IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO.AAU 100 of 2018
[In the High Court at Suva Criminal Case HAC 288 of 2018]

BETWEEN	**:**	**THE STATE**
		Appellant
AND	**:**	**SEPESA SERUTAMANA** **DERREN LIKUSUASUA** **SIMIONE DAUVEIQARAVI** **SITIVENI RADRAVU**
		Respondents
Coram	**:**	**Prematilaka, JA**
Counsel	**:**	**Ms. S. Waqainabete for the Appellant**
	:	**Mr. E. Samisoni for the Respondent**
Date of Hearing	**:**	**11 March 2021**
Date of Ruling	**:**	**12 March 2021**

RULING

[1] The respondents who were juveniles had been charged in the High Court of Suva on one count of aggravated burglary contrary to section 313(1)(a) of the Crimes Act, 2009 and another count of theft contrary to section 291(1) of the Crimes Act, 2009 committed between 06 April 2018 and 13 April 2018 at Moala, Lau in the Eastern Division. The information read as follows:

COUNT 1
Statement of Offence

AGGRAVATED BURGLARY: *Contrary to section* ***313(1)(a)*** *of the Crimes Act 2009.*

Particulars of Offence

SEPESA SERUTAMANA, DERREN LIKUSUASUA, SIMIONE DAUVEIQARAVI AND SITIVENI RADRAVU *in the company of each other between the 6th day of April, 2018 and the 13th day of April, 2018 at Moala, Lau in the Eastern Division, entered as trespassers into* ***YASAYASA MOALA COLLEGE*** *with the intent to commit theft.*

COUNT 2
Statement of Offence

THEFT: *Contrary to section* ***291(1)*** *of the Crimes Act 2009.*

Particulars of Offence

SEPESA SERUTAMANA, DERREN LIKUSUASUA, SIMIONE DAUVEIQARAVI AND SITIVENI RADRAVU *in the company of each other between the 6th day of April, 2018 and the 13th day of April, 2018 at Moala, Lau in the Eastern Division, dishonestly appropriated (stolen) 42 x tins of Oxford corned beef valued at $175.35, 25 x mackerel tinned fish valued at $49.50, 2 x 10kg rice valued at $39.90 and 6 x 2kg sugar valued at $22.50 all to the total value of $269.15 the property of* ***YASAYASA MOALA COLLEGE.***

[2] In the presence of their counsel from Legal Aid Commission the respondents had entered an unequivocal plea of guilty to the information on 27 August 2018. After the summary of facts had been read over and explained, the respondents had agreed to it and admitted the same to be true and accurate. The learned High Court judge had convicted the respondents on the charge of aggravated burglary on their own plea of guilty and sentenced them on 13 September 2018 to 100 hours of community work in terms of the provisions of the Community Work Act of 1994 under the supervision of the probation officer within a period of 02 years.

[3] The Learned High Court judge had, however, acquitted the respondents of the second count of theft on the basis that the total value of the items allegedly stolen by the respondents as described in the information was $289.25 whereas the information had set out the total value as $269.15 and therefore the charge of theft was defective. The difference between the two sums is just about 20 dollars and the information had indicated the lesser amount.

[4] The facts as narrated in the summary of facts are as follows:

> *'The Summary of facts reveal that on the 13th of April, 2018 at about 7.15am, the complainant PW1, who was the Principal of the Yasayasa Moala College, was informed by a student that the school canteen was broken into. PW1 found that the padlock of the main door of the canteen had been removed by cutting off the ring of the tower bolt. He confirmed that the following items were stolen:*
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> - *42 x tins of Oxford corned beef valued at $175.35;*
> - *25 x mackerel tinned fish valued at $49.50;*
> - *02 x 10kg Rice valued at $39.90;*
> - *06 x 2kg sugar valued at $22.50*
>
> ***All to the value of $269.15***

[5] The state had lodged a timely appeal against the acquittal of the respondents of the charge of theft on 12 October 2018 and filed written submissions on 28 October 2020. The Legal Aid Commission had filed written submissions on behalf of the respondents on 09 December 2020.

[6] In terms of section 21(2)(a) & (b) of the Court of Appeal Act, the appellant could appeal against acquittal without leave on a question of law alone and with leave of court on a question of mixed law and fact respectively. The test for leave to appeal is **'reasonable prospect of success'** (see **Caucau v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and **State v Vakarau** AAU0052 of 2017:4 October 2018 [2018] FJCA 173, **Sadrugu v The State** Criminal Appeal No. AAU 0057 of 2015: 06 June 2019 [2019] FJCA87 and **Waqasaqa v State** [2019] FJCA 144; AAU83.2015 (12 July 2019) in order to distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 and **Naisua v State** [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.

[7] The single ground of appeal is as follows:

> *THAT the learned trial judge erred in law when acquitting all juveniles for theft by holding that a mathematical variance in the total of the stolen items constituted a defective charge preventing a finding of guilt.*

[8] In **Saukelea v State** [2019] FJSC 24; CAV0030.2018 (30 August 2019) the Supreme Court dealt with the issue of a defective charge as follows:

> *'[36] The main consideration in situations similar to this where there is some infelicity or inaccuracy of drafting is whether the accused knew what charge or allegation he or she had to meet: **Koroivuki v The State** CAV 7 of 2017; [2017] FJSC 28. Secondly it was important that the accused and his counsel were not embarrassed or prejudiced in the way the defence case was to be conducted: **Skipper v Reginam** Cr. App. No. 70 of 1978 29th March 1979 [1979] FJCA 6. The Court of Appeal whilst not conceding merit in the point properly applied the proviso under section 23 of the Court of Appeal Act and dismissed the ground of appeal. Similarly in this Court, Ground 2 fails.'*

[9] **Vakatalai v State** [2017] FJHC 228; HAA035.2016 (17 March 2017) sheds more light on how to look at the issue of 'defective charge' as follows:

> *[4] The appellant was charged with robbery contrary to section 310(1) (a) (i) of the Crimes Decree 2009. The particulars of the offence alleged that the appellant 'on 4th day of June 2016 at Suva in the Central Division robbed and stole an I Phone 5c valued at $800.00 the property of the said Sean Fraser'. The appellant's contention is that the charge was defective because the particulars did not allege that the appellant used force to steal, which is an essential ingredient of the offence. I accept that the use of force to steal is an essential ingredient of the offence of robbery contrary to section 310(1) (a) (i) of the Crimes Decree 2009. But I do not think the charge was defective.*
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> *[5] All criminal charges filed in court must comply with section 58 of the Criminal Procedure Decree 2009 (CPD). The charge must contain a statement of offence and such particulars that are necessary for giving reasonable information as to the nature of the offence charged. The statement of offence must be described in an ordinary language, avoiding as far as possible the use of technical terms and without necessarily stating all the essential elements of the offence (section 61(2) of the CPD). Particulars of the offence must be set out in ordinary language, and the use of technical terms is not necessary (section 61(4) of the CPD).*
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> *[6] It has been said in many cases that that while the particulars of offence should be reasonably informative, it is not necessary slavishly to follow the section in the Act that creates the offence (**Shekar v State** [2005] FJCA 18; AAU0056.2004 (15 July 2005); **Mudaliar v State** [2007] FJCA 16; AAU0032.2006 (23 March 2007)). Even if the particulars lack an essential element of the offence, the charge may be defective but not bad. In such a case, the question is whether the accused was prejudiced by the defect (**McVitie** (1960) 44 Cr App R 201; **Skipper v R** [1979] FJCA*

*6; **Tavurunaqiwa v State** (2009) FJHC 198; HAA022l.2009 (10 September 2009)).*

[7] ..... Although the particulars did not expressly state that the appellant used force, the element of force was subsumed in the definition of robbery, thus, making the charge reasonably informative for the appellant to know what was being alleged by the prosecution. In my judgment, the charge was not defective.

*[8] But if I am wrong in my conclusion that the charge was not defective, I am not convinced that the appellant was prejudiced by the charge not stating that the appellant used force to steal the complainant's mobile (see, **Kirikiti v State** [2015] FJCA 150; AAU005.2011 (3 December 2015).The appellant's case was that he was mistakenly identified by the complainant as the person who had robbed him. The issue was whether the appellant was the robber. That is how the appellant presented his case at the trial. Whether force was used or not to steal the complainant's mobile phone was not an issue at the trial.'*

[10] **State v Beci** [2017] FJHC 807; HAA05.2017 (30 October 2017) was a case where the charges of indecent assault under section 154 (1) of the Penal Code had not mentioned whether the victim was 'a woman or girl' but the charges indicated that the appellant had inserted his fingers into her vagina. The appellant had raised an objection in the Magistrates court that the charge was defective for lack of particulars whether the offence had been committed against 'a woman or girl' and succeeded in getting an acquittal from the Magistrate who had followed **Kaukimoce v State** (2009) FJHC 22; HAA0026 of 2008 (30 January 2009) and held that the charge was defective. The High Court in ***Beci*** had correctly not followed ***Kaukimoce*** and held that there was absolutely no doubt that the complainant was a female as the charge referred to the victim as 'her' and the sexual organ as 'vagina' signifying the female genitalia.

[11] In **Deo v State** [2011] FJHC 372; HAA010 of 2011 (06 July 2011) the High Court had usefully remarked on the same mater:

'23. Considering decided cases in Fiji and other similar jurisdiction it is clear that the Accused should be given reasonable details of the charge against him. In simple term the Accused should clearly identify and understand the charges leveled against him. There should not be any ambiguity in the details of charges against him. This Court is of the view if the Accused is given the name of the offence (if provided by the law) or the relevant section is sufficient. Providing more details will be helpful to the Accused but it is not mandatory.

[12] In **Shekar v State** [2005] FJCA 18; AAU0056.2004 (15 July 2005) decided prior to the promulgation of the Crimes Act and the Criminal Procedure Act in 2009, the appellant argued that charges did not disclose any offence known to law or were defective in substance and form**.** The court dealt with it as follows:

> *'[6] At the trial in the Magistrates' Court, the appellants were represented by counsel but no challenge was raised to the suggested defects in the charges. In face of that, the respondent suggests that the terms of section 342 of the Criminal Procedure Code were a bar to the ground being raised in the High Court and they are also a bar in this Court:*
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> *[7] Counsel for the appellants cited the case of **DPP v Solomone Tui** [1975] 21 FLR 4 in which Grant CJ considered the authorities and the similarly worded provision in section 100 of the English Magistrates Courts Act 1952 and accepted that:*
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> > *"Despite its apparent scope, it has been held that the provisions of this section cannot validate a fundamental error going to the root of the matter; such as the failure to include in the charge a necessary ingredient of the offence in question, duplicity of a charge, want of jurisdiction, or a charge which discloses no offence known to law".*
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> *[14] We cannot accept that those omissions were such as to render the charges defective. The purpose of the charge is to ensure that the accused person knows the offence with which he is being charged. Whilst the particulars should be as informative as is reasonably practicable, it is not necessary slavishly to follow the section in the Act.*
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> *[15] Section 119 of the Criminal Procedure Code requires that:*
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> > *"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."*
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> *[18] It is and has long been counsel's responsibility to ensure the charge is correct. In this case the prosecution could and should undoubtedly have worded the charges better. Equally it is defence counsel's duty to ensure that his client understands the nature of the charge before he enters a plea. If the charge does not give sufficient or clear information, an application should be made to the court for correction. The court's duty, if amendment is permitted, is to allow the defence time to deal with the changes. Section 242 makes that clear.*
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> *[19] That section is based firmly on the duty of counsel to which we have referred. The proviso gives a strictly limited discretion to the appellate*

judge to consider alleged defects in the charge in cases where the accused did not have the advantage of counsel's advice in the trial. It does not affect the position where the appellant was legally represented in the magistrates' court as was the case here.

[20] Tui's case was one in which the appellant had not been represented. The decision was that the defects in that case were fundamental and could not be cured. It does not state any novel proposition of law but simply states the basic rule. In the present case, whilst the charge should have been better worded, there was no fundamental fault with the wording and the charge was not defective.

[21] If counsel at the trial had felt the charges were not clear, he should have raised the matter at that time. He did not and he is precluded by section 242 from raising it on appeal.

[13] Section 58 of the Criminal Procedure Act, 2009 is similar to section 119 of the Criminal Procedure Code while current section 279 of the Criminal Procedure Act, 2009 is similar to section 342 of the Criminal Procedure Code. Section 214 of the Criminal Procedure Act, 2009 is similar to section 274 of the Criminal Procedure Code.

[14] Coming back to the current appeal, the defense counsel had not raised any objection based on a defective charge in respect of the offence of theft. The respondents had pleaded guilty to the information without any reservations and admitted the summary of facts. However, the learned trial judge had on his own decided that the 20 dollar difference resulting from the mathematical error (as admitted by the learned judge) was serious enough to treat the charge of theft as defective and acquit the respondents.

[15] In doing so, unfortunately the trial judge had not considered any of the above judicial precedents that had set down relevant principles of law or applicable statutory provisions such as sections 58, 279 and 214 of the Criminal Procedure Act, 2009.

[16] The error in the calculation of the total value was not on an element of the offence of theft. The amount, if at all, would have been relevant in the mater of sentence only. The lesser total amount mentioned in the information would have been to the benefit to the respondents. No objection was taken up by the defense after the information was read over as per section 214 of the Criminal Procedure Act, 2009. Had the judge *ex mero motu* thought that the charge of theft was defective on account of the

mathematical error he should have directed an amendment to the total value accordingly in terms of section 214(2) of the Criminal Procedure Act, 2009.

[17] The charge of theft as formulated in the information was in compliance with section 58 of the Criminal Procedure Act, 2009. Twenty dollar calculation error would not change that position. Every error would not render a charge to be treated as defective. Every defect would not make a charge bad in law either. Even if a charge is defective that would not necessarily lead to an acquittal. The respondents knew what charge or allegation they had to meet and neither the respondents nor their counsel were embarrassed or prejudiced in the way the defence case was to be conducted as a result of the arithmetic error.

[18] Therefore, the learned trial judge had clearly made an error of law in stating:

> *'[7] ……Even though unequivocally admitted by the parties; a court would not be in a position to convict or to find guilty of any person to a defective charge. Hence, I have no option, but to acquit all the juveniles of the 2nd count, which I do accordingly.'*

[19] Firstly, the trial judge had erred in considering the charge of theft as defective. Secondly, if he had treated the theft charge to be defective due to the mathematical error the judge should have acted under section 214(2) of the Criminal Procedure Act, 2009 and have the error rectified.

[20] Therefore, the ground of appeal raised by the state constitutes a question of law alone and no leave to appeal is required. Even otherwise, it has a definite prospect of success in appeal to warrant granting leave to appeal.

[21] Before parting with this ruling I would like to place on record one more matter of importance. Out of the two offences the respondents were charged with theft is the lesser offence in terms of severity of sentence. The respondents, being juveniles, had already been sentenced to 100 hours of community work on the more serious aggravated burglary charge and the state had not challenged that sentence in appeal. Therefore, even if the state proceeds to the full court as permitted by this ruling on its appeal against the acquittal of the respondents on the charge of theft, the Court of

Appeal is unlikely to impose any additional sentence on the respondents other than setting aside the acquittal on count 02 and formally entering a conviction in respect of the count of theft. In the circumstances, since this ruling has clearly recognised and declared the error of law committed by the trial judge, there is little risk of the trial judge's impugned finding being followed by parallel or lower courts in the future. Thus, a hearing before the full court may not be necessary into this appeal and instead the time and resources of the full court would be more usefully and better utilised on another deserving appeal. Nevertheless, it is a matter left to the appellant to decide.

Order

1. The notice of appeal filed by the appellant against acquittal may proceed to the Full Court on the question of law set out under the single grounds of appeal.

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL