IN THE HIGH COURT OF FIJI
CRIMINAL JURISDICTION
AT LAUTOKA

CRIMINAL CASE: HAA 21 OF 2015

BETWEEN : SHAMIM ALI

APPELLANT

AND : THE STATE

RESPONDENT

Counsel : Appellant in person
Ms. J. Fatiaki for the Respondent

Date of Hearing : 10th of June 2015
Date of Judgment : 17th of June 2015

JUDGMENT

1. The Appellant was convicted and sentenced after trial for a period of nine months' imprisonment for one count of Damaging Property contrary to Section 369 (i) of the Crimes Decree by the Lautoka Magistrates' court on 13th of January and 16th of March 2015 respectively. He was also ordered to pay a sum of $ 400 to the complainant as compensation. Being aggrieved by the said conviction and the sentence, the Appellant files this appeal on the following grounds *inter alia;*

i. False allegation,

ii. *Unproven elements of the offence,*

iii. *Involuntary statement of the accused person,*

iv. *Mistaken plea,*

v. *Exploitation of previous conviction,*

vi. *Double jeopardy,*

2. The Respondent appeared in court on 19th of May 2015. Both parties were then directed to file their respective submissions, which they filed accordingly. Having carefully considered the grounds of appeal, and respective submissions of the parties, I now proceed to pronounce the judgment of this appeal as follows.

3. I first turn on to the third ground of appeal against the conviction, where the Learned Magistrate has refused to conduct a trial within a trial in order to determine the admissibility of the caution interview in evidence. The learned Magistrate has then admitted the caution interview in evidence and has relied on the content of it in order to find the guilt of the appellant.

4. Upon consideration of the record of the proceedings in the Magistrate's court, it appears that the Appellant was first produced on 19th of September 2011. The learned Magistrate has granted him bail and given time to retain a lawyer from Legal Aid Commission. However, the action had been adjourned on several dates for various reasons. Finally, the appellant pleaded not guilty for the offence on 2nd of September 2013. He was not represented by a lawyer when he entered his plea of not guilty. The matter was then fixed for hearing on 18th of December 2013. However, the hearing was again adjourned on 18th of December 2013. Hearing was finally eventuated on 5th of September 2014.

5. The Appellant was represented by a counsel from the Legal Aid Commission on the date of hearing. The learned counsel for the appellant advised the court prior to the commencement of the hearing that the appellant intends to challenge the admissibility of the caution interview. However, the learned Magistrate has refused to conduct a trial within a trial on the ground that the appellant had already informed the court on 2nd of September 2013 that he does not intend to challenge the caution interview. The Learned Magistrate then proceeded with the hearing and admitted the caution interview in evidence. Subsequent to the hearing, the learned Magistrate delivered her judgment on 13th of January 2014. The learned Magistrate in her said judgment, found the appellant guilty for the offence of damaging property. She has relied on the confession made by the appellant in his caution interview in order to reach her conclusion. Subsequent to the judgment, the learned Magistrate departed this jurisdiction and her successor continued with the matter, where he sentenced the appellant for a period of 9 months and ordered to pay $ 400 to the complainant as compensation.

6. Justice Nawana in **State v Malelei (Crimina Case No HAC 147/ 2007)** has discussed the inherent frailties of the self-incriminating confessions in caution interviews and the need of cautionary approach of admitting them in evidence. His lordship observed that; *"A confession, as observed at the out-set of this ruling, is an objectionable item of evidence in view of its inherent infirmities. Its admission in evidence should, therefore, be scrupulously examined by court and apply the widest possible test that favours an accused person."*

7. The Fiji Court of Appeal in **Rokonabete v State (Criminal Appeal No AAU0048.005s (14 July 2006)** has given a directional guideline in conducting a trial within a trial, where their lordships held that;

"Whenever the court is advised that there is challenge to the confession, it must hold a trial within a trial on the issue of admissibility unless counsel for the defence specifically declines such a hearing. When the accused is not represented, a trial with a trial must always be held. At the conclusion of the trial within a trial, a ruling must be given before the principle trial proceeds further. Where the confession is so crucial to the prosecution case that its exclusion will result in there being no case to answer, the trial within a trial should be held at the outset of the trial. In other cases, the court may decide to wait until the evidence of the disputed confessions is to be held:"

8. In view of the **Rokonabete (supra)**, the conduct of a trial within a trial to determine the admissibility of the confession in evidence is one of the essential components of fair and proper trial.

9. In this instant case the learned Magistrate has erroneously refused to conduct a trial within a trial. Her refusal is based on the misconceived and non-existing ground that the Appellant had informed the court on 2nd of September 2013 that he does not intend to challenge the admissibility of the caution interview. Having refused to conduct a trial within a trial, the learned Magistrate then erred in law by admitting the caution interview in evidence and relied on the confession of the appellant in order to reach her conclusion.

10. In view of the reasons discussed above, it is my opinion that the learned Magistrate by refusing to conduct a trial within a trial has denied the Appellant a fair and proper trial, resulting the subsequent conviction and the sentence invalid and erroneous.

11. Having concluded that the Appellant was denied a fair and proper trial, I now turn on to discuss the appropriate remedy pursuant to section 256 (2) of the Criminal Procedure Decree.

12. Justice Waidyarathne in **Josateki Cama and others v The State (Criminal Appeal No AAU 61 of 2011)** has expounded the scope of the discretionary power of the court to order for a retrial in a comprehensive manner. His Lordship observed that;

"It had been held that the exercise of the discretion to order a retrial requires the consideration of several factors, some of which may favour a retrial and some against it,

Public interest to prosecute offenders without terminating criminal proceedings due to a technical error by the trial judge and the availability of sufficient evidence against the accused are factors that could be considered in favour of an order for a new trial. Considerable delay between the date of offence and the new trial and the prejudice caused to the appellant due to non-availability of evidence at the new trial may fevour an acquittal of the appellant".

13. The Fiji Court of Appeal in **Azamatula v State (2008) FJCA84; AAU0060.2006S (14 November 2008)** held that the power of a High Court judge to order a retrial is discretionary and it must always be exercised judicially. The Fiji Court of Appeal further held that;

"As was said by the Privy Council in Au Pui-kuen v Attorney-General of Hong Kong ([1980] AC 351) 'no judge exercising his discretion judicially would require a person who had undergone this ordeal once to endure it for a second time unless the interests of justice required it' (see also Ting James Henry v HKSAR [2007] HKCFA 71). The

overriding consideration in the exercise of the power is the interests of justice (Aminiasi Katonivualiku v. The State (CAV 0001/1999S; 17 April 2003).

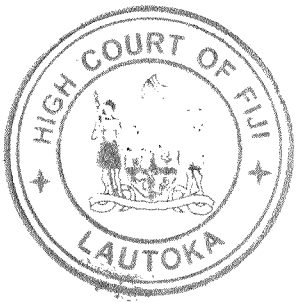
In the case of Au Pui-kuen the Privy Council went on to say that the exercise of discretion to order a retrial requires the consideration of a number of factors, some of which may weigh in favour of a retrial and some against. The Privy Council said that the interests of justice are not confined to the interests of either the prosecutor or the accused in any particular case. They also include the interests of the public that people who are guilty of serious crimes should be brought to justice and should not escape it merely because of a technical blunder by the judge below. One factor to be considered is the strength of evidence against an accused and the likelihood of a conviction being obtained on a retrial. The weaker the prosecution case, the less likely a retrial would be ordered. Another factor would be identifiable prejudice to an accused whilst awaiting a retrial such as might cause him to be unable to get a fair retrial. It has also been said that a retrial should not be ordered to enable the prosecution to make a new case or to fill in any gaps in evidence (Togara v. State (by Majority) [1990] FJCA 6)".

14. It appears that the case of the prosecution is mainly founded on the evidence of the complainant who had witnessed this alleged incident. The Appellant had confessed in his caution interview, but its voluntariness is being challenged. According I am satisfied that the prosecution has a quality and strong case against the Appellant.

15. Meanwhile, I am mindful of the fact that the appellant has already spent 3 months of his imprisonment period. The maximum penalty for this offence of Damaging Property is a period of 2 years of imprisonment. Justice Temo in **State v Nagalu [2010] FJHC 209; HAC122.2008S (24 June 2010)** has given a period of 9 months imprisonment for the offence of Damaging Property.

16. Having considered the reasons discussed above, it is my opinion that the strength of the prosecution case and the interest of justice have outweighed the prejudicial impact on the accused if an order of retrial is granted. Hence, I find a retrial against the Appellant would serve the interest of justice. I accordingly quash the conviction of the Appellant and order a retrial in the Magistrate's court.

17. 30 days to appeal to the Fiji Court of Appeal.



R. D. R. ThusharaRajasinghe

Judge

At Lautoka

17th of June 2015

Solicitors : Office of the Director of Public Prosecutions

Appellant in Person