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

**CRIMINAL APPEAL NO. AAU 117 OF 2016**
**(Magistrates Court 1709 of 2010 at Suva)**

**BETWEEN** : **JOSEFA TEMO**
**MANASA TEMO**

***Appellants***

**AND** : **THE STATE**

***Respondent***

**Coram** : **Calanchini P**

**Counsel** : **Mr T Lee for the Appellants**
**Ms S Kiran for the Respondent**

**Date of Hearing** : **31 October 2019**

**Date of Ruling** : **27 November 2019**

# RULING

[1] Following a trial in the Magistrates Court at Suva exercising extended jurisdiction the appellants were each convicted on one count of attempted aggravated robbery and one count of damaging property. On 1 August 2016 they were each sentenced to 7 years 10 months imprisonment with non-parole terms of 5 years.

[2] The appellants filed a timely joint notice of appeal against conviction and sentence. On 26 April 2018 they each signed and filed an application to abandon the appeal against sentence pursuant to Rule 39 (as amended) of the Court of Appeal Rules. The applications to abandon the sentence appeals are to be listed for hearing with the applications for leave to appeal against conviction (if leave is granted) or on a date to be fixed.

[3] This is therefore their applications 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 power to grant leave. The test for granting leave to appeal against conviction is whether the appeal is arguable before the Court of Appeal: **Naisua –v- the State** [2013] FJSC 14; CAV 10 of 2013, 30 November 2013.

[4] The relevant facts may be stated briefly. The appellants with two others attempted to rob a British American Tobacco vehicle at Wailoku. All four were wearing masks. They attacked the vehicle with cane knives and caused damage to the glass of that vehicle. The driver managed to flee the scene in the vehicle but was injured in the course of the attempted robbery.

[5] The appellant's proposed grounds of appeal are stated in the amended notice of appeal filed on 4 January 2019 as follows:

> "1. *THAT the learned Magistrate erred in law by convicting the Appellants on a defective charge.*
>
> 2. *THAT the learned Trial Judge erred in law in depriving the Appellants their right to elect a Court of their choice since it was an indictable offence thereby resulting in a miscarriage of justice.*
>
> 3. *THAT the learned Magistrate erred in law by not warning himself of the dangers of convicting the Appellant solely on the Appellants' confession contained in the Caution Interview.*

4. *THAT the learned Magistrate erred in law and fact in that the conviction was unreasonable and cannot be supported by the totality of the evidence, in particular to the following:-*

   *(a) Police fabricated the evidence to prove the charges against the Appellants;*
   *(b) State did prove there was an attempted aggravated robbery but could not prove beyond reasonable doubt that the Appellant's had committed the act."*

[6] Ground 1 raises the issue that the appellants were convicted "*on a defective charge*". No particulars are provided. The claim may be said to raise an error of law alone for which leave is not required. However in order to determine the nature of the complaint it is apparently necessary to go to the written submissions filed on behalf of the appellants.

[7] It is submitted that the conviction for damaging property under section 369(1) of the Crimes Act 2009 was defective because the damage occurred during the course of the attempted aggravated robbery offence and should therefore more properly be regarded as an aggravating factor for the purposes of sentencing for attempted aggravated robbery. Usually, in the case of aggravated robbery in the form of a home invasion, the perpetrators are not charged with damage to property even when a door has been kicked in and a house ransacked. In this case leave is not required although the ground raises an issue that, if decided in favour of the appellants, does not affect the outcome. The sentence for damaging property was ordered to be served concurrently with the sentence for attempted aggravated robbery.

[8] The second ground alleges that the appellants were deprived of their right to elect the court for trial on the basis that attempted aggravated robbery was an indictable offence triable summarily. However section 311 of the Crimes Act describes aggravated robbery as an indictable offence. Under section 4(1) of the Criminal Procedure Act 2009 indictable offences are tried by the High Court. It would appear that under section 44 of

the Crimes Act a person who attempts to commit an offence faces, upon conviction, the same consequences as if the attempted offence had been committed and remains indictable to be tried by the High Court. The ground raises an error of law only and as such is dismissed under section 35(2) as being vexatious and or frivolous.

[9] Ground 3 and 4 may be considered together. The principal issue for determination at the trial was identification. The offenders were all masked. The witnesses were not able to identify the appellants as being involved in the offences. The prosecution relied on admissions against interest made by the two appellants in their caution interviews. The appellants challenged the confessions on the basis that they were not made voluntarily. The appellants gave evidence to that effect at the voir dire hearing. Although page 11 of the Record of the Magistrates Court indicates that there was a voir dire ruling delivered, there is no copy of that ruling in the record. It was delivered on 19 February 2014 (p.38 Record). At the trial the appellants did not give evidence nor did they call any witnesses.

[10] The Magistrate admitted the confessions into evidence at the conclusion of the voir dire. In his judgment the Magistrate considered whether the confessions were true and could be relied upon by the Court to convict the appellants. Having summarized the contents of the confessions the Magistrate found that they were consistent with the evidence of the witnesses who were present when the offences were committed. The Magistrate concluded that they were true statements and sufficient to establish that the appellants committed the offences. However it seems that the Magistrate has failed to consider at the trial stage whether those statements, were voluntarily made by the appellants. In whatever way the issue is expressed, it is still essential at the trial stage to determine whether the confessions, were made voluntarily. If they are considered at the trial stage not to have been made voluntarily, then no weight can be attached to that evidence. In the absence of a written voir dire ruling this issue of identification remains arguable. In my judgment leave to appeal should be granted on grounds 3 and 4.

*Orders:*

1. *The appeal may proceed on ground 1.*
2. *The appeal on ground 2 is dismissed.*
3. *Leave to appeal on grounds 3 and 4 is granted.*
4. *Applications to abandon the sentence appeals are to be listed with the conviction appeals.*

Hon Mr Justice W D Calanchini
**PRESIDENT, COURT OF APPEAL**