SAULA LALAGAVESI v STATE (CAV0004 of 12S)

SUPREME COURT — CRIMINAL JURISDICTION

HETTIGE, SUNDARAM and CHANDRA JJ

15, 24 October 2012

Criminal law — accomplices — leave to appeal accomplice warning — prosecution witness — uncorroborated evidence of identification — meaning of accomplice — onus of proof — Administration of Justice Decree s 8; — Court of Appeal Act r 22(1) — Penal Code s 293(1)(b) — Supreme Court Act s 7(3).

The petitioner sought special leave to appeal against the judgment of the Court of Appeal. The Court of Appeal had dismissed an appeal against the High Court, which had refused the petitioner's appeal against conviction. The petitioner had been convicted of robbery with violence. The ground of appeal related to the reliance placed on the uncorroborated evidence of identification made by a prosecution witness in the trial.

Held –

(1) The Magistrate was not obliged to give an accomplice warning when considering the relevant witness's evidence. There is no obligation to give an accomplice warning when it is common ground that there is no basis for suggesting that the witness is a participant, or is in any way involved in the criminal offence. There was nothing to suggest that the witness was an accomplice of the accused.

R v Beck [1982] 1 WLR 461; [1982] 1 All ER 807, followed.

(2) The onus of establishing that a witness was an accomplice lies on the accused person. In this case the accused gave evidence, but did not make a suggestion that the relevant witness was an accomplice.

R v Cox [1986] 2 Qd R 55; (1986) 24 A Crim R 434, followed.

Application for special leave to appeal dismissed.

Cases referred to

Bulu v Housing Authority [2005] FJSC 1; *Daily Telegraph Newspaper Co Ltd v McLaughlin* [1904] AC 776; *R v Turnbull*, cited.

Davies v Director of Public Prosecutions [1954] AC 378; [1954] 1 All ER 507, applied.

Petitioner in person

M Korovou for the Respondent

[1] Hettige, Sundaram and Chanda JJ The petitioner has sought special leave to appeal against the Judgment and Order of the Court of Appeal dated 8th March 2012 which dismissed the appeal preferred against the judgment of the High Court of Fiji at Lautoka (Paul K Madigan J). The High Court refused the petitioner's appeal against conviction by Magistrate Rangajeeva Wimalasena on 29th June 2010 at Lautoka Magistrates Court. The petitioner was convicted of an offence of robbery with violence. The petitioner was sentenced to 6 years and 3 months in prison. This was to be concurrent with other sentences being served by the petitioner. The Magistrate also ordered that the petitioner be eligible for parole after 60 months.

The Facts of the case

[2] The complainant Nalin Kumar on 4th August 2008 had parked his 7 seater carrier vehicle outside Sunita's Photo Studio in Lautoka and was looking for customers to hire. At 7.30 in the morning a lady approached him and told him that

she wanted to go to the Rotuman Church in Maravu Street to pick some flowers and to proceed to a funeral. On her direction the van was driven to Rotuman Church and it was parked there. After ten minutes the lady said she wished to relieve herself and got out of the vehicle. At that time Nalin Kumar saw two men approaching the van. One of them he knew as Navitalai, he could identify him as he was not wearing a mask. The other person was wearing a mask.

[3] They pulled Nalin Kumar out of the van and punched him, he was injured. They took a bunch of keys and a Mobile Phone valued $850. When the Pastor of the Church arrived there, these two men ran away. The lady who came in the van was standing there near the van watching the incident.

[4] The two accused, Saula Lalagavesi and Navitali Tui were charged for the offence of robbery with violence contrary to s 293(1)(b) of the Penal Code Cap 17. Both Accused pleaded not guilty and the trial proceeded, after the complainant Nalin Kumar gave evidence the 2nd Accused changed his plea and pleaded guilty. The 2nd Accused was convicted for the offence and was sentenced for four years imprisonment and be eligible for parole after 24 months.

[5] The trial proceeded against the 1st accused (petitioner) he was unrepresented. The prosecution called two witnesses namely; Nalin Kumar (Complainant) and Seraseini Finau (PW-2) who hired a van. After the prosecution closed the case the accused was called to reply. The accused gave evidence and denied the allegation. The learned trial judge found the accused guilty of committing robbery with violence against the complainant.

Appeal to the High Court

[6] The petitioner (accused) appealed to the High Court on the grounds that there was no identification parade and that he was identified by the witness in the dock. The trial Magistrate erred in law to caution himself in the guidelines of *R v Turnbull*. The conviction of the offence was unsafe and dangerous as the conviction was based on the uncorroborated evidence of the witness Seraseini Finau an accomplice.

[7] The learned High Court judge in dealing with the grounds of appeal observed in paragraphs [6] and [7]:

> *"The Fijian lady was PW-2 at the trial. She identified this appellant because she knew him. She gave evidence that the accused had met her the previous evening at his friend's house and had asked her to arrange a van to be brought to the place near where she had directed to go "pick the flowers". She knew this appellant well and had known him for one year "through my brother". She said in evidence, that when the van had stopped, she had seen this appellant approach with another. She recognized him despite the fact that he was wearing a mask; she even saying that the mask was see-through.*
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> *In the light of this evidence, the appellant's submission that the evidence of identification was insufficient is totally baseless. It is not a question of identification at all. It is a matter of recognition by a witness who has known him and seen him for a year. In those circumstances an identification parade is totally unnecessary and a Turnbull warning is inappropriate."*

[8] On the issue of corroboration of an accomplice's evidence, the learned High Court Judge observed:

> *"First there is nothing contained in the record that would go in any way to suggest that PW -2 was an accomplice of the two men charged with robbery. She had been held by the Police on the day of the offence for questioning however she was never charged and there is no suggestion that she was giving evidence in this trial under immunity as the appellant appears to claim."*

[9] The learned High Court judge dismissed the Appeal as there is no merit in the appeal. Petitioner sought leave to appeal against this judgment to the Court of Appeal. An Appeal to the Court of Appeal can only be on a ground which involves a question of law. As per r 22(1) of the Court of Appeal Act Cap 12.

[10] The Petitioner raised the same grounds he urged in the High Court in particular, that the learned judge erred in law to warn that PW-2 had special interest in the outcome of the proceedings as an alleged accomplice, in accepting the evidence of PW-2 without corroboration (See in *Davies v Director of Public Prosecutions* [1954] AC 378,399 [1954] 1 All ER 507,513.

Appeal to the Court of Appeal

[11] The Petitioners application for leave to appeal against sentence was dismissed as the grounds had not been made out. But leave was granted against conviction on one specific ground, that the learned Magistrate failed to direct himself whether PW -2 was an accomplice. When granting leave the Court of Appeal observed:

> *"Madigan J thought that PW2 was not an accomplice. But the point is that Magistrate Rangajeeva Wimalasena did not direct himself on the point at all. It is not mentioned in the record.*
>
> *In my view it is arguable that the learned Magistrate misdirected himself on whether PW2 was an accomplice. Whether it is a point of "law only' is debatable. But it should be considered by a full court of Appeal."*

[12] The full court of the Court of Appeal after consideration dismissed the appeal *in limine* for lack of jurisdiction as the question involved is not a "question of law..only" under the Court of Appeal Act.

Special Leave to Appeal

[13] The only ground of appeal that could be urged in this Special Leave to Appeal application against the dismissal of an appeal preferred against the conviction of the Petitioner to the Court of Appeal is the reliance placed on the uncorroborated evidence of identification made of PW2 in the trial.

[14] The meaning of the term "accomplice" was laid down by House of Lords in *Davies v Director of Public Prosecutions* [1954] AC 378;[1954] 1 All ER 507 that "includes (i) persons who are participles criminis in respect of the actual crime charged, whether as principal or accessories before or after the fact (in felonies) or persons committing procuring or aiding and abetting (in the case of misdemeanours); (ii) on a trial for larceny receivers as regards the thieves from whom they receive the goods; (iii) where a person is charged with a specific offence on a particular occasion, and evidence is admissible and had been admitted of his having committed crimes of the identical type on other occasions, as proving system or intent or negativing accident, parties to such other similar offences. No further extension of the term 'accomplice' should be accepted. This definition was adopted with approval by the Court of Appeal in *Mudaliar v State* [2007] FJCA 16; AAU0032.2006 (23 March 2007).

[15] The Prosecution witness Seraseini Finau in the instant case had not participated in the offence of robbery or participated as accessory before or after the fact. She had not aided or abetted the commission of the crime. According to her evidence she had said "They told me to go and bring one van. I think they wanted to rob. They wanted to bring the van to the Rotuman Church at Maravu Street". She said that she got involved because she was afraid of the accused and

the other one. She speculated on what the accused were up to but there is no agreement between her and the accused on the commission of the crime.

[16] There is nothing contained in the record to suggest that witness Seraseini Finau was an accomplice of the accused. She had been held by the police on the day of the offence for questioning, however, she was never charged. She was not giving evidence under immunity. Although there is an obligation for a trial judge to advise the jury to proceed with caution where there is material to suggest that a witness's evidence may be tainted by an improper motive, and the strength of that advice must vary according to the facts of the case, there is no obligation to give an accomplice warning with all that entails, when it is common ground that there is no basis for suggesting that the witness is a participant or in any way involved in the criminal offence the subject matter of the trial; *R v Beck* [1982] 1 WLR 461; [1982] 1 All ER 807.

[17] The onus of establishing that a witness was an accomplice lies on the accused person; *R v v Cox* [1986] 2 Qd R 55; (1986) 24 A Crim R 434. In the instant case the accused opted to give evidence in defense. He said "I told the police officer I don't know who is involved in this offence. I told the Police that I don't know anything about this case. I don't know anything about this case. I don't know the witness and the 2nd Accused. I did not know anything about the case. That's all." The accused in this case had not even made a suggestion that the witness Seraseini Finau was an accomplice.

[18] In the above background the learned Magistrate is not obliged to give accomplice warning when considering witness Seraseini Finau evidence.

[19] This is a special leave to appeal application and it is incumbent on this Court to consider the several criteria set out in s 7(3) of the Supreme Court Act No 14 of 1998, read with s 8 of the Administration of Justice Decree 2009, to decide whether this is a fit case for the grant of special leave; *Daily Telegraph Newspaper Co Ltd v McLaughlin* [1904] AC 776; *Bulu v Housing Authority* [2005] FJSC 1.

[20] Section 7(3) provides that-

> *"In relation to criminal matter, the Supreme Court must not grant special leave to appeal unless-*
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> *(a) A question of general legal importance is involved;*
>
> *(b) A substantial question of principle affecting the administration of criminal justice is involved; or*
>
> *(c) Substantial and grave injustice may otherwise occur."*

[20] As the grounds of appeal have no merit it would not meet the threshold prescribed by s 7(3). In those circumstances the application for special leave to appeal is dismissed.

Application dismissed.