliable and credible. He rejected the appellant’s evidence on the alibi claim. This ground is not arguable.
- [7] For all of the above reasons leave to appeal against conviction is refused. However I am compelled to make a brief comment about the sentence imposed by the Magistrate although not challenged by the appellant’s Counsel.
- [8] The learned Magistrate has correctly noted that the maximum penalty for aggravated robbery is 20 years imprisonment. He has then proceeded to apply the sentencing guidelines discussed by the Supreme Court in **Wise v The State** [2015] FJSC 7; CAV 4 of 2015, 24 April 2015. The Supreme Court was considering an aggravated robbery case that involved a violent night time home invasion by a group of intruders who had awakened and terrified the occupants. The words in the Supreme Court decision refer to “*offences of this nature.*”
- [9] However the present case was a day time robbery of a taxi driver by two offenders who were unarmed. Although there was one punch in the stomach delivered by the appellant, the learned Magistrate in his judgment at paragraph 2 noted that the complainant stated that he did not receive any injuries and that the stolen wallet contained \$80.00.
- [10] Under those circumstances the more appropriate sentencing guidelines may be found in the decisions of Goundar J in **State –v- Ragici** [2012] FJHC 1082; HAC 367 or 368 of 2011, 15 May 2012 and **State –v- Bola** [2018] FJHC 274; HAC 73 of 2018, 12 April 2018.

Order:

Leave to appeal against conviction is refused.



W. Calanchini

Hon Mr Justice W D Calanchini
PRESIDENT, COURT OF APPEAL