IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION
CRIMINAL MISCELLANEOUS CASE NO: HAA 03 OF 2016

BETWEEN : **KRISHNEEL DEEPAK KUMAR**

Appellant

AND : **STATE**

Respondent

Counsel : **Appellant in Person**

Ms. R. Uce for the Respondent

Date of Hearing : **30th March, 2016**

Date of Judgment : **02nd May, 2016**

JUDGMENT

A. INTRODUCTION

1. The Appellant, Mr. Krishneel Deepak Kumar ('hereinafter referred to as the Appellant') appeals his conviction and sentence recorded by the learned Magistrate at Lautoka in criminal case No. 103 of 2015.

2. He was charged in the Lautoka Magistrates Court with the following offences:

FIRST COUNT

Statement of Offence (a)

THEFT: Contrary to Section 291 (1) of the Crimes Decree No. 44 of 2009.

Particulars of Offence (b)

KRISHNEEL DEEPAK KUMAR on the 23rd day of January, 2015 at Lautoka in the Western Division dishonestly appropriated a motor vehicle registration number CB 990 valued at $1,900.00 the property of **MOHAMMED ALFAZ DEAN** with the intention to permanently deprive the said **MOHAMMED ALFAZ DEAN**.

SECOND COUNT

Statement of Offence (a)

THEFT: Contrary to Section 291 (1) of the Crimes Decree No. 44 of 2009.

Particulars of Offence (b)

KRISHNEEL DEEPAK KUMAR on the 23rd day of January, 2015 at Lautoka in the Western Division dishonestly appropriated 1 x Dual brand car radio valued at $400.00 the property of **MOHAMMED ALFAZ DEAN** with the intention to permanently deprive the said **MOHAMMED ALFAZ DEAN**.

3. On the 12th of February, 2015 the Appellant was first produced before the Lautoka Magistrates Court and was remanded.

4. On the 10th of March, 2015 the Appellant appeared with his counsel from the Legal Aid Commission and pleaded 'Not Guilty' to both counts.

5. On the 24th of March, 2015, Defence Counsel informed Court of the Appellant's intention to challenge his caution interview and sought time to file grounds of *voir dire*. Filing grounds of *voir dire* through his Counsel, Appellant requested that he be disclosed three documents including Namaka Police Station Diary entries from 08-02-2015 to 09-02-2015.

6. On the 22nd of June, 2015, the Prosecution served *voir dire* disclosures on the Defence Counsel in the presence of the Appellant and the matter was fixed for *voir dire* hearing on the 8th of July, 2015.

7. On the 6th of July, 2015, the Court was informed that the Appellant had escaped from remand custody.

8. On the 8th of July, 2015, Defence Counsel informed Court that no instructions had been received from the Appellant. The Court, being satisfied that the Appellant was well aware of the hearing date, proceeded with the *voir dire* hearing pursuant to Section 171 (1) (a) of the Criminal Procedure Decree 2009.

9. The *voir dire* hearing was concluded on the 13th of July, 2015 after the Prosecution called 5 police witnesses for its case.

10. On the 17th of July, 2015, the Court ruled that the Appellant's caution interview was admissible and proceeded with the substantive trial on the same date. The Prosecution called 4 witnesses for its case.

11. On the 20th of July, 2015, the Court delivered its Judgment and convicted the Appellant on both counts as charged.

12. On the following day, that is on the 21st of July, 2015, the Court was informed that the Appellant had been arrested. The Court adjourned the case for the Appellant to be produced to provide mitigation before sentencing.

13. On the 3rd of November, 2015 the Court sentenced the Appellant to 30 months' imprisonment with a non-parole period of 2 years.

14. The trial Magistrate found the cautioned interview in which the accused confessed to the crimes admissible after trial within trial held *in absentia*. He also found the Appellant guilty on both counts and convicted the accused accordingly. Accused was not represented by a counsel in either proceeding.

15. On the 5th of November, 2015 the Appellant submitted his grounds of appeal against conviction and sentence which were filed through the Lautoka Correctional Service on the 30th of November, 2015.

B. GROUNDS OF APPEAL

16. Grounds of appeal submitted (in verbatim) by the Appellant are as follows:

I. *That the trial for the matter at hand was commenced and approved in the absence of the appellant whereby it has breached the Constitutional Right of the appellant to have a fair trial as stipulate under Section 15 (1) of the constitutional as stated (1) every person charged of an offence has the right to a fair trial before a court of law. I the appellant believe that the trial in this matter was unfair, biased and prejudiced due to it being a single sided affair;*

II. *That the learned Magistrate erred in law and in fact by not giving proper discount for the period spent in remand custody. The learned Magistrate state in his sentencing in Para 6, that it appeared to the court that I had appeared in court on the 12th of February 2015 but that honorable Magistrate failed to give a proper discount for the period in remand whereby he only back dated the sentence to the 4th of August 2015 but never has been granted bail in question neither was any formal bail application ever filed in Court;*

III. *That the learned Magistrate erred in law and in fact by not properly establishing all the elements of the offence whereby in paragraph 4 stated I had used a technique to steal a motor vehicle but no evidence or elaboration was given to what the technique was thus putting a shadow of doubt over the physical element of the offence;*

IV. *That the sentence imposed by the learned Magistrate is manifestly harsh and excessive considering all the circumstance of the case and also the learned Magistrate failed in law and in fact whereby the learned Magistrate did not give even a single thought to Section 14 (2) (n) of the Constitution of Fiji;*

V. *That the learned Magistrate erred in law and in fact when released the police exhibit (evidence) to the complainant before the trial date was even set thus contravening Section 155 (a) and Section 156 (i) subsection 3 (a) of the Criminal Procedure Decree No. 43 of 2009. Miscarriage of Justice occurred when the trial Magistrate on his own discretion returned the items recovered to the complainant even though the accused had opted for legal counsel and particularly in case as such theft whereby the only material evidence which the court had brought forward to close examination to determine the validity of the offence. Neither was any motion or application filed to the honorable court for the return of the items that clearly shows that the learned Magistrate exercised his own discretion and add did not allow to evaluate the whole case and also did not give the appellant a chance to seek proper counsel from Legal Aid Commission.*

VI. *The learned Magistrate fell into error when he failed to consider the Namaka cell diary as that it was also requested by the defence for voir dire, please consider the Namaka cell diary. Cell diary attached with list of injuries which is sufficient and neither was any medical report brought forward by the Prison Department pertaining to the order dated 24/2/2015;*

VII. *That the learned Magistrate fell into error when he considered the caution interview as admissible evidence;*

VIII. *The learned Magistrate erred in law and in fact when he considered the evidence of the prosecution and stated in his sentencing in paragraph 3 "you stole the car stereo" but never I believe was the material evidence which is the 'car stereo' ever presented in court;*

IX. *That the learned Magistrate fell into error when he set a 2 years non-parole period.*

C. ANALYSIS

17. It appears that the grounds (I), (III), (V), (VI), (VII) and (VIII) are in relation to conviction whilst grounds (II), (IV) and (IX) are in relation to sentence. I begin my analysis with the grounds challenging conviction.

Appeal against Conviction

Ground I

18. The Appellant submits that the learned Magistrate fell into error when he proceeded with the *voir dire* hearing in the absence of the Appellant. He further claims that both the proceedings were unfair, biased, and prejudicial and breached his constitutional right to a fair trial guaranteed under Section 15 (1) of the Constitution of the Republic of Fiji.

19. Section 15(1) of the Constitution of the Republic of Fiji guarantees to a person charged with an offence the right to a fair trial before a court of law. Proviso to Section 14(2) (h) also allows the Court to proceed with the trial in the absence of the accused.

20. To ensure a fair trial, Constitution further provides for the right of an accused person to be present during trial:

> *14 (2) Every person charged with an offence has the right –*
>
> *(h) to be present when being tried, unless—*
>
> *(i) the court is satisfied that the person has been served with a summons or similar process requiring his or her attendance at the trial, and has chosen not to attend;*

21. Even before the promulgation of the present Constitution, Section 171 (1) of the Criminal Procedure Decree 2009 invested magistrates with discretion to proceed with the hearing *in absentia*:

> *"If at the time or place to which the hearing or further hearing is adjourned —(a) the accused person does not appear before the court which has made the order of adjournment, the court may (unless the accused person is*

charged with an indictable offence) proceed with the hearing or further hearing as if the accused were present;"

22. The Constitutional provision speaks of a 'trial' whereas the Criminal Procedure Decree speaks of a 'hearing'. When considered the impact of the finding on *voir dire* proceedings on the final outcome of the trial and the rights of an accused person, Constitutional wording 'trial' should be interpreted to include 'trial within trial'.

23. The Appellant claims that he was not informed of any trial date. However, in page (4) of the Magistrate's Minutes, it is clearly stated that the Appellant was present with his Counsel on the 22nd of June 2015 when the hearing date was fixed. Counsel from Legal Aid Commission represented the Appellant and received disclosures on his behalf when served by the Prosecution. The Appellant is now estopped from claiming that he was not informed of the hearing date. He was present and his interests in Court were looked after by his Counsel when the hearing date was fixed although she did not defend him at the hearing.

24. The Appellant submits that the Court should have issued a warrant of arrest to satisfy the requirement in Section 14(2)(h)(i) of the Constitution before proceeding *in absentia*. He further submits that warrant, being a 'similar process' within the meaning of the constitutional provision requiring his attendance, should have been issued in the first place by the learned Magistrate before he could form an opinion that the accused had chosen not to attend.

25. There is no need to issue a warrant and await the report for the learned Magistrate to be satisfied when an accused person had escaped from remand custody. The Magistrate could have taken the information given by the prison officer for granted and taken judicial notice of the fact that a prisoner had escaped from remand custody in order to satisfy himself that he (prisoner) had chosen not to attend. Furthermore, Appellant's Counsel on 8th July, 2015 confirmed to Court that his client had escaped from prison. Therefore, the learned Magistrate was rightly satisfied and formed the opinion that the Appellant had chosen not to attend court to face his trial.

26. If the Appellant, whilst he is on bail, had absconded then the learned Magistrate should have issued a warrant in the first place and awaited a report with some evidentiary value (affidavit) for him to be satisfied that he had chosen not to attend. The situation is different when an accused person had escaped from remand prison. Therefore, this ground has not merit.

Ground III

27. The Appellant submits that the elements of the offence had not been established, in particular, the physical element of the offence. He claims that there was no evidence led in relation to the 'technique' used to steal the motor vehicle. In his submission, the Appellant highlights that *"there was no single evidence that could collaborate the allegation that the appellant was anywhere even near the said motor vehicle let alone any evidence to prove that the said motor vehicle was driven away or taken by the appellant".*

28. To establish the offence of Theft, prosecution is under no obligation to prove that the accused used a 'specific technique' to appropriate the property stolen, although the using of such a technique could mount a ground for aggravation at the sentencing stage [(***Ratusili v State*** *Crim . App No. HAA011of 2012*)].

29. The learned Magistrate did consider the technique used to commit the offence when he found the accused guilty of Theft although he considered it as an aggravating factor in his sentencing ruling.

30. Having described elements of Theft in Paragraph 5, learned Magistrate in paragraph 10 of the judgment states as follows:

> *"I have considered whether the elements of the two counts are established by the prosecution. There was ample evidence to prove that the accused stole the car belonging to the complainant on the 23rd January 2015 without his consent in order to deprive him of the said property. Also there was ample evidence adduced by the Prosecution that it was the accused who sold the car radio to a third person which was later recovered by the police. Further the evidence of the Prosecution was more buttressed by the voluntary confession of the accused".*

31. Section 291 of the Crimes Decree. Section 291 of the Crimes Decree states that;

> *"A person commits a summary offence if he or she dishonestly appropriates property belonging to another with the intention of permanently depriving the other of the property"*

32. Pursuant to Section 291 of the Crimes Decree, the main elements of the offence of Theft are that;

[a] The Accused,

[b] Dishonestly appropriates,

[c] Property belonging to another,

[e] With the intention of permanently depriving the other of the property.

33. Section 291 of the Crimes Decree replaced the physical element of Theft namely, "takes and carries away anything capable of being stolen without the consent of the owner" under Section 259 of the Penal Code with wider and expanded element of "appropriates property belonging to another". The physical element as defined under Section 259 of the Penal Code was limited only to taking or carrying away of the property. However, Section 291 of the Crimes Decree has expanded the scope of the physical act to cover not only taking and carrying away, but also the assumption of the right of ownership, possession, or control (appropriation) of any property without the consent of the person to whom it belongs.

34. It is clear from the proceedings in relation to the substantive trial (page 10-13 of the copy record) that none of the witnesses for the Prosecution adduced any direct evidence to establish that Appellant took possession or control of the complainant's vehicle or the radio in it. Learned Magistrate relied on the Appellant's admissions in his caution interview and the circumstantial evidence to come to the finding that the physical elements of the offence had been established. Therefore, before expressing any opinion on Ground III, it is necessary for me to come to a definite conclusion on grounds VI and

VII raised on *voir dire* finding and grounds V and VIII raised on non-production of stolen property for inspection as exhibits.

Grounds VI and VII

35. By raising grounds of appeal VI and VII, the Appellant challenges the learned Magistrate's finding on *voir dire*. Appellant submits that the learned Magistrate failed to consider the Namaka Station Diary which he claims lists the injuries that he sustained whilst in police custody.

36. According to page (4) of the Magistrate's Minutes, the Prosecution had served disclosures on 22nd June 2015 before the *voir dire* hearing date was fixed for 8th July 2015. There is nothing to indicate as to what disclosures were served. The Appellant and his counsel were both present when they were served. However, it seems that Defence Counsel had no opportunity to check if all the disclosures, including the Namaka Police Station Diary, had been served because by the hearing date, accused had escaped forcing his Counsel to withdraw. *Voir dire* proceeded *in absentia* and the accused was unrepresented right throughout. No issue was raised in Court with regard to Namaka Police Station Diary. Therefore, the argument of the Respondent that '*if there were any issues, then this would have been noted in the Court record and certainly the hearing date would not have been fixed'* cannot hold water.

37. Upon conclusion of *voir dire* proceedings, the learned Magistrate, having satisfied himself that the cautioned interview of the accused was made voluntarily, held it to be admissible in evidence at the trial.

38. The following two grounds of *voir dire* were filed on behalf of the Appellant with a request that he be disclosed certain documents including Namaka Police Station Diary containing entries of 8th and 9th of February, 2015.

    (1). That the will of the accused was overcome by arresting police officers at Nadi Police Station when they assaulted the accused by punching and assaulting the accused with use of weapons so as to force the accused to make an involuntary confession and admit to the offence.

(2). That the interview statements of the accused were fabricated and made up by the interviewing officer when they charged that accused for 8 offences in 1 day.

39. It is clear that ground (2) above raised by the Appellant does not give rise to a *voir dire*. Nevertheless, the learned Magistrate proceeded with both grounds and, having heard evidence of five police witnesses, held inter alia:

> *"I am satisfied that the Prosecution has proved beyond reasonable doubt that the accused made the statement to the police voluntarily and on his own free will. There was nothing to suggest that the accused was coerced or intimidated to admit the offence. Further, there is nothing which suggests that that is a fabricated one".*

40. In coming to his finding, the learned Magistrate failed to give any consideration to Namaka Police Station Diary entries of 8th and 9th of February, 2015, the main piece of evidence relied on by the Appellant to prove police brutality. He also failed to inquire or follow up his own Order dated 12th of February, 2015 wherein he stated *"Accused to be produced before a medical doctor for treatment as he complains of injuries".*

41. Namaka Police Station Diary carrying entries of 9th of February, 2015 clearly indicates that Appellant had at least five injuries on his body; bruises on the right side of rib, bruises on the left knee, swollen left arm and left knee, nose swollen, black eye (right). In view of the magisterial Order that the accused be produced for treatment (not for mere examination), it can be assumed that the Appellant had some injuries when he was produced before the learned Magistrate.

42. The Appellant also raised the fact that he was not served with any medical report by the Prison Department after he was produced before a doctor. There is nothing to indicate whether he was in fact taken for medical examination or whether he was served with his medical report.

43. It is not clear whether the Namaka Police Station Diary containing entries of 8th and 9th February, 2015 was available to the learned Magistrate. However, in view of the above mentioned Order for medical treatment he made and the *voir dire* grounds filed by the

Appellant requesting Namaka Police Station Diary, the learned Magistrate was duty bound to give due consideration to this document as a judicial officer trying an undefended accused *in absentia*.

44. According to their evidence, neither the Interviewing Officer, PC 3863 Wara nor the Charging Officer PC Manoa noticed any injury on the Appellant on the 10th of February 2015. None of the police officers who gave evidence had seen any injury on the accused despite the entry in the Station Diary to the contrary.

45. Detective CPL Penaia gave evidence on the basis that it was he who arrested the Appellant in Nadi on the 9th February, 2015, whilst doing an operation to arrest an accused. Learned Magistrate having noted that the witness had not initially arrested the Appellant ordered the Prosecution to call the officer who initially arrested him to give evidence (vide proceedings 9.7.15).

46. On the next hearing day (13.07.15), Prosecution called DC Opeti. He said that it was he who arrested the Appellant on the 6th of February 2015 when he was with his girlfriend at the Nadi Bus Station. Evidence of the Police officers not only contradicted each other on his arrest but also raised serious issues of Constitutional Right violation.

47. Appellant had been arrested on 6th of February, 2015. He was produced before the Magistrate on the 12th of February, 2015. There was no evidence adduced before the learned Magistrate to show that the Appellant was produced before a magistrate within 48 hours or within reasonable time as required by the Constitution. He was charged for eight offences in one day. The learned Magistrate should have looked not only in to the voluntariness, but also into fairness and prejudice caused to the Appellant by breach of his Constitutional rights during the course of the cautioned interview. Evidence led at the *voir dire* hearing does not support the learned Magistrate's finding on admissibility of the cautioned interview. Therefore, Grounds VI and VII succeed.

Grounds V and VIII

48. Apart from the confession which I have just found not admissible, learned Magistrate relied on circumstantial evidence to find the accused guilty on the two counts. The

Appellant highlights in his submission on Ground VIII that the recovered items were the only material evidence and should have been brought forward for close examination to determine the validity of the offence.

49. The Appellant further submits in Ground V that the learned Magistrate erred in law and in fact when he released the police exhibit to the complainant before the trial date was fixed. The Appellant relies on Section 155 (a) and Section 156 (1), (3) (a) (b) of the Criminal Procedure Decree.

50. Section 155 deals with disposal of properties or things produced in evidence or as to which questions may arise in the proceedings before conclusion of the trial while Section 156 deals with final disposal of stolen properties after conviction of the accused.

51. It is important to note that this provision of Section 155 does allow the Court to dispose of properties and release them to the person who is entitled to the possession thereof even before the conclusion of the matter and even in the absence of a formal application.

> *155. — (1) It shall be lawful for any court in any criminal proceedings to make orders for—*
>
> *(a) the preservation or interim custody or detention of any property or thing produced in evidence or as to which questions may arise in the proceedings;*
>
> *(b) the sale, destruction or other disposal of any such property or thing which may be of a perishable nature or liable to deteriorate, or which may be dangerous;*
>
> *(c) the restoration or awarding of possession of any such property or thing to the person appearing to the court to be entitled to possession of it, without prejudice to any civil proceedings which may be taken in relation to it;*

52. The learned Magistrate did not err in law and in fact when he released the recovered item, in this case, the taxi and car radio, to the virtual complainant. It is to be noted from the proceedings of 12th of February, 2015 that the learned Magistrate had in fact considered

such an application and noted that the *"Accused does not claim for the items recovered. The items to be released to the complainant."* The Appellant was present when the application was made and raised no objection to the release of the recovered items. The Appellant had later engaged a Counsel from Legal Aid Commission and therefore, if he had an issue regarding the release of the items, he could have informed his counsel who would have raised this issue before the learned Magistrate. This was not done. Therefore, Ground V fails.

53. Learned Magistrate, no doubt, released the recovered items (by an Order made either on Section 151(1) (a) or (c) of the Criminal Procedure Decree) on a temporary basis subject to the final determination of their fate. They formed part of real evidence or *'property or thing produced in evidence or as to which questions may arise in the proceedings'*.

54. Released items were not produced by the Complainant or the Prosecution at the trial to be inspected by Court or by the witnesses although they had crucial evidentiary value in the case. Inspection of recovered items *per se* does not determine the validity of the offence. However, in a case where the prosecution relies heavily on circumstantial evidence, those items form an important part of the chain of circumstances to be established by the Prosecution. Prosecution must prove that the recovered property is nothing but the stolen property of the complainant. It must also establish that the stolen property came into the possession of the person from whose custody it was taken from no one other than the Accused. Non -production for inspection of those properties when it is claimed that they had been recovered, will definitely impair the credibility of the Prosecution version. If the Appellant had been present at the trial, he could have impeached the credibility of the Prosecution witnesses on these lines.

55. One of the alleged stolen properties (Car Radio) was recovered from a mini bus driver Krishneel Raj who was called by the Prosecution as a witness. He was not shown the radio alleged to have been taken from his custody for him to ascertain whether it was the same item he bought. According to his evidence, the person who sold the radio to him was not known to him before. He had bought the radio from a Hindi speaking Fijian man on 10th of February, 2015. At the Police Station, he was informed that the person who

sold the radio is one Krishneel Deepak Kumar. There is no evidence that the accused confronted the witness at the police Station.

56. Krishneel Raj's evidence is completely contradictory to the caution interview and other evidence led in the trial. Appellant was taken into custody on the 6th of February 2015. When Raj bought the radio from a Hindi speaking Fijian man on the 10th of February, 2015, the Appellant had been in police custody. Furthermore, at the police station, Raj had no opportunity to ascertain the identity of the person who sold the radio to him. The link between the Appellant and the 'so called stolen property' is not established beyond reasonable doubt.

57. Nevertheless the learned Magistrate disregarded the crucial contradictions and improbabilities in the Prosecution version. He stated in paragraph 7: *"Although the witness said that it was on 10th February it seems that there is a disparity in the dates. However, I decide to disregard the disparity in the date as the accused has admitted selling of the radio to a mini bus drive".* Therefore, Ground III has merit and succeeds.

58. Before the promulgation of the present Constitution and in the absence of any provision in the Criminal Procedure Decree, 2009 on trials *in absentia* (so far as High Court hearings are concerned), Justice Priyantha Fernando in ***Fiji Independent Commission Against Corruption v Nemani*** [2012] FJHC 1309; HAC37A.10 (3 September 2012) explored the possibility of conducting a trial in the absence of the accused without jeopardizing his or her fair trial safeguards. Having looked into the Common Law position and having cited from English jurisprudence, His Lordship held:

> *"However her rights have to be safeguarded at the trial in absentia by the presiding Judge. Assessors shall be clearly warned not to hold the absence of the accused against her. Further the prosecution should disclose and present in evidence all relevant material facts that would be advantages to the accused to the assessors. Judge must also warn the assessors in his summing up that the absence of the accused is not an admission of guilt and adds nothing to the prosecution case. Judge must also take steps to expose weaknesses of the prosecution case in his summing up".*

Magistrates doing trails in the absence of the accused must always be mindful of and direct themselves to the principles and caution expressed in ***Nemani*** *(supra)*

59. In the present case in appeal, the learned Magistrate failed to ensure that fair trial safeguards of an accused person when he is tried *in absentia* are available to the Appellant. At one time, Appellant had escaped from custody and that fact had been referred to in the sentencing Ruling. The learned Magistrate should have manifested that his judgment was not swayed in anyway by the accused's absence and his escape from remand custody. Therefore, Appellant's conviction on both counts is liable to be quashed.

60. The Appellant also raised in his submission that he was not given a chance to seek proper counsel from the Legal Aid Commission. However, this is contrary to the Magistrate's Minutes as they clearly indicate that the Appellant was represented by a Counsel from the Legal Aid Commission on more than one occasion. Therefore, this ground has no merit.

Appeal against the Sentence

Ground II

61. This ground deals with the discount given for time spent in remand. As per the Magistrate's Minute, the Appellant was first produced in custody on the 12th of February, 2015 and was remanded. There was no bail application made nor was there any noted to be filed by the Appellant or his counsel from the time he was first produced until he was convicted.

62. On the 6th of July, 2015, the Court was informed that the Appellant had escaped from custody. The Appellant was then produced in Court on the 4th of August, 2015. However, on the 21st of July 2015, the Prosecution informed the learned Magistrate that the accused had been arrested in Savusavu.

63. The learned Magistrate had noted that the Appellant was remanded in custody for another matter and therefore, discount for remand period was counted from the 4th of August, 2015, the day he was produced before the Magistrate. The Appellant raised the issue that the sentence is contrary to Section 24 of the Sentencing and Penalties Decree.

Section 24 Sentencing and Penalties Decree No. 42 of 2009 provides:

> *"If any offender is sentenced to a term of imprisonment any period of time during which the offender was held in custody prior to the trial of the matter or matters shall unless the court otherwise orders, be regarded by the court as the period of imprisonment already served by the offender.*

64. It appears that the learned trial Magistrate took into consideration an irrelevant factor when he considered in paragraph 6.5 of the sentencing Ruling the fact *"although you were in remand custody not especially for this case...."* to calculate the remand period. The fact that he is in remand for other matter has no relevance to the matter in hand. The learned Magistrate should have directed himself to Section 24 of the Sentencing and Penalties Decree and given the discount accordingly. Therefore, this ground has merit and it succeeds.

Ground IV

65. This ground is in relation to the sentence imposed which the Appellant claims is manifestly harsh and excessive considering all the circumstance of the case. The Appellant states that the learned Magistrate failed to consider Section 14(2)(n) of the Constitution of Fiji which reads:

> *"to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time the offence was committed and the time of sentencing."*

66. The above provision is irrelevant to the circumstance of this case as the prescribed maximum penalty for the offence of Theft is still the same that is 10 years' imprisonment. And also, the applicable tariff for the offence of Theft as per the case of ***Ratusili v State*** *Criminal Appeal No. HAA 011 of 2012* was applied by the learned Magistrate.

67. The Appellant raised in his submission that the sentence was harsh and excessive when the sentences for both counts were made to run consecutively to each other and therefore, the learned Magistrate failed to consider the totality principle. The Sentencing and

Penalties Decrees allows the Court to order sentence to run consecutively or concurrently as per Section 22.

68. This provision was discussed by the Fiji Court of Appeal in ***Vukitoga v State*** *[2013] FJCA 19; AAU0049.2008 (13 March 2013)* which was referred to in ***Dhirendra Nandan v State***- *HAM 162 of 2014*. The Court held that a concurrent sentence should be imposed and that if the Court intends to impose a consecutive sentence, then the Court must give a justifiable reason to do so. In this case, the learned Magistrate has imposed a consecutive sentence without any reason noted. Therefore, Appellant's argument has some merits.

Ground IX

69. The Appellant argued that the learned Magistrate fell into error when he imposed a 2 years' non-parole period. The Appellant has not made any further submission to clarify this ground. Non-parole period is not excessive and not in breach of the Sentencing and Penalties Decree in relation to the sentence the learned Magistrate imposed.

D. CONCLUSION

70. There is substance in grounds raised by the Appellant against his conviction and Sentence. For the reasons given, I quash the conviction and sentence of the learned Magistrate at Lautoka. Appellant has already served both in remand and prison for more than one year. If the sentences imposed on him were to run concurrently, he would have served almost his full sentence. Therefore, I do not order a retrial.

Aruna Aluthge
Judge

HIGH COURT OF FIJI
LAUTOKA

At Lautoka
02nd May, 2016

Solicitors: **Appellant in Person**
Office of the Director of Public Prosecution for Respondent