

WATISONI BAINIVANUA v STATE

COURT OF APPEAL — CRIMINAL JURISDICTION

5 REDDY P, EICHELBAUM and GALLEN JJA

10, 13, 17 May 2002

[2002] FJCA 35

10

Criminal law — appeals — appeal against conviction and sentence — robbery with violence — appellant cannot use own non-appearance and request for adjournment to claim delay — 1997 Constitution s 29(3).

15

Appellant sought an appeal against conviction and sentence. He was convicted for three counts of robbery with violence and was sentenced to 5 years' imprisonment. The High Court affirmed the conviction and sentence. Appellant failed to appear in the proceedings and applied for a total of 4 months' adjournment to claim delay.

20

Held — Section 29(3) of the 1997 Constitution states that every person charged with an offence has the right to have the case determined “within a reasonable time”. But clearly the concept of “reasonable” includes consideration of the progress of the particular case and of factors affecting its progress. In this instance the appellant's failure to appear affected progress of the case for a period of 8 months. He cannot use his own non-appearance and request for adjournment to claim delay.

25

Appeal dismissed.

No case referred to.

Appellant in person

J. Naguilevu for the Respondent

30

Judgment

35

Reddy P, Eichelbaum and Gallen JJA. The appellant was convicted on an information containing three counts relating to Robbery with Violence on the premises of Rup's Investments Limited in that with others he robbed two security guards on the premises of various equipment and that he wrongfully confined each of the guards. The appellant's part in the offending was as a party, it being alleged that he was the look-out man. Having been sentenced to 5 years' imprisonment the now appeals against the convictions and sentence.

40

The offences occurred on 7 March 1998. The appellant was questioned on 26 and 27 March and made a full confession in his caution statement, this being the only significant evidence against him. He first appeared in court on 27 March and after a fortnight's remand in custody was bailed. There were various regular appearances until 3 August 1998 when the appellant failed to appear although his co-accused was present. After that the case was called on six occasions when the appellant did not appear, and on several occasions bench warrants were issued. Eventually the appellant appeared again on 30 April 1999. As from an appearance on 7 May 1999 the appellant was a serving prisoner, having been sentenced on another matter.

50

The committal proceedings commenced on 12 November 1999. On 20 December 1999 the appellant was committed to the High Court for trial. From the entry dated 20 December 1999 it seems the appellant may have remained a

serving prisoner until 6 February 2000. After that he was on bail. According to information supplied by State counsel, on 5 March 2001 the appellant sought and obtained an adjournment for 2 months to earn money to brief counsel. On 4 April 2001 the trial date was fixed for 5 June. The appellant applied for a further 5 2 months' adjournment which was declined. The trial commenced on 7 June 2001. It concluded on 25 June when the assessors were of the unanimous opinion that the appellant was guilty on all counts. The judge convicted him on each count.

Of the numerous grounds of appeal advanced by the appellant, who appeared 10 before us in person, most have no substance and can be dealt with briefly.

Hearsay identification

The police interviewed the Appellant because of information given by the co-accused. He had referred to the Appellant as *Bai*. It is elementary that 15 information which leads the police to a suspect need not be legally admissible evidence. The co-accused was not called at trial and the so called identification played no part in the trial itself.

Dock identification by security guards

The appellant mistakenly thought that the security guards identified him in 20 court. They did not do so.

Unlawful Detention

The appellant was taken to the police station on evening of 25 March 1998 to be questioned about an unrelated matter. The interview about that matter took up 25 much of the following day. At 7.30 pm on 26 March a police officer commenced to interview him in connection with the Rup's robbery. He had been arrested in connection with the other matter but when is not stated. The interview on the Rup's matter continued on the morning of 27 March and at 10.30 am the appellant was charged. He was taken to court that afternoon.

30 In connection with both events it is unclear when the appellant was arrested. The subject was simply not explored. We appreciate that generally, an unrepresented accused will be unaware of this kind of legal requirement, but if the point was to be taken that at the time of his incriminating statement, the appellant was unlawfully detained, the time to explore that subject was at the trial 35 within a trial where the caution statement was challenged. The point cannot validly be pursued before this court when there is no sufficient material to decide it.

Not allowing further evidence at trial within trial

40 The crux of the Appellant's defence was that he signed the confessional statement following beatings and threats by the police. At the trial within a trial a succession of police officers was called to say there had been no violence whatsoever. The appellant gave evidence of a sustained beating by several police on 25 March and again the following day. He claimed he was told that unless he 45 confessed he would be kept until the following Monday which was a holiday. He signed the statement to escape further violence. At the trial within a trial he called a witness, Mr Baleloa who confirmed he saw the Appellant being beaten on 25 March.

At the conclusion of Mr Baleloa's evidence the Appellant stated he had 3 other 50 witnesses, ex-prisoners, but had not been able to locate them. He added that their evidence was similar to Mr Baleloa's. The prosecutor informed the court that

these people had been released from prison and their whereabouts were unknown. He objected to an adjournment.

In declining to adjourn the judge said the accused had an ample opportunity to find his witnesses. The judge added that in any event they could add very little evidence relevant to the inquiry. That, we have to say, was an incautious remark. If their evidence was similar to Mr Baleloa's it was relevant to the inquiry and one could hardly say in advance that it would not be meaningful. However, the judge was justified in saying the appellant had already had ample time to organise his evidence. There is no basis for challenging the exercise of the judge's discretion about an adjournment.

Further witness at trial

The voir dire concluded with the judge's ruling on 8 June 2001. It was then proposed that there should be a 5-week adjournment while the appellant attended a social welfare workshop. The court agreed to adjourn the trial until 21 June. On 20 June the appellant sought an adjournment in order to attend another course. This was declined and on 21 June the trial continued. On that day the State completed its case and the appellant elected to give evidence, stating that his witnesses would come tomorrow. At the end of the day he said he had two witnesses both of whom were available the next day. He said he had notified them the previous day. On 22 June the appellant said the witnesses were not available that morning. They were on their way but would not arrive until the afternoon. The court adjourned the case until Monday 25 June. At that stage a witness gave alibi evidence. Following cross-examination and re-examination the appellant said his other witness was not available that day. The record shows a discussion about a medical report, which the appellant was allowed to tender, and the appellant is then recorded as closing his case. Nothing was said about an adjournment. If it is regarded as implicit that the appellant wanted an adjournment, given the previous adjournments and the history of the case the judge was fully entitled to decline such an application.

There remain three matters of greater substance.

Delay

We appreciate that court lists are congested, a state of affairs not helped by the aftermath of the attempted coup in May 2000. Nevertheless, in the ordinary case a delay of 3 years and 2 months from the date of the original charge until commencement of trial would be regarded as longer than desirable or appropriate, having regard to the provision of s 29(3) of the 1997 Constitution that every person charged with an offence has the right to have the case determined "within a reasonable time". But clearly the concept of "reasonable" includes consideration of the progress of the particular case and of factors affecting its progress. In this instance the appellant's failure to appear affected progress of the case for a period of 8 months. There was an adjournment of 2 months at the appellant's request and (rather ironically, given the appellant's present complaint about the delay) he applied, unsuccessfully, for a further 2 months' adjournment as the fixture date approached. Further, given that the scope of the trial was virtually limited to what occurred in the police station on 25 and 26 March 1998 we see no evidence of prejudice to the appellant from any delay. This ground fails.

Failure to obtain records

The appellant maintained that when he appeared in the Magistrates Court on 27 March he complained to the magistrate about the violence he said had been inflicted on him at the police station. According to the appellant the magistrate made an order that he should be taken to hospital for examination but this order was ignored. By the time of his release on bail a fortnight later his injuries had healed. We interpolate that if that was so it is curious that at trial the appellant should wish to produce a medical report dated 24 April 2001 confirming that he had been seen in the orthopedic clinic of the CWM hospital on 4 January 2001 with a fracture of his right clavicle. The report continued “he was advised on the appropriate treatment”, and was to re-attend the following month for follow up. Either the claim that his injuries had healed (thus excusing his own failure to attend hospital on his release on bail) was wrong, or the medical certificate produced at trial had nothing to do with any events on 25 and 26 March 1998.

The record produced for this appeal commenced with an appearance of the appellant in the Magistrates Court on 14 July 1998. It made no reference to any events between 7 March and that date. A comparison of the appeal record with the actual record in the Magistrates Court file showed the two tallied. However, thanks to inquiries made by counsel for the State at the request of the court, the mystery was explained. There was another file which commenced with the appellant’s appearance on 27 March and continued until 14 July 1998 when the record showed *leave granted, accused discharged*. It is apparent that a fresh charge sheet was tendered immediately, accounting for the appellant’s appearance in relation to that fresh charge sheet on the same day, and the commencement of a new file. The record does not disclose why leave was sought to withdraw the earlier charges but one may speculate that there was a perceived deficiency in the original charge sheet.

The appellant’s complaint under this heading was that the High Court judge ought to have called for the record of the hearing on 27 March. He expected this would confirm his account of proceedings that day, and in particular his complaint about police violence, and the order for hospital examination. Having examined the original records we can say however that neither matter is referred to in the records. The Magistrates Court files we examined were 871/98 (Factory breaking YKK Fiji Ltd 9, 10 March 1999; warehouse breaking, Sunrise Valley Produce Ltd, 9–10 March 1999); 872/98 (the first file relating to Rup’s); 873/98 (criminal trespass, YKK Fiji Ltd 25 March 1998); 1790/98 (the second Rup’s file). All they showed on the subject was that on previous occasions, the appellant had made the same claim now made, that the magistrate before whom he appeared on 27 March 1998 had ordered a medical examination. So if the trial judge had called for the records it would not have helped the appellant’s case. Thus this ground of appeal is without substance.

Right to consult lawyer

In his submissions the appellant claimed he was denied his right to have a solicitor present, as he put it, during his interview under caution. He relied on s 28(d) of the 1997 Constitution. That section does not give a right to have a solicitor present during the caution interview; and in any event, as counsel for the State pointed out, this provision of the Constitution was not yet in force at the relevant date.

However, s 6(3) of the 1990 Constitution applied. This provides that any person who is arrested or detained upon reasonable suspicion of having committed a criminal offence, and who is not released –

5 ...shall be afforded reasonable facilities to consult a legal representative of his own choice...

This may be contrasted with the fuller provision contained in s 27(1)(c) of the 1997 Constitution where the detainee's right to consult a legal practitioner of his or her choice in private is reinforced by the addition of a right to be informed promptly of the right of consultation.

At the trial within a trial the admissibility of the caution statement was challenged on the ground that the confession was obtained by violence and threats. The ruling records and deals with that ground alone. However, in the course of evidence in chief the detective who conducted the caution interview commencing at 7.30 pm on 26 March said he could not recall if the appellant was told of his "right to a lawyer". It is unclear why he raised the subject. There was no other evidence, and no cross-examination, on the matter. As with the subject of possible unlawful detention, we are left without the necessary materials on which to decide the issues arising, namely whether there was a breach of the appellant's right, and if a breach were established, the consequences. If the subject was to be pursued as a ground for exclusion of the caution statement there should have been cross examination. The accused ought to have given evidence about it, and could have been cross examined about whether he would have taken action on the information had it been given to him, and indeed whether, as a person to whom arrest was not a novelty, he was already aware of his rights.

In New Zealand, in dealing with cognate issues arising under the New Zealand Bill of Rights Act 1990, the courts have said repeatedly that Bill of Rights points involve serious issues which require a proper foundation. In most cases this means the subject needs to be explored in evidence at trial or on a voir dire.

We are not criticising the appellant for not knowing the procedure a lawyer might have followed. We say "might" because whether there were good grounds for pursuing the point was by no means obvious. Without expressing any concluded view it seems to us that even in the absence of the more explicit wording of the 1997 Constitution, there is at least a tenable argument that s 6(3) requires the suspect should be informed of his right, at a time when such information will be of practical use, which normally would be before the commencement of questioning. Otherwise the conferment of this important right of consultation would be a hollow gesture. However, it is apparent this was not a commonly held view, since counsel for the prosecution in his helpful submissions was not able to refer us to any judgment where this issue of interpretation had been considered. The Force Standing Orders governing police practice on interviews current at the time proceeded on the assumption that facilities for consultation had to be granted only when requested by the suspect.

The question arises whether the judge ought to have followed up the issue. In relation to unrepresented accused Archbold (2000 ed, paras 4-309) states that the judge should endeavour to assist in the conduct of the defence, particularly when the accused is examining or cross examining witnesses or giving evidence himself.

Having regard to the state of the law and practice concerning the s 6(3) issue under the 1990 Constitution, as discussed above, we do not consider the judge was obliged to take any action. On the strength of the single reference to

solicitors in the voir dire evidence, we do not consider it was the judge's duty to open up a novel and quite complex topic.

We are conscious that in procedural matters the courts need to allow some latitude to unrepresented accused persons. However, even in that situation, it is inappropriate to allow points to be raised for the first time on appeal, when the necessary evidential foundation has not been laid at the trial stage.

Thus this ground fails also with the result that the appeal against conviction must be dismissed.

Sentence

The sentence was 5 years' imprisonment for robbery with violence, and 8 months on each of the confinement counts, the sentences to be concurrent. The transcript of the remarks on sentencing shows that the judge carefully took the relevant considerations into account. It was an appropriate sentence and there are no grounds for interfering with it.

Result

Appeal against convictions and sentence dismissed.

Appeal dismissed.