

IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

Criminal Appeal No. HAA 008 of 2015

SAMUELA MACEDRU

Appellant

v

STATE

Respondent

Counsel: Mr. J. Savou (LAC) for appellant.
Ms. P. Madanavosa for the State.

Dates of hearing: 10 March and 28 April 2015

Date of Judgment: 1 May, 2015

JUDGMENT

[1] After trial in the Magistrates Court at Suva, the appellant was convicted of one charge of theft of a purse containing F\$500 cash and one count of resisting arrest by a police officer. He now appeals those convictions.

[2] His grounds of appeal are as follows:

- 1) The learned trial Magistrate had wrongly allowed dock identification of the appellant which was prejudicial resulting in a substantial miscarriage of justice.
- 2) The learned Magistrate erred in law and in fact when he did not properly direct himself on the essential elements of the charge of theft contrary to section 291 of the Crimes Decree 2009 resulting in a substantial miscarriage of justice, and
- 3) The learned trial Magistrate erred in law and in fact when he did not properly direct himself on the essential elements of the charge of resisting arrest contrary to s.277 of the Crimes Decree 2009 resulting in a substantial miscarriage of justice.

[3] The facts of the case as far as possible gleaned from the inadequate Court Record are that on the 23rd November 2012 at Nairai Road, Raiwaqa, the complainant with her husband and four children were in Raiwaqa preparing to go to the city for shopping. On their way to the bus stop, she met 2 men and a pregnant lady on the street. The men and woman appeared to be drunk. One of the men grabbed her purse containing \$500 and gave it to the pregnant lady before running away. The complainant saw the snatcher and identified the accused in a dock identification. Acting on information, the Police later went to the accused's house. They found him there watching TV and when trying to apprehend him, the accused tried to run away. He punched the arresting officer and wounded his arm.

[4] The learned Magistrate devoted his entire judgment to issues relating to identification of the accused by both the complainant and her husband. He reminded himself of the **Turnbull** criteria and then applied them to the identifications of each witness.

- [5] Both the complainant and her husband were permitted to identify the accused in the dock during the trial hearing. However before allowing dock identifications a solid basis must be laid. There must be evidence that the Court identification will be reliable. It was said recently in the Court of Appeal in **Peni Lotawa** AAU0091 of 2011 (para 7)

“Dock identification is completely unreliable in the absence of a prior foundation of identity parade or photographic identification because it then becomes the ultimate leading question. The answer is obvious to any witness – the person to be identified is sitting in the dock.”

- [6] In the present case the complainant had never seen the accused before and there had not been an identification parade. Moreover the accused was unrepresented. As the Privy Council had determined in **Holland v. HM Advocate** (June 7, 2005 unreported) such an identification without proper basis and where the accused is unrepresented could be incompatible with a fair trial
- [7] The identification by the husband, apart from bearing the same factors of uncertainty pertaining to his wife, raises far more disturbing issues. In fact he had not even seen the theft committed. He was sitting in a taxi at the time with his children when the wife came to him screaming that her purse had been stolen. It was then that he saw the man he knew as “Tuks” running away from the scene. There could be any reason why Tuks was running away and it could never be said that the husband had seen Tuks steal the wallet.
- [8] The dock identifications of the accused by both the husband and the wife are unreliable and it would not be safe to confirm the conviction of the accused on the basis of those two identifications alone. The Magistrate had not bothered to

address any other issues in his judgment apart from identification. The conviction on the theft charge is quashed and the sentence set aside.

- [9] The second count of resisting arrest contained in another file (1705/12) is clearly made out by the evidence of the police officers at trial. The officers had approached this accused declaring arrest and he had tried to elude them, one officer saying that the accused resorted to punching the arresting officer.
- [10] After addressing the evidence on this charge, the Magistrate said that he believed the officers and found that the prosecution had proved the charge beyond reasonable doubt.
- [11] It is very odd that the resisting arrest charge had never been put to the accused. He was never asked to enter a plea to it. The charge is listed in the associated Magistrate's Court file (1705/2012) but the Magistrate's notes on that file are woefully inadequate. No mention is made neither of its disposal nor of its transfer to the main file (1704/12). Even though the Magistrate has found the charge proved beyond reasonable doubt there is no conviction for it and no sentence.
- [12] Because of the totally irregular proceeding below with regard to the resisting arrest count and because the record fails to record a plea being taken to it, it cannot stand as a conviction against this accused (if he ever were convicted of it) and that charge too is set aside.
- [13] This appeal succeeds to the extent that both counts are quashed and dismissed and the sentence of three years for theft is set aside.

[14] Before leaving this appeal it must be said that in the interests of transparency, Magistrates must be seen to deal with every charge that comes before them and their notes, no matter how busy they are, must show the world that there is due process in their courts and that every accused person has a fair trial. To fail to have an accused plead to a count but then hear evidence on it and then find it proved but not pass a conviction or sentence for it, is totally unacceptable.



At Suva
1st May 2015

A handwritten signature in blue ink, appearing to read "P. K. Madigan".

P. K. Madigan
Judge