IN THE COURT OF APPEAL, FIJI

(ON APPEAL FROM THE HIGH COURT OF FIJI)

CRIMINAL APPEAL NO. AAU 140 of 2017

(High Court Action No: HAA 72 of 2016)

BETWEEN : **JOSUA NATAKURU**

Appellant

AND : **THE STATE**

Respondent

Coram : **Chandra, RJA**

Counsel : **Ms S Nasedra for the Appellant**

Mr L J Burney and Mr E Samisoni for the Respondent

Date of Hearing : **29 August, 2019**

Date of Ruling : **15 October, 2019**

R U L I N G

[1] The Appellant was charged with one count of robbery contrary to section 310(1)(a) of the Crimes Act, 2009.

[2] The Appellant pleaded not guilty and the matter proceeded to trial in the Magistrate's Court at Lautoka.

[3] The Appellant was found guilty and was convicted and thereafter sentenced on 15th November 2016 to 3 years and 9 months imprisonment with a non-parole term of 3 years.

[4] The Appellant filed a timely appeal against his conviction in the High Court and on 31st May 2017 his appeal was dismissed.

[5] He filed a timely appeal in the Court of Appeal against the decision of the High Court. Subsequently he amended his grounds of appeal and filed amended grounds on 12th February 2018, and filed further additional grounds on 10th May 2018.

[6] Grounds of appeal:

1. The learned Magistrate erred in law when he failed to ask the unrepresented accused whether he had other evidence to adduce in his defence, therefore causing a substantial miscarriage of justice in the circumstances of this and to the Appellant.

2. The learned Magistrate erred in law when he failed to expressly explain to the unrepresented Appellant his right to remain silent and its consequences and failed to direct himself not to draw any adverse inference from the Appellant's exercise of his right to remain silent.

3. The Learned Appellate Judge erred in law when not holding that the failure by the learned Magistrate to expressly explain the right to remain silent to the Appellant and the failure by the learned Magistrate to direct himself not to draw any adverse inference from the Appellant's exercise of his right to remain silent has caused a substantial miscarriage of justice in the circumstances of the case and to the Appellant.

4. The Learned Magistrate erred in law when he failed to direct himself on the legal principle and application of the doctrine of recent possession.

5. The learned Magistrate erred in law in failing to consider the existence of a particular defence for the accused by the means by which the accused came to be in possession of the mobile phone.

6. The Learned Magistrate erred in law when he found that the accused had the necessary mental element of dishonest appropriation of property belonging to the complainant.

7. That the Learned Magistrate erred in law in the manner he had accepted the uncorroborated evidence of the complainant on the element of the use of force to affect robbery.

8. That the flagrant incompetence of the Legal Aid Counsel by misrepresentation of facts in her appeal submissions has denied the Appellant a reasonable opportunity of acquittal on the element of the proof of the use of force to affect robbery.

[7] The complainant while returning from work had crossed the road to go home just before Natokowaqa Police Post. The Appellant had come from the back and started talking to him as if he had known him before. The Appellant had then put his hand over the complainant's left shoulder. When the complainant realized that this person was an unknown person, he had tried to stop the appellant from holding his hand. The Appellant had then grabbed the complainant forcibly from the back and taken his phone from his pocket. Then the complainant had run to the police post and lodged a complaint.

[8] When considering the above grounds of appeal only ground 3 relate to the judgment of the High Court. The present appeal is against the judgment of the High Court as the judgment of the Magistrate's Court had been considered and dealt with by the High Court on the appeal from the Magistrate's Court.

[9] In terms of Section 22 of the Court of Appeal Act, an appeal lies only on a question of law against the judgment of the High Court, when the High Court has sat as an appellate Court.

[10] The only ground advanced by the Appellant against the judgment of the High Court is ground 3 set out above. That ground relates to the consideration by the learned High Court Judge that the learned Magistrate had failed to inform the Appellant the consequences of remaining silent when called up to lead evidence.

[11] The learned Magistrate had at the close of the prosecution case informed the Appellant that there was a case to answer and had read out the charge to the Appellant. Thereafter the learned Magistrate had asked the Appellant whether he wanted to give evidence, call witnesses or remain silent. The Appellant had stated that he had no witnesses and that he wishes to remain silent and that he also has an application to make. Thereafter the learned Magistrate had stated that since the Appellant did not want to give evidence that he is fixing it for judgment at which point the Appellant had sought permission to file written submissions, for which he had been told that he could file them in the Registry.

[12] The learned High Court Judge had considered this position and cited Section 179 of the Criminal Procedure Act which provides the procedure to be followed at the close of the case for the prosecution. The learned High Court Judge had been satisfied that the learned Magistrate had informed the Appellant of his right to remain silent and that he had complied with section 179(1)(a). The learned High Court Judge further stated that even if it is implied in that section that the learned Magistrate should have explained such right and its consequences, that the Appellant was not prejudiced because he exercised his right to remain silent and that in any event did not offer to give evidence or call any other witnesses. Further that the learned Magistrate as judge of both fact and law would have directed himself not to draw any negative inference when the Appellant opted to remain silent.

[13] Section 179 of the Criminal Procedure Act provides:

> *"179(1) At the close of the evidence in support of the charge, if it appears to the Court that a case is made out against the accused person sufficiently to require the making of a defence, the Court shall –*
>
> *(a) Again explain the substance of the charge to the accused; and*
> *(b) Inform the accused of the right to –*

(i) Give evidence on oath from the witness box, and that, if evidence is given, the accused will be liable to cross-examination; or

(ii) Make a statement to the court that is not on oath;

and

(c) Ask the accused whether he or she has any witnesses to examine or other evidence to adduce in his or her defence;

and

(d) The Court shall then hear the accused and his witnesses and other evidence (if any).''

[14] The Appellant argues that the learned High Court Judge erred in law in concluding that he was not prejudiced because he had exercised high right to remain silent.

[15] The record of the Magistrate's Court reveals that the learned Magistrate had inquired from the Appellant whether he was going to give evidence or call any witnesses and had told him that he had the right to remain silent. In that sense the entirety of section 179 had not been complied with and it is the complaint of the Appellant that he was confused and failed to understand the consequences and that thereafter he had made an attempt to make an application before Court which he has now said in his submission was to furnish further evidence by getting CCTV footage.

[16] The Appellant cited the decision in **Vaweqa v State** [2015] FJCA 152; AAU0119.2011, AAU0038.2013 (3 December 2015) where the accused had not been informed of their right to remain silent and the Court of Appeal held that such right should have been expressly stated to the Accused by the learned Magistrate.

[17] In the present case the learned Magistrate had stated to the Appellant that he could remain silent but had failed to explain the consequences. Therefore the decision in **Vaweqa** is distinguishable from the present case. The learned High Court concluded that the Appellant was not prejudiced as the Appellant had chosen to remain silent and that in any event had not offered to give evidence or call any other witnesses.

[18] What is necessary to be considered is whether there was a miscarriage of justice as a result of the complaint of the Appellant that the learned Magistrate had not explained the consequences of remaining silent which the learned High Court Judge held had not caused any prejudice to the Appellant.

[19] In his judgment the learned Magistrate had not commented on the Appellant not giving evidence at the trial and as to whether he drew any adverse inferences regarding the fact that the Appellant had not given evidence or call any witnesses to give evidence. He had considered the evidence of the prosecution witnesses and had been convinced of the credibility of those witnesses in concluding that the prosecution had proved its case beyond reasonable doubt.

[20] In the above circumstances I see no merit in the ground of appeal made out against the judgment of the High Court.

[21] As stated earlier, the other grounds of appeal are grounds of appeal regarding the judgment of the learned Magistrate and the procedure followed therein of which some were canvassed before the High Court. Therefore the other grounds of appeal cannot be considered in the present application for leave to appeal.

[22] Along with his submissions the Appellant has apparently made an application to adduce further evidence. Such an application cannot be considered by a single Judge and has to be considered only by the Full Court of the Court of Appeal.

[23] For the reasons setout above the application for leave to appeal of the Appellant against conviction is refused.

***Orders of Court**:*

Application for leave to appeal against conviction is refused.

Hon. Justice Suresh Chandra
RESIDENT JUSTICE OF APPEAL