

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

**CRIMINAL APPEALS NO. AAU 73 OF 2016**  
**AND AAU 127 OF 2016**  
(Magistrates Court No: 727 of 2011 at Suva)

**BETWEEN** : **KONIA TUWAI**  
**SAILOMA VODO**

**Appellants**

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

**Respondent**

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

**Counsel** : **Ms S Ratu and Mr T Lee for the Appellants**  
**Mr M Korovou for the Respondent**

**Date of Hearing** : **24 January 2019**

**Date of Ruling** : **22 February 2019**

**RULING**

- [1] This is an appeal from the extended jurisdiction of the Magistrates Court at Suva. Following a trial the appellants were convicted on one count of aggravated robbery. On 22 July 2016 the appellant Konia Tuwai was sentenced to a term of imprisonment of 5

years with a non-parole term of 4 years and the appellant Sailoma Vodo was sentenced to a term of 7 years imprisonment with a non-parole term of 6 years.

- [2] The appellants have both filed timely applications for leave to appeal against conviction pursuant to section 21(1) of the Court of Appeal Act 1949 (the Act). Section 35(1) of the Act gives a single Judge of the Court of Appeal power to grant leave. The test for granting leave to appeal against conviction is whether the appeal is arguable: Naisua –v- The State [2013] FJSC 14; CAV 10 of 2013, 20 November 2013.
- [3] On 24 January 2019 the appellant Konia Tuwai filed a notice under Rule 39 of the Court of Appeal Rules seeking leave to abandon his appeal against conviction. That application will be listed for hearing before the Full Court on a date to be fixed. This Ruling therefore is concerned only with the application for leave to appeal conviction by Sailoma Vodo.
- [4] The learned Magistrate found that on 28 March 2011 the appellant along with others had robbed the complainant behind the Raiwaqa market. The complainant after closing his computer shop walked towards his vehicle when all the accused grabbed him and took his money and car key. The appellant denied the allegations. However based on the admissions in the caution interview the Magistrate found the charge proved and proceeded to convict the appellant.
- [5] The grounds of appeal against conviction are:
- “1. That the learned Magistrate erred in law by failing to fairly and objectively apply the principle of joint enterprise to convict the appellant whilst acquitting a co-accused.
  2. That the learned Magistrate erred in law by not warning himself of the dangers of convicting the appellant solely on the appellant’s confession in the caution interview.
  3. That the conviction entered against the appellant is unsafe and unsatisfactory giving rise to a grave miscarriage of justice.”

- [6] The first ground raises the principle of joint enterprise. The learned Magistrate towards the end of the judgment at paragraph 17 refers to “*joint enterprise*” and section 46 of the Crimes Act 2009. Upon a careful reading of section 46 it is clear that the principle of joint enterprise is invoked to attach criminal liability to joint offenders for an offence that occurs during the prosecution of an unlawful purpose. In other words joint enterprise is relevant to criminal liability for the commission of an offence whilst the offenders are conducting their initial illegal purpose. For example, during the course of a bank robbery by 3 offenders, one of the offenders pulls out a knife and injures a teller who subsequently dies. The concept of joint enterprise is not relevant to attaching criminal liability to the three offenders for the bank robbery. Joint enterprise is relevant for the possibility of attaching criminal liability to all three offenders for the actions of the offender who stabbed the teller.
- [7] In this case the appellant was convicted on the basis of his confession in his caution interview. There was no offence committed other than aggravated robbery. The concept of joint enterprise was not relevant to the question of criminal responsibility in this case. The two convicted appellants were simply co-offenders in the commission of the offence. This ground is not arguable.
- [8] The second ground raises the issue whether the confession alone could support a conviction. It must be noted that there is no challenge in this appeal to the caution interview having been admitted into evidence. In Fiji it is now settled that an accused may be properly convicted on evidence consisting of an uncorroborated confession alone: **Kean –v- The State** [2015] FJSC 27; CAV 7 of 2015, 23 October 2015. This ground is not arguable.
- [9] The third ground claims that the conviction was unsafe and unsatisfactory thereby resulting in a grave miscarriage of justice. Any reference in a judgment of this Court or for that matter the Supreme Court, that considers “*unsafe and unsatisfactory*” as a basis for allowing an appeal against conviction in the Court of Appeal must be regarded as a




judgment delivered “*per incuriam*.” Section 23(1) of the Court of Appeal Act 1949 sets out the bases upon which the Court of Appeal may allow an appeal against conviction; they are (a) the verdict is unreasonable, (b) the verdict cannot be supported by the evidence, (c) the judgment is based on a wrong decision on a question of law and (d) a ground raising a miscarriage of justice. The proviso to section 23 allows the Court of Appeal to dismiss an appeal on the basis that there has been no substantial miscarriage of justice although the Court may have decided a point raised on appeal in favour of the appellant. Apart from the non-existence of the ground raised by the appellant, there are no particulars provided in the notice of appeal. In the written submissions the appellant claimed that the caution interview admitted into evidence also implicated an accused who had been acquitted by the Magistrate. However as an exception to the rule against hearsay, admissions against interest are admissible as evidence only against the maker of the statement and no-one else. This ground is not arguable.

[10] For all of the above reasons leave to appeal against conviction is refused.

Orders:

1. *Application for leave to appeal against conviction by the appellant Vodo is refused.*
2. *Application to abandon the appeal against conviction by Tuwai is to be listed for hearing before the Court of Appeal on a date to be fixed.*



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