

IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

Criminal Appeal No: HAA 113 OF 2008

Between: **MAIKALI MASI TUVOLI** **Appellant**

And: **THE STATE** **Respondent**

Hearing: 6th March 2009
Judgment: 13th March 2009

Counsel: Ms T. Leweni for Appellant
 Ms N. Ratakele for State

JUDGMENT

[1] The State concedes this appeal. Both counsel ask for a retrial. On the 11th of July 2008, I allowed the appeal of Tomasi Turuturuvesi (HAA039 of 2008) and ordered a retrial. He was the alleged co-accused of this Appellant Maikeli Masituvoli.

[2] The facts of the case were that the Appellant and Turuturuvesi were jointly charged with one count of robbery with violence, one count of unlawful use of motor vehicle, and one count of resisting arrest. The prosecution alleges that on the 23rd of May 2006 the Appellant with Turuturuvesi took the motor vehicle of Ravin Dutt and forced Dutt to drive to Farm Road Nasinu. At Farm Road the two men allegedly put masking tape around Dutt's mouth, hands and legs and threw him into the back of the

van. At Newtown, a third man came into the vehicle, then left in Raiwaqa. At the Suva Cemetery, Dutt was assaulted with a steel brace. At Wailoku, the van was intercepted by a police vehicle. The evidence led was that the same vehicle was involved in a robbery and it was chased by a police mobile patrol. Both men were arrested.

[3] The trial commenced on the 13th of August 2007, in the Nasinu Magistrates' Court. Prior to that date, on the 22nd of May 2007, the Appellant had told the court:

“I do not know anything about this case. The statement I gave to the police is not true. I was beaten and tortured by Police. They spray some chemical on my eyes. I was beaten up by members of Police Tactical Response Unit (PTR).”

[4] The learned Magistrate was therefore put on notice that there was a challenge to the admissibility of the Appellant's confession.

[5] At the trial, the Appellant alleged police assault. The police response was that the Appellant had a knife and that reasonable force had to be used at the time of arrest. The confession was tendered without a trial within a trial. On the 14th of August 2007 the learned Magistrate found a case to answer. The Appellant remained silent. On the 4th of September 2007 the case was adjourned for “judgment and sentencing on 30/10/07.”

[6] On that date however the learned Magistrate proceeded to hear mitigation without delivering judgment. Sentence was delayed because of the non-appearance of the Appellant. On the 19th of February 2008 the Appellant was sentenced to 2 years imprisonment.

[7] The grounds of appeal are that the learned Magistrate failed to deliver a judgment, and failed to consider the admissibility of the confession.

[8] On the 11th of July 2008 I said this about the trial:

“In this case, it is clear that there was non-compliance with sections 154 and 155 of the Criminal Procedure Code and the sentence must be quashed.

Section 319 of the Criminal Procedure Code allows the High Court to confirm, reverse or vary the decision of the Magistrates’ Court, or to remit the matter with the opinion of the High Court to the Magistrates Court, or may order a new trial. In principle therefore this case could be remitted to the trial magistrate for the delivery of a judgment. However, the non-delivery of the judgment is not the only defect in this case. The allegation of police assault should have resulted in a trial within a trial, and a decision as to the admissibility of the confession. That was not done, and this is also a substantial irregularity.

Further, the learned Magistrate has already sentenced the Appellant, and he may well feel that writing the judgment now is simply going through the motions of the requirements of section 155 of the CPC, without giving him the benefit of any doubt which might have arisen in the course of trial. It would be a case of closing the stable door after the horse has already bolted.

In these circumstances it would be just to order a retrial before another magistrate. The offences were alleged to have been committed in May 2006, and they are serious offences which warrant a retrial.”

[9] The State agrees with this result. The sentence of the Appellant is quashed and a retrial is ordered. Because of his unfortunate history with bench warrants, he must be kept in remand until his case is recalled before another magistrate in the Nasinu Court.

[10] This appeal is allowed.

Nazhat Shameem
JUDGE

At Suva
13th March 2009