IN THE HIGH COURT OF FIJI

AT SUVA

APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO. HAA 006 OF 2013S

1. **LUKE DELAINUKUNAWA**
2. **MESAKE RAIVIU**
3. **SHALENDRA PRASAD**

APPELLANTS

vs

THE STATE

RESPONDENT

Counsels	**:**	**Mr. J. Rabuku for the Appellants**
		Ms. M. Fong for the State
Hearing	**:**	**15th March, 2013**
Judgment	**:**	**21st June, 2013**

JUDGMENT

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1. On 14th February, 2007, all the appellants (accuseds) appeared in the Nasinu Magistrate's court, on the following charge:

Statement of Offence

LARCENY: **Contrary to Section 259 (1) 262 of the Penal Code Act 17.**

Particulars of Offence

Luke Delainukunawa, Masake Raiviu and Shalendra Prasad f/n Narendra Prasad, between the 6th and 8th January, 2007 at Nasinu in the Central Division stole, one Subaru vehicle engine valued at $1,000.00 and (2) two gear box valued at $1,000.00 to the total value of $2,000.00 the property of Sarwan Singh f/n Moti Singh.

2. The matter went through some pre trial matters, before the trial proper started on 1st July 2008. On 1st July 2008, only the complainant (Sarwan Singh – PW1) gave evidence. After that, the trial proper resumed on 31st October 2008, wherein the parties agreed to tender by consent the accuseds' caution interview statements and charge statements, as Prosecution Exhibits No.s 1, 2, and 3. The prosecution had only one civilian witness to call ie. Mr. Shalendra Singh. The Defence told the court that Mr Singh had migrated overseas. The prosecution asked for time to locate Mr Singh.

3. On 12th March 2009, the prosecution conceded that Mr. Singh was unavailable and they closed their case. It appeared that the defence conceded there was a case to answer against them and time was given to them to prepare their case. The trial proper did not resume until 9th April 2010. On 9th April 2010, appellant No. 3 gave his sworn evidence. On 10th April 2010, appellant No. 1 gave his unsworn evidence. Later appellant No. 2 gave his sworn evidence. Then two defence witnesses (DW1 and DW2) gave evidence. The trial proper then ended.

4. On 9th March 2011, the court made the following judgement:

JUDGEMENT

1. **Luke Delainukunawa, Mesake Raiviu and Shalendra Prasad f/n Narendra Prasad you have been charged for the offence of:**

Statement of Offence

LARCENY: Contrary to Section 259 and Section 262 of the Penal Code Act. (Cap 17).

Particulars of Offence

2. **Luke Delainukunawa, Masake Raiviu and Shalendra Prasad f/n Narendra Prasad, between the 6th and 8th January, 2007 at Nasinu in the Central Division stole, one Subaru vehicle engine valued at $1,000.00 and (2) two gear box valued at $1,000.00 to the total value of $2,000.00 the property of Sarwan Singh f/n Moti Singh.**

The hearing of this case was held on the 1st of July 2008. Due to the busy schedule of the Court and the fact that there was only one Resident Magistrate handling Court 1 and Court 2 matters intermittently for a period of 10 months in the Nasinu Magistrate's Court the continuation of the hearing was completed on the 10th April 2010. The ruling of this case was scheduled for 04/10/10 but had been further delayed due to the busy schedule of the Court for the above

reasons. Upon transferring to Suva Magistrate's Court I was assigned to Court No. 5 and to Navua Court. This had added to further delays and a final judgment date was then set for today.

This Court heard the evidence in chief by the Prosecution and their witnesses and also the Accused persons and their respective witnesses. Having carefully considered the evidence adduced in Court I am satisfied beyond all reasonable doubt that all three (3) Accused are guilty of the offence of larceny contrary to Section 259 and Section 262 of the Penal Code.

I will now proceed to take your pleas in mitigation and give a date for sentencing.

28 days to Appeal.

Note: Full written Judgement in 30 days.

5. The above judgement was delivered in court on 19th July 2012. Before proceeding to plea in mitigation and sentencing, the defence filed a petition of appeal on 16th August 2012 against conviction, complaining as follows:

   (i) The judgement is dated 9th March 2011 but was pronounced or delivered on 19th July 2012. The judgement stated that a full written judgement was to be delivered in 30 days, that is, from 9th March 2011. However no full written judgement was delivered.

   (ii) The learned Magistrate erred in law in failing to determine this case in accordance with Section 142(1) of the Criminal Procedure Decree 2009 in that judgement dated 9th March 2011 and delivered on 19th July 2012 does not contain the point or points for determination, the reasons for the decision and is not dated or signed by the magistrate at the time of pronouncing it.

   (iii) The learned Magistrate erred in law and in fact in holding that she was satisfied beyond all reasonable doubt that all three petitioners are guilty of the offence of larceny and convicting the petitioners without providing any reasons for her decision, a fatal miscarriage of justice.

6. The above complaints can be dealt with together, as it concerned the interpretation and application of section 142 (1) of the Criminal Procedure Decree 2009, which reads as follows:

142 (1) – Subject to sub-section (2), every such judgement shall, except as otherwise expressly provided by this Decree, be written by the judge or magistrate in English, and shall contain –

(a) The point or points for determination;
(b) The decision and the reasons for the decision; and
(c) Shall be dated and signed by the judge or magistrate in open court at the time of pronouncing it.

7. The above section is similar to section 155 (1) of the repealed Criminal Procedure Code (Chapter 21), which reads as follows:

155. – (1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by the presiding officer of the court in English, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it:

Previous case laws on the interpretation and application of section 155 (1) of the Criminal Procedure Code (Chapter 21) also applied to the interpretation and application of section 142 (1) of the Criminal Procedure Decree 2009, because the two sections are almost identical. I refer to the authorities mentioned in **"Laws of Fiji, Criminal Procedure Code, Chapter 21, Annotated",** by Marie Chan of Chan Law, 2008, in the footnotes to section 155(1) of the Criminal Procedure Code.

8. On 1st March 2013, when the matter first came before the High Court, both the appellants and the respondent agreed that the learned Magistrate, in writing the judgement on 9th March 2011, as quoted in paragraph 4 hereof, did not comply with the mandatory requirements of section 142 (1) of the Criminal Procedure Decree 2009. She did not mention the points for determination. She did not given details of her reasons for finding the appellants guilty as charged. In this case, there was a need for an analysis of the evidence, and how the elements of the offence of Larceny, had been satisfied beyond reasonable doubt, on the accepted evidence. There was no analysis of which evidence was accepted or rejected, and why. It was essential that an accused person must know the reasons of why he or she was found guilty as charged. That was fundamental in any criminal case judgement. Because of the above, both parties agreed that the convictions of the appellants must be quashed. I agree with them, and accordingly I quashed the convictions of the appellants on 9th March 2011.

9. Should there be a re- trial? I have called for submission from the parties on this issue. Both have submitted very helpful authorities. I acknowledge the binding authority of **Azamatula** vs **The Sate**, Criminal Appeal No. AAU 0060 of 2006, Fiji Court of Appeal, especially paragraphs 12 to 15 of their Lordships' judgement. I thank Mr John Rabuku, counsel for the appellants, on his powerful and persuasive submissions. I thank Ms. M Fong, Counsel for the state, in her forthrightness in conceding that, there was no need for a re- trial, on the ground that, it was not in the interest of justice, to do so. Reading through the court record, I agree with Mr. Rabuku that the prosecution's case was weak. One of their main witnesses was overseas. If a re- trial is ordered, it might give the prosecution a chance "to plug the loopholes". Because the alleged incident occurred in 2007, a re-trial would probably be in 2014 or 2015, and witnesses' memory would probably be faded by then, and the quality of evidence suffers. It would also be an intolerable strain on the appellants to subject them to a re- trial. I agree with Mr. J. Rabuku. Re- trying this case will be a waste of scarce resources. More so when we are dealing with properties worth $2,000. Given the above, I order that the public interest and the interest of justice required that no re- trial be ordered.

10. In summary, the appellant's appeal are allowed and the case is not to be re-tried. I order so accordingly.

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JUDGE

Solicitor for the Appellants: **Law Solutions, Suva.**
Solicitor for State : **Office of the Director of Public Prosecution, Suva.**