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

CRIMINAL APPEAL NO. AAU 122 OF 2019
(High Court No. HAC 72 of 2018)

BETWEEN : **RICHARD ALLEN**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**
Mataitoga, RJA
Andrews, JA

Counsel : **Mr. S. Waqainabete for the Appellant**
Mr. R. Kumar for the Respondent

Date of Hearing : **13 February 2024**

Date of Judgment : **28 February 2024**

JUDGMENT

Prematilaka, RJA

[1] I have read in draft the judgement of my brother Mataitoga RJA. I agree with his reasons and conclusions.

Mataitoga, RJA

[2] The appellant stood indicted in the High Court of Suva with another, on one count of aggravated burglary contrary to section 313(1)(a) of the Crimes Act, 2009 and another count of theft of items and cash to the total value of $1,748.00 contrary to Section 291 (1) of the Crimes Act 2009 committed on 21 January 2018 at Nasinu in the Central Division.

[3] After trial, the assessors had unanimously found the appellant guilty of the two counts as charged. In delivering his judgment, the learned High Court judge had partially agreed with the assessors and convicted the appellant of burglary and theft instead of aggravated burglary. He had been sentenced on 9 August 2019 to 6 years and 6 months of imprisonment as an aggregate sentence.

[4] Leave to appeal against conviction and enlargement of time to appeal against sentence was allowed on 9 November 2021. Leave to appeal against conviction had been mainly allowed under the 1st ground of appeal and enlargement of time to appeal against sentence had been allowed on the sole ground of appeal. They are as follows;

> ***Ground 1- conviction***
>
> *THAT the Learned Trial Judge may have erred in fact and law to unreasonably convict the appellant without independently assessing and considering the totality of the evidence on the doctrine of recent possession, thereby causing a substantial miscarriage of justice.*

Ground 1 - sentence

THAT the Learned Trial Judge may have erred in law by imposing a sentence deemed harsh and excessive without having regarding to the sentencing guideline and applicable tariff for the offence of aggravated burglary.

Appeal Against Conviction

[5] The appellant's single ground of appeal urged in this court, on his behalf by Mr. Waqainabete [Legal Aid Commission] is that the verdict of the High Court trial, was unreasonable or cannot be supported having regard to the evidence on the basis of doctrine of recent possession as that appears to be the only evidence against the appellant. Daniel Raj (PW2) was the driver of the car. PW2's evidence did not establish the appellant as one of the two passengers in his car. There had been three persons including the driver in the car when it was stopped by the police. The police had seen part of the loot inside the car but nothing had been recovered from any of the passengers. Even after the police found some money in the appellant's possession both money and he had been released.

[6] The State had filed an information against PW2 Daniel Raj for the same offending under CF151/18 & HAC 46/18. This charge was later the subject of a nolle prosequi by the Director of Public Prosecutions. After the nolle prosequi was filed against the charge against Daniel Raj, he was later called as a witness (PW2) against the appellant in this matter in the High Court trial . According to the respondent's submission the state counsel who was in carriage of the case against the driver Daniel Raj was the same counsel who did the prosecution against the appellant but she had failed to disclose to court that PW2 was an accomplice. There was a third person who travelled along with the appellant and PW2, who had never been charged or called as a witness against the appellant.

Unreasonable Verdict & No Evidence to Support

[7] In **R v. Bellamy** [1981] 2 NSWLR 727, the Court of Appeal of New South Wales, held that where there is no other evidence available, apart from recent possession, then the jury should be instructed that if it takes the view that the accused's explanation might reasonably be true, then it must acquit the accused. With respect to the doctrine of recent

possession, the state must establish some form of physical possession or dominion (or control) over the property: **R v. Salem** (1989) 41 A Crim R 108 at 114.

[8] For the doctrine of recent possession to operate certain prerequisites should be satisfied namely:

i. that the accused was in possession of the property;

ii. That the property was positively identified by the complainant;

iii, That the property was recently stolen;

iv. that there are no co-existing circumstances, which point to any other person as having been in possession: **Boila v State** [2021] FJCA 184; AAU 049.2015 (4 May 2021) and **Batimudramudra v State** [2021] FJCA 96; AAU11AAU113.2015 (27 May 2021)].

[9] In reviewing the evidence at the trial in this case, factors ii) and iii) referred to in **Boila** (supra) is established from the evidence of the victim (PW1) of the offence. She had positively identified the property and that they were stolen from her home in 10 Dabea Road, Laucala Beach [Refer to Pages 195 and top of 196 Court Record]. The same cannot be said with regard to factors i) and iv) of the prerequisites for establishing recent possession. The evidence against the appellant adduced by the prosecution at the trial, was given by PW2 Daniel Raj and 2 Police Officers PW3 Josateki and PW4 Mahen.

[10] The following evidence was given under oath in court by PW2 Daniel Raj [Car Driver] and two police officers.

PW2 Daniel Raj – Page197 Court Record

Q. What happened after the police stopped the vehicle?
A: they release those two and took me to the station

Q. Do you know why they took you to the station?
A: They thought the items in the car was stolen

*Q. **Were those items seized from your vehicle?***
*A: **yes***

PW3 PC 5513 Josateki – Page 198 – 199 Court Record

Q. What did you do?
A. We drove to Nepani to Pilling Road

Q. Then?
A. So we managed to stop the car at Piling Road

Q. What happened then?
A. Officer Sabua told them to get out of the car.

Q. Who?
A. The Driver and the two passengers who were seated in the car

*Q. **Did you see the passengers seated in the car?***
A. In the front passenger side of the vehicle I saw Richard Allen

Q. Then what happened?
A. Officer Sabua called him and questioned him

Q. What was your role?
A. I conducted a search of the vehicle. I saw some stolen stuff in the vehicle

Cross – Examination – Page 199 -200

Q. In your statement you mentioned PC Sabua left with the taxi driver. Is this correct
A. Yes

Q. Did you and the officers searched the two i-Taukei?

A. Officer Sabua and Officer Mahen searched them.

Q. Was there anything caught on the two i-Taukei

A. The stolen items were found in the car

Q. Why did you let the two i-Taukei go?

A. Officer Sabua questioned them and let them go

PW4 PC 4665 Mahen – Page 200 Court Record

Q. Who were there?
A. Indian Driver [PW2] and two i-Taukei boys. We parked the police vehicle in front of their vehicle. I went out and opened the boot of the vehicle. I found the laptop which was lying in the boot. Then I asked DC Sabua to checked this vehicle thoroughly.
.....

Q. Then what happened?
A. The driver was taken to Valelevu Police Station

Q. What happened to Richard?
A. On 5 February he was arrested. I saw and he confirmed that he is Richard

Q. You said the driver was taken to the police. ***Why not the two passengers?***

A. ***The driver said the items belonged to someone else.***

[11] From the Judge's summing he said this in summarising PW2 Daniel Raj's evidence at paragraph (g) on top of page 9 of the Summing Up:

> *"(g) The witness [PW2] acknowledges that the stolen properties were recovered from his car. He fails to identify the accused as a passenger who travelled with him when the police stopped his car."*

[12] From the transcript of the evidence set out above, there was no evidence that the appellant was in possession of the stolen property. From the same set of evidence, it establishes that there were 3 persons in the car; the driver Daniel Raj who later became PW2 in the trial, the appellant in this case and another person who was not identified. In other words, there were co-existing circumstances because there were 2 other persons apart from the appellant who could have been in possession of the stolen goods. Clearly, the doctrine of recent possession cannot be applied on the facts of this case.

[13] A separate issue that became apparent was the omission of the state counsel at the trial to inform the trial judge that the evidence of Daniel Raj (PW2) was that of an accomplice. He was initially separately charged for the same offence but the DPP entered a nolle prosequi,

so that he gave evidence against the appellant. This omission to inform the trial judge led to no proper direction being given by him to the assessors to approach the evidence of PW2 with caution, being accomplice evidence. This omission to inform the trial judge and the lack of accomplice direction is a miscarriage of justice in the context of the trial where recent possession evidence is the only evidence against the appellant.

[14] On the evidence led by the prosecution in this case, it is difficult to understand why the appellant was chosen to be charged, when possession of the stolen items was at all material time in the possession of PW2, not the appellant. His own evidence said the stolen items in the boot of his car did not belong to the two i-Taukei passengers. The appellant was one of the i-Taukei.

[15] None of the police witnesses in their evidence at the trial, were able to confirm that the appellant had any of the stolen goods or money in his possession at the time they were stopped by the police. The appellant was only charged after several months from the date he was first apprehended by the police and let go. In addition, the failure of the state counsel to inform the trial judge that PW2 Daniel Raj was an accomplice, deprived him of the opportunity to direct the assessors on how to approach the accomplice evidence: **Baleilevuka v State** [2019] FJCA 209.

[16] It is difficult to understand how criminal liability for the offending could be fixed on the appellant alone on the basis of the doctrine of recent possession while excluding the other two persons completely. The three persons were in the car and part of the loot was inside the car but not in the possession of anyone of them. PW2's evidence summarized by the trial judge states that the stolen property was recovered from the boot of his car. He was not able to identify the appellant as one of the passengers in the car when the police stopped at Pilling Road.

[17] On the facts of this case, there was no evidence that the appellant was in possession of the property and second, there were co-existing circumstances because there were 2 other persons apart from the appellant who could have been in possession of the stolen goods. Clearly, the doctrine of recent possession cannot be applied on the facts of this case. This

is apart from the fact that evidence led against the appellant at the trial was largely given by an accomplice, who was initially charged but prosecution entered nolle prosequi in his case to enable him to give evidence against the appellant.

[18] The state (respondent) had the option of charging all three persons in the car on the basis of the doctrine of recent possession, had it decided to do so. Such a course of action would have been at least logical and could be explained in the light of Section 4 of the Crimes Act, 2009 and the concept of joint possession. When the respondent decided to charge only the appellant, upon the evidence led in this case it is doubtful whether one could say that the appellant was ever, on the basis of evidence led during the trial, in possession of the stolen property. In this case there were two other persons who could have been charged on the same basis as the appellant.

[19] Under those circumstances the trial of the appellant was doomed to fail and the evidence adduced was insufficient to prove the case beyond reasonable doubt. Evidence of recent possession and accomplice evidence with no warning by the trial judge appear to be the only evidence against the appellant.

[20] Admittedly, there had been three persons including the driver in the car when it was stopped by the police. The police had seen part of the stolen items inside the van but nothing had been recovered from any of the passengers. Even when the police found some money in the appellant's possession both money and he had been released.

[21] State Counsel at the hearing conceded that the appeal must succeed in the interest of justice.

[22] The Court agrees that the appeal against conviction has merit. The conviction in the High Court of the appellant must be set aside.

[23] The appeal against sentence is not necessary given the outcome of the conviction appeal.

Andrews, JA

[24] I agree with the judgement of Mataitoga RJA

ORDERS

1. *Appeal against conviction is allowed.*
2. *Conviction by the High Court is set aside*
3. *Appellant is acquitted*

Hon. Justice Chandana Prematilaka
RESIDENT JUSTICE OF APPEAL

Hon. Justice Isikeli Mataitoga
RESIDENT JUSTICE OF APPEAL

Hon. Justice Pamela Andrews
JUSTICE OF APPEAL