IN THE HIGH COURT OF FIJI

AT LAUTOKA

APPELLATE JURISDICTION

Criminal Appeal No. HAA 024 of 2017

BETWEEN	:	**LEKIMA ROKOLISOA**
		APPELLANT
A N D	:	**THE STATE**
		RESPONDENT
Counsel	:	Ms. P. Chand [LAC] for the Appellant.
	:	Mr. J. B. Niudamu for the Respondent.
Date of Hearing	:	13 July, 2017
Date of Judgment	:	28 July, 2017

JUDGMENT

BACKGROUND INFORMATION

[1] The Appellant was charged in the Magistrate's Court as follows:-

FIRST COUNT

UNLAWFUL USE OF MOTOR VEHICLE: Contrary to section 292 of the Penal Code Cap 17.

Particulars of Offence

Lekima Rokolisoa, Tomasi Cama, Sakiusa Naulumatua, Josaia Leone on the 27th day of September 2009 at Lautoka in the Western Division, unlawfully and without colour of right but not so as to be guilty of stealing took to their own use motor vehicle registration number DV 641, the property of **AKBAR HUSSAIN.**

SECOND COUNT

ROBBERY WITH VIOLENCE: Contrary to section 293 (1) (b) of the Penal Code Cap 17.

Particulars of Offence

Lekima Rokolisoa, Tomasi Cama, Sakiusa Naulumatua, Josaia Leone on the 27th day of September 2009 at Lautoka in the Western Division, robbed **AKBAR HUSSAIN** of $30.00 cash, a Nokia mobile phone valued $40.00, a Casio wrist watch valued $50.00 and immediately before the time of such robbery did use personal violence to the said **AKBAR HUSSAIN**.

[2] On 9 October, 2009 the Appellant and the other accused appeared in the Magistrate's Court the charges were put to all the accused. The right to legal representation was also explained the Appellant opted to represent himself.

[3] Since second count was an electable offence under the Penal Code (now repealed) the right of election was put to the Appellant. The Appellant elected Magistrate's Court trial.

[4] On 13 November, 2009 the Appellant was bailed by the Magistrate's Court the matter was adjourned to 27 November 2009 for mention.

[5] On 27 November, 2009 the Appellant did not appear in court and a bench warrant was issued against him. Thereafter the Appellant appeared in court he was again granted bail.

[6] After numerous adjournments for various reasons a trial date was assigned. On 1 February, 2016 the Appellant was present when a trial date was assigned for 13 April, 2016.

[7] The Appellant did not appear in court on 13 April, 2016 the date of the hearing. The matter was adjourned to 2 November, 2016 for trial in absentia the bench warrant issued against the Appellant was extended.

[8] On 2 November, 2016 (the date of trial) the Appellant was not present however, the hearing proceeded in the absence of the Appellant.

[9] On 14 February, 2017 the Magistrate's Court found the Appellant guilty as charged and sentenced him to 4 years imprisonment with a non-parole period of 3 years. The Appellant was present on the date of sentence.

[10] The Appellant been dissatisfied with the conviction and sentence filed a timely appeal against his conviction and sentence which was later amended by his Legal Aid Counsel who now appears for the Appellant.

GROUNDS OF APPEAL

[11] The Appellant advances the following amended grounds of appeal:

Appeal against Conviction

1. The Learned Magistrate erred in law by granting the Prosecution's application for trial in absentia and thereafter taking up the case for trial in absentia when the second count was an indictable offence.

2. The Learned Magistrate erred in law by allowing the prosecution to tender the caution interview of the Appellant in evidence without conducting a trial within a trial in order to determine the admissibility of the caution interview of the Appellant in evidence.

3. The Learned Magistrate erred in law and in fact when he convicted the Appellant despite the Prosecution failing to satisfy the elements of the offence.

Appeal against Sentence

1. The Learned Magistrate erred in law and fact when he sentenced the Appellant without taking his mitigating factors in consideration when in fact he was produced in court before sentencing was delivered.

2. The Learned Magistrate erred in law and fact when he failed to consider the remand period of the Appellant into consideration.

3. The Learned Magistrate erred in law and fact when he added 12 months as aggravating factors making the sentence harsh and excessive.

[12] Both counsel have filed helpful written submissions and also made oral submissions during the hearing for which the court is grateful. Counsel for the Appellant withdrew ground one at the hearing.

APPEAL AGAINST CONVICTION

GROUND TWO

The Learned Magistrate erred in law by allowing the prosecution to tender the caution interview of the Appellant in evidence without conducting a trial within a trial in order to determine the admissibility of the caution interview of the Appellant in evidence.

[13] Counsel for the Appellant submits that when the Appellant's plea was taken on 29 July, 2013 he was not asked whether he wished to challenge his caution interview which contained admissions. Counsel further submits that the learned Magistrate relied on the evidence of the interviewing officer at the substantive trial to come to the conclusion that the admissions were given voluntarily by the Appellant.

[14] Counsel relies on the case of *Vinend Kumar vs The State, Criminal Case No. HAA 34 of 2015 (15 December, 2015)* where the High Court held that the learned Magistrate erred when he did not conduct a trial within a trial separately but proceeded with the substantive trial and admitted the caution interview of the accused as evidence for a trial in absentia which was wrong in principle and procedure.

DETERMINATION

[15] A court having the jurisdiction to hear a matter has the discretion to proceed in the absence of the accused if the court is satisfied that the

accused has been served with the summons or similar process requiring his or her attendance in court and has chosen not to attend (section 14 (2) (h) (i) Constitution of the Republic of Fiji). When conducting trial in absentia the court must exercise caution reason being such a trial will have to be fair to the absent accused as the circumstances permit resulting in a just outcome. The rights of the absent accused had to be safeguarded so that the principles of fair trial are not compromised.

[16] The trial court should remind itself not to hold the absence of the accused against him or her and it is incumbent upon the prosecution to disclose and present evidence of all relevant facts that would be favourable to the accused. The above safeguards are, however, not exhaustive (see *Fiji Independent Commission against Corruption vs. Fiona Tukana Nemani, Criminal Case no. HAC 37(A) of 2010)*. Furthermore trial in absentia not only includes substantive trial but trial within trial (see *Krishneel Deepak Kumar vs. State, Criminal Misc. Case No. HAA 03 of 2016 (2 May, 2016)*.

[17] The House of Lords in *R v Jones (2002) UKHL 5* stated that it is an overriding duty of the judge to ensure that the trial if conducted in the absence of the defendant will be as fair as circumstances permit and lead to a just outcome.

[18] The Court of Appeal in *Rokonabete vs. The State (Criminal Appeal No. AAU0048 of 2005 (14 July 2006)* has given a directional guideline in conducting a trial within a trial where their Lordships held at paragraph 24 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[in] 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 confession is to be led:"

[19] In view of the *Rokonabete* guidelines, the Magistrate's Court must conduct a trial within a trial if the accused is unrepresented and if the prosecution proposes to tender the confession in evidence. Moreover the ruling of the trial within a trial must be given before the principle trial proceeds further.

[20] In this case the Appellant was unrepresented in the Magistrate's Court, the prosecution knew about the confession in the caution interview of the Appellant but at no time in the presence of the Appellant had informed the court about their intentions to rely on the confession.

[21] Section 171 (1) (a) of the Criminal Procedure Act has set down the procedure of conducting a trial in absentia as follows:

" (a). the accused person does not appear before the court which has made the order of adjournment, the court may (unless the accused is charged with indictable offence) proceed with a hearing or further hearing as if the accused were present..."

[22] The above provision requires the Magistrate's Court to conduct the trial as if the accused was present in court to defend himself. Furthermore it was erroneous of the learned Magistrate not to conduct a trial within a trial as per *Rokonabete* guidelines.

[23] At paragraph 7 of the Judgment in Absentia and Sentence the learned Magistrate stated:

"PW2 – The second prosecution witness is Sergeant 942 Manoa of Lautoka Police Station. He testified on oath and stated that on the 7th October, 2009 he interviewed Lekima in the English language. The accused voluntary gave answers to the questions that were asked. He identified the caution interview through his signature and was tendered as Prosecution Exhibit 1. He could identify the accused if he is present."

[24] It is obvious from the above that a trial within a trial was not separately conducted to ascertain whether the confession of the Appellant was obtained voluntarily or not. The evidence of the interviewing officer is also not sufficient to establish the fact that the confession of the Appellant was not obtained unfairly, without oppression, improper inducements and so on but was given voluntarily by the Appellant.

[25] Furthermore the learned Magistrate proceeded with the substantive trial admitting the caution interview of the Appellant in evidence without ensuring that the rights of the Appellant were safeguarded and that a fair trial was held.

[26] The failure by the learned Magistrate not to conduct a separate trial within a trial in respect of the confession obtained by the Police during investigations and to ensure a fair trial in the absence of the accused is fatal to the conviction. This ground of appeal succeeds.

GROUND THREE

The Learned Magistrate erred in law and in fact when he convicted the Appellant despite the Prosecution failing to satisfy the elements of the offence.

[27] Briefly the complainant was fueling his vehicle at a Service Station on 27 September, 2009 at about 4am when four Itaukei boys came and forcefully sat in the complainant's vehicle. They wanted to be taken to Lum Street, Waiyavi, Lautoka. The complainant took them to Waiyavi where he was taken out of the vehicle, his hands and legs were tied and a plaster was placed on his mouth. The complainant was then pushed in the boot of the vehicle and taken to Tavakubu.

[28] At Tavakubu the complainant was punched on his head and thrown out of the vehicle into the drain, when his hands and legs were tied he was robbed of his mobile phone, cash and other items valued at $120.00.

[29] At paragraph 6 of the Judgment in Absentia and Sentence the learned Magistrate states that the complainant will be able to identify both the accused if they were present in court.

[30] The complainant in his evidence at page 59 of the copy record was asked to describe the people who had robbed him the complainant said:

"I was not able to see his face – there was a girl as well, she was fair in colour and she was wearing a top that is all I remembered because they covered my face and I cannot recall their faces."

[31] Whilst considering the above the identification of the perpetrators who robbed the complainant is doubtful. In the circumstances the conviction

is unsafe since an essential element of the charge has not been satisfied. The caution interview has been admitted in error therefore no weight can be attached to the admission contained in the caution interview.

[32] This ground of appeal also succeeds.

[33] The question before the court now is whether a retrial should be ordered considering the fact that the conviction against the Appellant cannot stand. Both counsel have filed further written submissions in this regard.

[34] Counsel for the Appellant submits that the evidence against the Appellant was weak and if a retrial is ordered the same evidence will be adduced which will not serve any purpose. Counsel referred to the observations made by the Court of Appeal in *Josateki Cama and others vs. The State, Criminal Appeal No. AAU 61 of 2011* at paragraphs 32 and 33:

"32. 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.

33. Public interest to prosecute offenders without terminating criminal proceedings due to 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 favour an acquittal of the appellant."

[35] I note that the alleged offence was committed in 2009 and the complainant is available to give evidence. At page 60 of the copy record upon questioning by the learned Magistrate as to whether the complainant will be in a position to identify the accused the complainant replied:

"The person who came and tied my hands – I will recognise him"

[36] The prosecution also has the confession of the Appellant which if admitted in evidence is strong evidence against him since this is a criminal matter it is important to consider public interest as well.

[37] In the case of *Au Pui-Kuen vs. Attorney General of Hong Kong [1980] AC 351* at p. 356 his Lordship Lord Diplock in delivering their opinion of the Privy Council has stated:

"The power to order a new trial must always be exercised judicially. Any criminal trial is to some degree an ordeal for the accused; it goes without saying that no judge exercising the discretion judicially would require a person who had undergone this ordeal once to endure it for the second time unless the interests of justice required it."

And later at p.357:

"The interests of justice are not confined to the interests of the prosecutor and the accused in the particular case. They include the interests of the public ... that those persons who are guilty of serious crime should be brought to justice and should not escape it merely because of a technical blunder by the judge in the conduct of the trial or his summing up to the jury."

[38] This court is mindful of the lapse of eight years from the date of the offences in particular the Constitutional right of the Appellant to have his case determined within a reasonable time. However, when considering the seriousness of the offences committed, the strength of the prosecution case and the non-cooperative attitude of the Appellant which resulted in him not appearing in court when required and absconding after been released on bail the delay cannot be considered to be unfair and unreasonable.

[39] The Court of Appeal in *Azamatula vs. The State, Criminal Appeal No. AAU 0060 of 2006 (14 November, 2008)* after following the principles in *Au Pui-Kuen* (supra) allowed an appeal against an order of the High Court where a retrial was ordered after 10 years of the date of offence. The Court of Appeal took into account the weaknesses in the prosecution case and the long delay in allowing the appeal. I am satisfied that the facts in this case can be clearly distinguished from the facts in *Azamatula's* case (supra).

[40] I am also satisfied that the Appellant will not be prejudiced if a retrial is ordered. The Appellant can be tried fairly without any prejudice in the conduct of his defence. The trial court has processes to deal with admissibility of evidence if it can be shown there is prejudice to the Appellant as a result of delay. At trial the Appellant will have the chance to cross examine the State witnesses and challenge their veracity. The issue of memory of the Prosecution witnesses could be more appropriately dealt with by the learned Magistrate at trial whilst evaluating evidence.

[41] In view of the above and in the interest of justice a retrial should be ordered.

[42] The duration of the time spent as part of imprisonment can be used in mitigation in the event the Appellant is found guilty.

[43] Since the conviction of the Appellant is unsafe there is no need to consider the appeal against sentence.

ORDERS

(1) The appeal against conviction is allowed.

(2) The conviction of the Appellant is quashed and the sentence set aside.

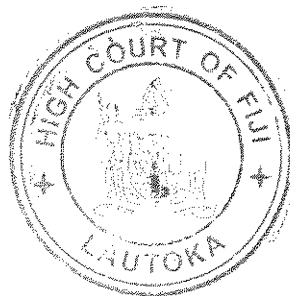
(3) This case is remitted to the Magistrate's Court at Lautoka for trial *de novo* before another Magistrate. Furthermore every effort **must** be made to give this matter a priority hearing.

(4) Matter is adjourned to 31 July, 2017 for mention at the Magistrate's Court, Lautoka.

(5) A copy of this ruling is to be forwarded to the Chief Magistrate for his attention and necessary action.

(6) 30 days to appeal to the Court of Appeal.

Sunil Sharma
Judge



At Lautoka
28 July, 2017

Solicitors
Office of the Legal Aid Commission, Lautoka for the Appellant.
Office of the Director of Public Prosecutions, Rakiraki for the Respondent.