IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO. HAA 31 OF 2023

BETWEEN:	**SAILOMA VODO**	**APPELLANT**
A N D:	**THE STATE**	**RESPONDENT**

Counsel: Ms. S. Prakash for Appellant
Mr. Z. Zunaid for Respondent

Date of Hearing: 23rd January 2024

Date of Judgment: 19th April 2024

JUDGMENT

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1. The Appellant was charged in the Magistrate's Court at Suva with one count of Aggravated robbery, contrary to Section 311 (1) (a) of the Crimes Act. The particulars of the offence are that;

Particulars of Offence (b)

***SAILOMA VODO** with others on the 10th day of November 2012 at Suva in the Central Division, robbed one **ARVIND CHAND** of $490.00 cash, 1*

x Nokia Mobile Phone valued at $199.00 and 1 x Gold chain valued at $300.00, 1 x New Balance canvas valued at $169.00 all to the total value of $1158.00, and at the time of committing the robbery, threatened to use force on the said ***ARVIND CHAND.***

2. Consequent to the plea of not guilty entered by the Appellant, the matter proceeded to the hearing in the Magistrate's Court. The Prosecution had proposed to adduce the admission made by the Appellant in his Caution Interview in evidence, for which the Appellant had objected on the ground of involuntariness. Accordingly, a *voire dire* hearing was held to determine the admissibility of the Caution Interview in evidence. The learned Magistrate, having heard the evidence presented during the *voire dire* hearing, held that the Caution Interview of the Appellant was admissible in evidence. After the *voire dire* ruling, this matter was listed before another Resident Magistrate. Subsequent to several adjournments and an amendment made to the charge, the hearing took place on 23rd March 2015. The Prosecution presented evidence from two witnesses: the Complainant and the Interviewing Officer of the Appellant's Caution Interview. The Appellant opted to exercise his right to remain silent, hence, adducing no evidence for the Defence. On the 12th of September 2018, the learned Magistrate delivered the judgment on this matter, finding the Appellant guilty of the offence and convicted accordingly. The learned Magistrate then sentenced the Appellant on the 31st of October 2018 to a period of nine years and eleven months imprisonment term with a non-parole period of nine years.

3. The Appellant, dissatisfied with the conviction and sentence, has filed this appeal on two grounds, which are:

<u>APPEAL AGAINST CONVICTION</u>

a) That the Learned Magistrate erred in law and in fact when she failed to properly assess the truthfulness of the Record of Interview in totality with other evidence, as such prejudicing the Appellant.

APPEAL AGAINST SENTENCE

a) That the Learned Magistrate erred in principle by incorrectly calculating the final sentence after deduction of the remand period.

4. The first ground of appeal is based on the contention that the learned Magistrate erroneously failed to properly assess the truthfulness of the caution interview, considering all other evidence presented during the hearing.

5. In **Maya v State [2015] FJSC 30; CAV009.2015 (the 23rd of October 2015),** the Supreme Court of Fiji has set forth the principle of evaluating the caution interview in detail, where Keith JA outlined the two schools of thought in the Common Law, regarding the boundaries of the function of the Jury and the Judge in a Jury trial in determining the admissibility of the record of the caution interview evidence, and then the evaluation of the evidential truthfulness of the admission made by the Accused in his caution interview. His Lordship having adverted in detail the approaches adopted in **Chan Wei Keung v The Queen** [1966] UKPC 25; [1967] 2 AC 160 and **R v Mushtaq** [2005] UKHL 25, held that:

> *"23. That does not give much help to judges about how to direct the assessors in the meantime. They are entitled to look to the Supreme Court for guidance. If that guidance can only be given by the Court expressing its provisional view on which school of thought should be adopted in Fiji, it seems to me that the Court should not shrink from expressing its provisional view on the topic. In my opinion, the school of thought adopted in **Chan Wei Keung** puts too much emphasis on the need to maintain clear demarcation lines between the respective functions of judge and jury, and we should adopt the position which says that a confession should be treated as valueless if it may be been made involuntarily. Judges should for the time being, therefore, tell the assessors that even if they are sure that the defendant said what the police attributed to him, they should nevertheless disregard the confession if they think that it may have been made*

involuntarily. I am not unmindful of the irony here. The judge will have to direct himself on these lines if he changes his mind about the voluntariness of the confession in the course of the trial. If he does that, there will never be case in which the issue which we have identified will come up for final determination. But that is sometimes the way things go.

6. Premathilaka JA in **<u>Volau v State [2017] FJCA 51; AAU0011.2013 (26 May 2017)</u>** propounded that the Maya v State's guidelines are in harmony with the principles discussed by the Fiji Court of Appeal in **Chand v State** [2016] FJCA 61; AAU0015.2012 (27 May 2016). Premathilaka JA then observed that:

[20] The following principles could be deduced from the said decisions.

(i) The matter of admissibility of a confessional statement is a matter solely for the judge to decide upon a voire dire inquiry upon being satisfied beyond reasonable doubt of its voluntariness.

(ii) Failing in the matter of the voire dire, the defence is entitled to canvass again the question of voluntariness and to call evidence relating to that issue at the trial ('second bite at the cherry') but such evidence goes to the weight and value that the jury would attach to the confession (Chan Wei Keung, Prasad and Murray) inter alia on the premise that there might be cases in which the jury would conclude that a statement is involuntary according to the rule relating to inducement, but nonetheless it is manifestly true (Wendo)

(iii) Once a confession is ruled as being voluntary by the trial Judge, whether the accused made it, it is true and sufficient for the conviction (i.e. the weight or probative value) are matters that should be left to the assessors to decide as questions of fact at the

> *trial. In that assessment the jury should be directed to take into consideration all the circumstances surrounding the making of the confession including allegations of force, if those allegations were thought to be true to decide whether they should place any weight or value on it or what weight or value they would place on it. It is the duty of the trial judge to make this plain to them.*

7. Applying the guidelines adverted in the above authorities *mutatis mutandis* to the hearing in the Magistrate's Court, which is referred to as bench trial, the trial Magistrate, even though he had already ruled in the *voire dire* hearing that the admissions in the Caution Interview were made voluntarily and under fair and just circumstances, could still consider whether he still holds the same view of the voluntariness and fairness at the end of the trial proper if the Accused again presented or pointed out any evidence challenging the voluntariness and fairness of the recording of the caution interview. Suppose the learned Magistrate remains of the same view of voluntariness and fairness. In that case, the learned Magistrate must then proceed on to evaluate the truthfulness and probative value of the admission made by the Accused in his caution interview. In doing that, the learned Magistrate must consider all the circumstances surrounding the making of the confession and all other evidence presented during the hearing. (vide **Volau v State (supra),Khan v State [2014] FJSC 6; CAV009.2013 (17 April 2014))**

8. In this matter, the learned Counsel for the Appellant submitted that the learned Magistrate had failed to properly evaluate the truthfulness of the admission made in the Caution Interview while considering all other evidence adduced during the hearing.

9. According to the particulars of the offence in the amended charge, the Prosecution alleged that the Appellant had robbed Arvind Chand of $490 cash, one Nokia mobile phone, one gold chain, and one pair of New Balance canvas on the 10th of November, 2012.

10. Arvind Chand was the first Prosecution witness. He had testified, stating that three masked men were in his room when he went to the room on the night of the 10th of November 2012.

That night, he was having a party with a few friends at his home at 54 Shalimar Street. One of the masked men threatened him with a knife. The three masked men stole $450 from his wallet and another $40 from his pocket. They then took a mobile phone and a pair of new balance canvas. While leaving, they had stolen a chain and a mobile phone. Mr. Chand had not explicitly stated that the chain and second mobile phone were stolen from him or another person. The following morning, he identified the canvas, gold chain, and mobile phone at the Raiwaqa Police Station. It is important to note that none of those items were introduced to Mr. Chand during the trial for him to identify. Moreover, Mr. Chand had not identified any of the three assailants as they were all masked.

11. I shall now turn to the Caution Interview of the Appellant, which was tendered in evidence during the hearing. The Appellant was interviewed for a crime allegedly committed on the 9th of November 2022 at 53 Shalimar Street. According to the allegation put to the Appellant, it was alleged that the Appellant had stolen a laptop, mobile phone, Cash, an amplifier, and a car radio. (*vide question 9 of the Caution Interview*). According to the answers recorded in the Caution Interview, the Appellant had stolen a laptop and mobile phone from the house. While leaving the house, they had stolen an amplifier and a radio from a car parked outside the house. During the interview, the Appellant was shown an Apple mobile phone and a laptop, which he had admitted were the items he stole from the house.

12. The Appellant admitted to an offence committed on the 9th of November 2022 at 53 Shalimar Street, where he had stolen a laptop and an Apple mobile phone. Whereas the three unidentified masked men had robbed Mr. Chand's house on the 10th of November 2022 and stolen $490 cash, one Nokia mobile phone, one gold chain, and one pair of New Balance canvas. Accordingly, the admissions in the caution interview are strikingly contradicted by the evidence given by Mr. Chand in the Magistrate's Court.

13. The Prosecution had not provided any explanation for these contradictions. Under such circumstances, it appears that the admission made by the Appellant in his Caution Interview was irrelevant to the nature of the offence that he was charged in the Magistrate's Court.

Hence, it was not opened to the learned Magistrate to conclude that the identity of the Appellant was proved beyond reasonable doubt based on his admission made in the Caution Interview.

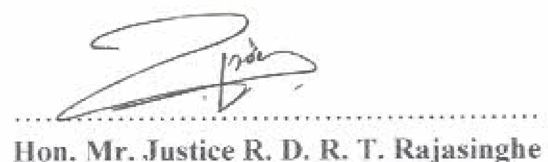
14. Upon careful consideration of the evidence presented in the hearing, I am compelled to conclude that the conviction entered against the Appellant is untenable. Hence, I am satisfied that a substantial miscarriage of justice has occurred. Consequently, I quash the conviction and set aside the sentence.

15. Given the above conclusion, there is no need to further deliberate on the grounds of Appeal against the sentence. Considering the delay caused during the Magistrate's Court proceedings and the time the Appellant has already served for this matter, I do not find this is an appropriate matter for an order of re-trial.

16. In conclusion, I make the following orders:

    i) The Appeal is allowed,
    ii) The Judgment dated 12th of September 2018 is quashed, and the sentence dated 31st of October 2018 is set aside,

17. Thirty (30) days to appeal to the Fiji Court of Appeal.



Hon. Mr. Justice R. D. R. T. Rajasinghe

At Suva
19th April 2024

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