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

CRIMINAL APPEAL NO. AAU0036 OF 2002S
(High Court Criminal Action No.Ham022 of 2001S)

BETWEEN:

WAISAKE BULEWA

Appellant

AND:

THE STATE

Respondent

Coram: Reddy, President
Davies, JA
Ellis, JA

Hearing: Wednesday, 6th November 2002, Suva

Counsel: Appellant in Person
Mr. G. Allan for the Respondent

Date of Judgment: Friday, 15th November 2002

JUDGMENT OF THE COURT

The appellant appeals to the Court against his conviction and sentence in the Magistrate's Court on 22 February, 2002 on a charge of receiving. He appealed to the High Court and this was dismissed by Singh J. on 10 July 2002. Accordingly pursuant to s.22 of the Court of Appeal Act 1978 an appeal against conviction is limited to a question of law and against sentence to claim that it was unalwful or culminated in the substitution of a custodial sentence for a non-custodial sentence.

The prosecutor sought leave to adduce affidavit evidence to expand the Court record. This was opposed by the appellant. We had been able to reach our conclusion without referring to the affidavit, so refuse leave to adduce it.

The appellant was charged with two others with robbery with violence in these terms:

> ***"Emasi Samumu, Joji Veiquwa and Waisake Bulewa and another on the 11th day of December 2000 at Suva in the Central Division robbed Samson Susau Garisau of cash $20,862.75 and cheques valued $1,618.75 to the total vlaue of $22,481.50 the property of Fiji Centre (USP) and immediately after such robbery used personal violence on the said Samson Susau Garisau."***

The evidence established that Mr Garisau was working at the USP Fiji Centre on 11 December 2000 when two men grabbed him from behind and seized the till containing the money and cheques and that he was injured by the two men. The appellant was not identified by Mr Garisau. The two men then escaped the scene in a taxi. The Magistrate held that the only evidence linking the appellant to the robbery was that he was seen in possession of the till shortly afterwards, when the cash was divided into 4 parts and the cheques dumped and the accused Bulewa asked witness PW5 to throw the box away. Witness PW5 said Bulewa got his share. Evidence was given of statements made to the Police and that the appellant did not confess to the crime. However the appellant chose to call the second accused as his witness (as he had earlier pleaded guilty and been sentenced). In evidence he confirmed that the appellant was present when the "loot"was shared out. While one of the witnesses identified the accused Somumu was one of the

men who ran off with the till, that appellant was not so identified.

On the evidence the Magistrate found the accused Somumu guilty as charged as one of the two men that seized the till, and the other one was the accused Veiquwa who had pleaded guilty. His finding in regard of the appellant was in these words:

> *"As for Accused No.3, the State's evidence against him, appear circumstantial. PW5 said she saw Accused No.3 bring into a meeting at Veisari, the money box stolen by Accused No.1 and Accused No.2, from PW1, at the material time. PW5 said, she saw Accused Nos. 1,2 and 3, sharing the proceeds of the robbery, from the money till, at Veisari, on 12th December 2000 - a day after the robbery. PW5's evidence seemed to suggest that Accused No.3 is involved in this robbery. Why should Accused No.3 be "sharing" in the stolen proceeds, unless he is part of the group, that carried out the robbery?*
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> *However, this Court, has a reasonable doubt, as to whether or not, Accused No.3 was part of a group, that robbed PW1, at the material time. My doubts are based on the following grounds. No one actually saw Accused No.3 robbing PW1, at the material time. In his police caution interview (Prosecution Exhibit No.8(a)), Accused No. 3, said he was a taxi driver. No evidence was given by the State, to show that Accused No.3 used his taxi, in the robbery. The only evidence against Accused No.3, is that provided by PW5. I find, on the evidence, that there is a reasonable doubt, as to Accused No.3's guilt, and the benefit of that doubt must go him. I find Accused No.3 not guilty as charged, and I acquit him accordingly.*
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> *However, on the basis of PW5's evidence, and accused No.2's sworn evidence corroborating PW5's evidence that, accused No.3 was present when the loot was shared and that he shared in the same, I find, on the evidence, that Accused No.3 is guilty of the lesser charge of "receiving stolen property", contrary to Section 313(1)(a) of the Penal Code - Chapter 17. I find, on the evidence, that accused No.3 shared in the money that was stolen from PW1, at the material time. I also find, on the evidence, that Accused*

No.3, knew, when taking the money, that the same was stolen. Pursuant to Section 169(2) of the Criminal Procedure Code, I find Accused No.3 guilty of the offence of "receiving stolen propety", contrary to Section 313(1)(a) of the Penal Code - Chapter 17."

The appellant was then sentenced to 3 years imprisonment.

The appellant appealed to the High Court against conviction and sentence alleging that the prosecution had failed to prove he knew the property was stolen, that the evidence against him was circumstantial only and that the Magistrate erred in law in convicting him of receiving. He alleged that the sentence was manifesting excessive. Singh J. held that the Magistrate was entitled to make the factual findings he did and that decision involved matters of fact only and so is not open to review by this Court. He then dealt with the Magistrate's ability to substitute a charge of receiving for the charge or robbery with violence. That does involve a matter of law and is the issue we must now address.

In this case the prosecution had hoped to establish that the appellant was a party to the robbery carried out by the other two but on the evidence failed to do so. For present purposes it must be accepted that the evidence did establish the offence of receiving. The Criminal Procedure Code containes a group of sections dealing with convictions for offences other than those charged. Relevant here are sections 169,181 and 185. These provides:

"169- (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."

"181 When a person is charged with stealing anything and -

(a) it is proved that he received the thing knowing the same to have been stolen, he may be convicted of the offence of receiving although he was not charged with it;

(b) It is proved that he committed an offence against section 274 of the Penal Code (relating to embezzlement), he may be convicted of embezzlement although he was not charged with it.

(c) It is proved that he obtained the thing in any such manner as would amount, under the provisions of the Penal Code or of any other law for the time being in force, to obtaining it by false pretences with intent to defraud, he may be convicted of the offence of obtaining it by false pretences although he was not charged with it."

"185 - The provisions of sections 169 to 184, both inclusive, shall be construed as in addition to, and not in derogation of, the provisions of any other Act and the other provisions of this Code, and the provisions of sections 179 to 184, both inclusive, shall be construed as being without prejudice to the generality of the provisions of section 169."

The general power of amendment is contained in section 214.

The offence of robbery with violence involves an allegation of theft and an allegation of violence. In Nawaqabuli v. R (1977) 23 FLR 160 Mishra A.C.J. was

considering an accused charged with robbery with violence, and that involved on the facts of the case an allegation of theft and an allegation of assault. There the Magistrate had found the theft not proved, but an assault causing actual bodily harm proved. He had used section 163(1) of the previous Criminal Procedure Code (now the present s.169(1)) to convict the accused on a charge of assault causing actual bodily harm only. Mishra A.C.J considered the section and held that while the use of personal violence did include assault it did not necessarily include an assault occassioning bodily harm. He accordingly held the Magistrate was only entitled to such a conviction for assault. As to the word "minor" used in this section he said at page 167:

> *"The issue of whether an offence is "minor" to the one charged often comes up before the Courts. In my view the test to be applied is to be found in the case of Springfield (53 Cr. App. R. 608 at 610).*
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> > *"The question accordingly arises as follows. Where an indictment thus charges a major offence without setting out any particulars of the matters relied upon, what is the correct test for ascertaining whether it contains allegations which expressly or impliedly include an allegation of a lesser offence? The test is to see whether it is a necessary step towards establishing the major offence to prove the commission of the lesser offence: in other words, is the lesser offence an essential ingredient of the major one? To take obvious examples, it is impossible to establish larceny from the person without proving a larceny. Similarly one cannot establish a wounding with intent to do grievous bodily harm without proving as steps in ascending order a common assault, an assault occasioning actual bodily harm, and an unlawful wounding. Similarly, if robbery with violence had been charged under section 23(1) (b), this could not have been established without proving that a common assault had taken place: and the same would apply if there had been a charge of assault with intent to rob under section 23(1)(a)."*

Though the statutory provision under consideration in Springfield was slightly different, the test is equally applicable to section 163(1) of the Criminal Procedure Code. Sections 23(1) (a) and 23(1) (b) referred to in the quotation above are identical with sections 326(1)(a) and 326(1)(b) of the Fiji Penal Code."

In our view the reasoning of Mishra ACJ is authority for the proposition that a charge of robbery with violence includes a charge of theft and section 169 authorised a conviction on the lesser charge. On this basis section 181 empowers the Court to enter a conviction of receiving as it is correct to say the accused was charged with stealing although in the form of an allegation of robbery.

We are of course conscious of the fact that the Magistrate declared he acquitted the accused of robbery with violence. He than immediately made his decision to enter a conviction for receiving. It would have been more appropriate to reduce the charge and then convict without referring to an acquittal on the more serious charge. However this is more a matter of form of words than subsance. It follows that in agreement with Singh J we consider the appellant was correctly convicted on the lesser charge and no error of law has been shown.

Singh J. reduced the sentence to one of 2 1/2 years imprisonment. The appellant claims in this Court that the sentence cannot be sustained because he should not have been convicted. As we have held he was correctly convicted the appeal against sentence also fails.

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Reddy, President

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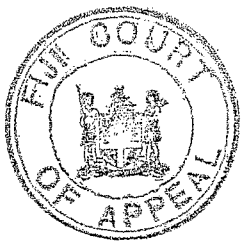
Davies, JA



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Ellis, JA

Solicitors:

Appellant in Person
Office of the Director of Public Prosecutions, Suva for the Respondent