

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU 10 OF 2013

(High Court No. HAC 39 of 2009 [Ltka])

BETWEEN : 1) **ERAMI TUIDOMO**
2) **LINO LEWADUA**

Appellants

AND : **THE STATE**

Respondent

Coram : Prematilaka JA
A Fernando JA
Nawana JA

Counsel : Mr M Fesaitu for the Appellants
Ms E Rice for the Respondent

Date of Hearing : 10 & 16 September 2019

Date of Judgment : 3 October 2019

JUDGMENT

Prematilaka JA

[1] I have read in draft the judgment of Fernando JA and agree with the reasons and conclusions thereof.

Fernando JA

The Appeal

- [2] The 1st and 2nd Appellants had appealed against their convictions for the offence of murder and the sentences imposed. Both Appellants had been sentenced to life imprisonment. The 1st Appellant was ordered to serve a non-parole term of 12 years and the 2nd Appellant a term of 15 years.

How the case proceeded before the Trial Court

- [3] The Appellants with three others, were originally charged with murder under section 199 and 200 of the Penal Code Cap 17.
- [4] The charge of murder against two of the co-accused was withdrawn following a ruling dated 23rd January 2013, rendering their caution interviews inadmissible at the voir dire stage, as they were made under oppressive circumstances.
- [5] As per the Amended Information filed by the Director of Public Prosecutions, dated 24th January 2013, the two Appellants along with another had “*on the 28th day of May 2009, at Nasavu Village, Rakiraki in the Western Division, murdered Leone Naivi.*” The Appellants had been charged on the basis of ‘*offences committed by Joint Offenders in prosecution of common purpose.*’
- [6] The other co-accused charged along with the Appellants in the Amended Information, had been “discharged from further proceedings” by the learned Trial Judge at the conclusion of the prosecution case when he upheld a no-case submission, by stating “*Considering the evidence before the Court I agree with the counsel that the 2nd accused did not get his legal rights hence the statement becomes questionable. I find that there is*

a reasonable doubt arisen hence I give the benefit of the doubt to the 2nd accused and decide that the Prosecution had not proved prima facie case against him.” (verbatim)

- [7] After the trial all three Assessors had unanimously opined that the 1st Appellant was guilty of the charge, while only two of them opined that the 2nd Appellant was guilty. The third Assessor opined that the 2nd Appellant was not guilty.

Grounds of Appeal:

- [8] Leave had been granted by a Single Judge of this court to appeal against the following grounds:

i. *That the Learned Trial Judge erred in law and fact in not directing the assessors on the issue of joint common enterprise, in particular that an accused person cannot be found guilty simply by being present at or near the crime scene.*

ii. *That the Learned Trial Judge erred in fact when at para. 46 of the Summing Up he stated,*

“In this case you have to decide whether you are acting only on the confession of the Accused persons or other materials to prove the case. I want you to consider contents of the confession is proved by other independent evidence.”

In doing so the Learned Trial Judge misdirected the assessors on the facts as no other evidence linked the Appellants to the crime aside from their caution interviews, which resulted in a grave miscarriage of justice.

iii. *That the Learned Trial Judge erred in law when at para 9 of the Judgment he stated that the contents of the Appellants caution interviews were admissible because of corroboration by “the evidence of the Accused Persons”.*

In doing so the Learned Trial Judge misdirected himself on the law regarding corroboration from a co-accused caution interview.

iv. *That the Learned Trial Judge erred in fact when he ruled at para 9 of the judgment that,*

“...the statements of the 1st and 3rd Accused was made voluntarily further some of the contents were independently corroborated by other witnesses...”

as none of the witnesses present at the crime scene identified the Appellants. In doing so there was a substantial miscarriage of justice.

- v. *That the Learned Trial Judge erred in law and fact in taking into account irrelevant matters when sentencing the appellants.*

[9] The single Judge of this court had rejected the application of the 2nd Appellant, seeking leave to adduce fresh evidence in the appeal on the basis that application must be made to the full Court at the hearing of the appeal. At the hearing before us Counsel for the 2nd Appellant informed the Court that he was abandoning the application to adduce fresh evidence. The fresh evidence sought to be led was a supposed original of a medical certificate relating to the 2nd Appellant. I am of the view that it was the correct decision on the part of the Counsel for the 2nd Respondent not to pursue that application, since at the trial having sought to produce a copy of a medical certificate on the basis that *“she doesn’t know where the original is”*, trial counsel had, said as set out in the recorded proceedings: *“Counsel moves to withdraw the application and says she is not asking questions about the Medical Report.”*

Background:

[10] There is no dispute as to the background to the crime. A dispute had existed for some time between two villages Nailuva and Nasavu. There was a free-for-all, a physical confrontation between the two villages on the day of the incident where Leone Naivi came by his death.

[11] The only evidence that was available against the 1st and 2nd Appellants were their caution statements. This is confirmed by the learned Trial Judge when he stated at paragraph 20 of his summing up *“There is no eye witness to the incident”*. The learned Trial Judge summarizing the evidence at paragraphs 20 to 23 of the prosecution witnesses who had

gone to the scene soon after the incident and seen the deceased lying motionless had stated, that none of them had identified the assailants, leave aside the Appellants. The learned Trial Judge had in his judgment stated: “*The Prosecution relied on the statements of the Accused persons made at the cautioned interview.*” There was no “*other independent evidence*”, circumstantial evidence or otherwise available against the Appellants.

- [12] In view of what I had stated at paragraph 11 above, grounds (ii) and (iv) of the grounds of appeal referred to at paragraph 8 above succeed.
- [13] In order to determine appeal grounds (i) and (iii) above it was absolutely necessary for us to peruse the caution statements of the 1st and 2nd Appellants that had been produced at the trial.
- [14] The original caution statement of the 1st Appellant in itaukei language had been produced at the trial, through DC 2860 I. Bilo of the police who interviewed the 1st Appellant, as P1 and its translation in English as P1A. The original charge statement in Itaukei language of the 1st Appellant had been produced at the trial, through Cpl. K. Namoumou of the police who charged the 1st Appellant, as P3 and its English translation as P3A.
- [15] The original caution statement in itaukei language of the 2nd Appellant had been produced at the trial, through PC 3434 S. Turuva of the police who interviewed the 2nd Appellant, as P6 and its English translation as P6A. The original charge statement of the 2nd Appellant in itaukei language had been produced at the trial, through PC 3920 S. Bawaqa of the police who charged the 2nd Appellant, as P10 and its translation as P10A.
- [16] Since this Court found that all the exhibits produced at the trial were missing specifically PI, PIA, P6, P6A and P10 and P10A, except P3 and P3A, this Court by its Order dated 10th September 2019, namely the date this case was originally fixed for hearing, ordered in terms of rule 45(2) of the Court of Appeal Rules; the Registrar of the Lautoka High Court and the Officer-in-charge Rakiraki Police Station to produce the exhibits to the

Registrar of the Court of Appeal on or before the 13th of September 2019 and re-fixed the date of hearing of this case for the 16th of September 2019. The Registrar was notified by the same order to communicate the said orders forthwith.

[17] According to the Memorandum from the Senior Court Officer, High Court, Lautoka dated 13/09/2019 to the Senior Court Officer, Court of Appeal, Suva: *“A search party was conducted in all our disposed filing rooms and the old Archives but have been unsuccessful, as we were not able to locate the said mentioned file. The only information gathered was that the original files together with all documents intact were forwarded to the Court of Appeal registry on 14/09/2016 for appeal purposes.”* According to the Memorandum dated 13/09/2019, from the Officer in Charge Ra Police District to the Senior Court Officer, Court of Appeal, Suva: *“The Police Investigation File (CR 117/09) was checked and we discovered that copies of the Caution Interview and Charge Statements of Erami Tudomo and Lino Lewadau were not there after the said file was returned from DPPs office at the conclusion of the trial. A search was conducted in our old archives but have been unsuccessful.”* This was confirmed to us by Inspector A. Tuvura, Acting Officer-in-charge of Rakiraki police station who was present in Court on the 16th of September 2019. Counsel for the State informed Court at the hearing that the said documents were not with the DPP’s office. The Registry of the Court of Appeal had by its letter dated 16th September 2019 informed this Court that they had *“undertaken a thorough search for the related High Court file and documents pertaining thereto and at the conclusion of their search have not been able to locate a single document, file or paper related to this matter...”*

[18] Both the Counsel for the State and the Appellant informed Court that they would proceed with the appeal as there would be no prospect of finding the exhibits PI, PIA, P6, P6A and P10 and P10A.

[19] There is no reference to the contents of the caution statements in the summing up or anywhere in the record. This was confirmed to us by Counsel for the State and the Appellants.

[20] All that I find in the summing up is the learned Trial Judge telling the Assessors in relation to the caution statement of the 1st Appellant: *“I want you to read it”*. He further states: *“The Prosecution submits to court that this statement was made voluntarily (referring to the evidence of DC I Belo). The defence says it was obtained after a beating. The Prosecution submits to court that the 1st Appellant Erami Tuidomo had admitted his involvement of which the defence denies”*. In relation to the charged statement the learned Trial Judge had said: *“The 1st Appellant made a statement voluntarily admitting the allegations against him. (referring to the evidence of Cpl K. Namoumou) The defence suggested that the statement was obtained by force and not made voluntarily...I want you to read it carefully”*. There is no direction to the Assessors to consider the truthfulness of the statements and this in my view is a fatal irregularity in the summing up.

[21] In relation to the caution statement of the 2nd Appellant, the learned Trial Judge had said referring to the evidence of PC 3434 S. Turuva: *“He submits to Court that the 3rd Accused (presently the 2nd Appellant) had admitted his involvement in the crime but the defence denies the same and suggested that the statement was obtained after assault and using of force.”* In relation to the charged statement of the 2nd Appellant, the learned Trial Judge had said referring to the evidence of PC 3920 S. Bawaqa: *“the 3rd Accused (presently the 2nd Appellant) made a voluntary statement admitting his involvement in the offence. The defence suggested that the statement was not made voluntarily.”* There is no direction to the Assessors to consider the truthfulness of the statements.

[22] In the English version of the charged statement (P3A), the 1st Appellant had said: *“I admit that I was involved in the assault on Leone Naivi...with others. I just wanted him to stop taking the youths from Nasavu to go and do damages in the village. I didn’t know that what I did would cause his death. I would like to apologize for that.”* At the trial the 1st Appellant had said that he did not give the charged statement voluntarily. As stated earlier the Assessors had not been asked to consider the truthfulness of the charged

statement especially in view of the 1st Appellant's evidence at the trial that he was beaten and forced to give the answers the police wanted.

[23] In giving evidence at the trial the 1st Appellant had said that on the day of the incident between 8 -9 pm, he along with about 20-30 boys had gone to Nayala in a vehicle because of a request for help. The vehicle had broken down half way and thereafter they had gone by foot. There had been destruction caused to houses and people were injured. Boys from the other village were challenging them for a fight. One of them had come on horse back swearing at them and the horse he was riding had bumped on the deceased. The deceased had tumbled over and fallen near the bridge and did not move. When he came near the deceased to see what had happened the boys from the other village had thrown stones at him and one had hit his head. He had then fallen down unconscious.

[24] Counsel for the State at the hearing before us made an attempt to place reliance on the suggestions put to the 1st Appellant in cross-examination at the trial, based on his answers at the caution statement and asked the Court to come to a finding against the 1st Appellant on that basis. That was a totally misconceived proposition since the 1st Appellant had categorically denied each of the suggestions made to him and denied that he in anyway assaulted the deceased. Suggestions in cross-examination which are specifically denied cannot become evidence.

[25] In view of the fact that there was no direction to the Assessors, as stated at paragraph 21 above, to consider the truthfulness of the charged statement (P3A), the 1st Appellant's evidence at the trial that he did not give the charged statement voluntarily and that he was beaten and forced to give the answers the police wanted, no reasonable court can come to a finding against him on the basis of P3A. The 1st Appellant's evidence at the trial only shows that he was at the scene of offence but had not taken part in any assault on the deceased. This is no evidence to convict him of the murder of the deceased.

[26] The 2nd Appellant testifying at the trial had stated that he was at the scene where the fighting took place, saw the deceased lying on the ground, but did not assault him in any

way. He had thereafter spoken of his arrest by the police and being beaten to make a statement that the police wanted him to make.

[27] In view of the fact that both the caution statement (P6 and P6A) and charged statement (P10 and P10A) are missing, and in the absence of any other evidence implicating the 2nd Appellant, the appeal of the 2nd Appellant against his conviction has to necessarily succeed.

[28] In order to come to a finding against the two Appellants on the basis of *'joint common enterprise'*, the basis on which they had been jointly charged there should have been evidence that the two of them along with another formed a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence was committed of such a nature that its commission was a probable consequence of the prosecution of such purpose. In the absence of the caution statements in respect of both Appellants, the absence of the charged statement of the 2nd Appellant, the inability to place any reliance on P3A to come to any finding against the 1st Appellant and the absence of any other evidence showing the involvement of the two Appellants in any attack on the deceased, ground (i) and (iii) of appeal have to necessarily succeed.

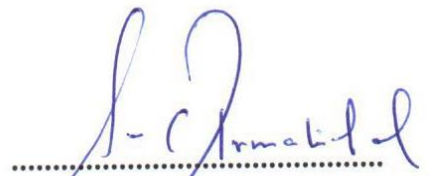
[29] I therefore have no hesitation in quashing the convictions of both Appellants. Consideration of ground (v) of appeal therefore becomes unnecessary.

Nawana JA

[30] I agree with the conclusion that the appeal should be allowed.


Orders of the Court:

- a) Appeals of the 1st and 2nd Appellants allowed
- b) Convictions and sentences of the 1st and 2nd Appellants quashed
- c) 1st and 2nd Appellants are acquitted.


.....
Hon. Justice C. Prematilaka
JUSTICE OF APPEAL


.....
Hon. Justice A Fernando
JUSTICE OF APPEAL




.....
Hon. Justice P Nawana
JUSTICE OF APPEAL