

IN THE HIGH COURT OF FIJI

AT SUVA

MISCELLANEOUS JURISDICTION

MISCELLANEOUS CASE NO. HAM 137 OF 2014S

BETWEEN

THE STATE

APPLICANT

AND

SERA FAKALAWA KOBITI

RESPONDENT

Counsels : Mr. L. Fotofili and Mr. T. Qalinauci for Applicant  
Mr. J. Reddy for Respondent  
Hearing : 4 May, 2015  
Judgment : 29 April, 2016

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## JUDGMENT

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1. On 20 February 2013, in the presence of her counsel, the following charge was read and explained to the respondent (accused):

*Statement of Offence*

DAMAGING PROPERTY: Contrary to section 369 of the Crimes Decree No. 44 of 2009.

*Particulars of Offence*

**SERA FAKALAWA KOBITI** between 1<sup>st</sup> to the 31<sup>st</sup> of April, 2010 at Delainavesi, Lami in the Central Division, wilfully and unlawfully damaged a concrete wall fence valued at \$3,550.00 the property of **LORAINI VUNIBOKOI**.

2. The respondent said she understood the charge and pleaded not guilty to the same. The prosecution then called three witnesses – the complainant (PW1), her sister (PW2) and a former police officer (PW3). The defence made a submission of no case to answer at the end of the prosecution's case, but on 12 August 2013, the court dismissed the same.
3. The respondent (accused) was called upon to make her defence. However, through her counsel, she choose to remain silent and called no witness. That was her right, as the burden to prove her guilt beyond a reasonable doubt stayed with the prosecution throughout the trial, and it never shifted to her, at any stage of the trial.
4. On 10 February 2014, the Magistrate Court found the respondent (accused) not guilty as charged, and acquitted her accordingly, on the ground that there was a reasonable doubt on the ownership of the land on which the damaged concrete wall fence was on. The court appeared to have said that for the prosecution to succeed, it must prove beyond reasonable doubt that the land on which the damaged concrete wall was on, belonged to the complainant. It said, the prosecution had failed to establish the above fact beyond a reasonable doubt.
5. The Learned Director of Public Prosecution was unhappy with the above decision. He filed a Petition of Appeal on 17 June 2014. This petition was well out of time. He also filed an application to appeal out of time, with an affidavit in support, on the same date. The respondent filed an affidavit in opposition on 8 August 2014. The court then called for written submissions from the parties. On 2 February 2015, the applicant filed their written submission. On 4 May 2015, the respondent filed her written submission. I heard the parties on 4 May 2015. On 8 April 2016, I called for the Magistrate Court's original record.
6. I have carefully read the Suva Magistrate Court's original file. I have carefully read and considered the evidence of the three prosecution's witnesses, and all the parties' written submissions.
7. As a matter of law, the applicant does not have the right to file his Petition of Appeal, because it was well out of time and well outside the 28 days appeal period. However, the Magistrate Court or the High Court can permit the applicant to appeal out of time, provided he showed the

court "good cause" to appeal out of time. "Good cause" can include the merits of the appeal or the case raises a question of law of unusual difficulty. The Learned Director of Public Prosecution appeared to be complaining that the Learned Resident Magistrate in this case, had incorrectly interpreted section 369 (1) of the Crimes Decree 2009, which involved the offence of "Damaging Property".

8. In his "Petition of Appeal", the Learned Director of Public Prosecution's ground of appeal were as follows:

**"...3(a) The Learned Resident Magistrate erred in law by acquitting the Respondent on the basis that the Prosecution has not proved the ownership of the land, when ownership of the land is not a fact relevant to any element of the offence of Damaging Property under Section 369 of the Crimes Decree 2009..."**

9. This application by the Learned Director of Public Prosecution was an application for leave to appeal out of time. Normally, an application for leave to appeal out of time should be considered first, and if leave is granted, then the appeal proper is heard. However, the applicant's ground of appeal was in fact the "good cause" it was trying to show the court, for permission to appeal out of time. So, in a sense, the leave application and the appeal proper were somewhat interlinked. Therefore, to avoid wastage of time, I will consider the leave application and the appeal proper together.

10. The resolution to this case lies in how section 369 (1) of the Crimes Decree 2009 is properly interpreted. Section 369(1) of the above Decree reads as follows:

**"...369 (1) A person commits a summary offence if he or she wilfully and unlawfully destroys or damages any property.  
Penalty – Imprisonment for 2 years, if no other punishment is provided under any other provision of this section..."**

11. The will and/or intention of Parliament or the law makers of this country, as enshrined in the words of Section 369 (1) of the Crimes Decree 2009, must be found and given effect to. To break it down to its components, the offence created by section 369 (1) of the Crimes Decree 2009, would look something like this:

- (i) A person commits a summary offence if
- (ii) he or she
- (iii) wilfully and unlawfully
- (iv) destroys or damages
- (v) any
- (vi) property.

12. Fundamental to the idea behind the creation of the above offence is the protection of property. The word "property" is defined in Section 4 of the Crimes Decree 2009 as including "any description of real and personal property". Real property in law is often referred to land. Personal property in law often involved properties that are not land. In this case, "the concrete wall fence valued at \$3,500", is obviously a piece of property. It became an offence, when someone wilfully and unlawfully destroys or damages this property.
13. According to the evidence, given in the Magistrate Court, the concrete wall fence was built and paid for by PW1 and PW2 on or about 2005. The respondent admitted to police that the concrete wall belonged to PW1 (see question and answer 11 of her police caution interview statements, tendered as Prosecution Exhibit No. 1). PW1 being the owner of the concrete wall fence was not disputed by the parties. Its destruction by the respondent, at the material time, was also not disputed by the parties. The respondent, in wilfully destroying the concrete wall, at the material time, when she hired some boys to do the same, was not disputed by the parties. PW1 said, the land on which the concrete wall fence was on, was her land. PW2 said, the respondent told her, she didn't need a court order to damage the wall.
14. In my view, after looking at the elements of the offence created by Section 369 (1) of the Crimes Decree 2009, and after carefully considering the whole evidence, I agree with the Learned Director of Public Prosecution's complaint as contained in paragraph 8 hereof. In my view, when "someone wilfully and unlawfully damages any property", that person commits the offence created by section 369 (1) of the Crimes Decree 2009, that is, damaging property. In my view, the respondent, in her police caution interview statements, tendered as Prosecution Exhibit No. 1, admitted wilfully damaging PW1's concrete wall fence, at the material time, when she hired some boys to damage the same. PW1 owned the concrete wall. PW1 said she owned the land. The respondent in her caution interview, did not point to any lawful authority authorizing her to damage the concrete fence. A lawyer's letter or a surveyor's report is no authority to damage a concrete wall on a person's land. A court order is required for such a wall to be damaged.
15. In my view, given the above, I quash the Magistrate Court's acquittal of the Respondent on 10 February 2014. On the evidence and the law, I find the Respondent guilty as charged, and I fine her \$3,550, this to be paid in 6 week's time, in default 12 months imprisonment.

Respondent is allowed to seek further time to pay the above fine, on an application to the court.  
The \$3,550 fine is to be paid to the complainant as compensation. I order so accordingly.

16. Matter is adjourned to 10 June 2016, to review the payment of the fine.



**Salesi Temo**  
**JUDGE**

**Solicitor for Applicant** : **Office of the Director of Public Prosecution, Suva**  
**Solicitor for Respondent** : **Reddy & Nandan, Barrister and Solicitor, Suva.**