

**IN THE HIGH COURT OF FIJI AT SUVA**

In the matter of an appeal under section  
246(1) of the Criminal Procedure Decree  
2009.

**STATE**

**Appellant**

**CASE NO: HAA. 20 of 2016**  
[MC Suva, Crim. Case No. 1428 of 2010]

**Vs.**

**VINAY PRASAD**

**Respondent**

**Counsel** : Ms. J. Prasad for Appellant  
Ms. J. Lal for Respondent

**Hearing on** : 25 April 2017

**Judgment on:** 31 May 2017

**JUDGMENT**

1. The respondent was charged with four counts of dealing with infringing objects contrary to section 121(1)(d)(i) of the Copyright Act of 1999. The charges read as follows;

**FIRST COUNT**  
*Statement of Offence (a)*

**DEALING IN INFRINGED COPY:** *contrary to section 121(1)(d)(i) of the Copyright Act of 1999.*

***Particulars of Offence (b)***

*VINAY PRASAD s/o Ramendra on the 22<sup>nd</sup> day of March 2010 at Suva in the Central Division, in the course of business offered for sale seventeen (17) infringing copies in the DVD format for the movie titled 'Shutter Island' being the copyright of Paramount Pictures when Vinay Prasad s/o Ramendra ought reasonably to have known that the same was an infringing copy.*

**SECOND COUNT**

***Statement of Offence (a)***

**DEALING IN INFRINGED COPY:** *contrary to section 121(1)(d)(i) of the Copyright Act of 1999.*

***Particulars of Offence (b)***

*VINAY PRASAD s/o Ramendra on the 22<sup>nd</sup> day of March 2010 at Suva in the Central Division in the course of business offered for sale five (5) infringing copies in the DVD format for the movie titled 'Day Breakers' being the copyright of Lions Gate Entertainment when Vinay Prasad s/o Ramendra ought reasonable to have known that the same was an infringing copy.*

**THIRD COUNT**

***Statement of Offence (a)***

**DEALING IN INFRINGED COPY:** *contrary to section 121(1)(d)(i) of the Copyright Act of 1999.*

***Particulars of Offence (b)***

*VINAY PRASAD s/o Ramendra on the 22<sup>nd</sup> day of March 2010 at Suva in the Central Division in the course of business offered for sale three (3) infringing copies in the DVD format for the movie titled 'Invictus' being the copyright of Roadshow Film when Vinay Prasad s/o Ramendra ought reasonable to have known that the same was an infringing copy.*

**FOURTH COUNT**

***Statement of Offence (a)***

**DEALING IN INFRINGED COPY:** *contrary to section 121(1)(d)(i) of the Copyright Act of 1999.*

***Particulars of Offence (b)***

*VINAY PRASAD s/o Ramendra on the 22<sup>nd</sup> day of March 2010 at Suva in the Central Division in the course of business offered for sale four (4) infringing copies in the DVD format for the movie titled 'Tooth Fairy' being the copyright of 20<sup>th</sup> Century Fox when Vinay Prasad s/o Ramendra ought reasonable to have known that the same was an infringing copy.*

2. After trial, the learned Magistrate acquitted the respondent on all four counts on 05<sup>th</sup> March 2014.

3. The appellant had taken steps to file this appeal against the said decision of the learned Magistrate on 02<sup>nd</sup> April 2014. However, the case was first listed before this court on 19<sup>th</sup> September 2016.
4. The appellant assails the aforementioned decision of the learned Magistrate based on the following grounds of appeal;
  - 1) *That the Learned Magistrate erred in law in finding that the number of infringing discs is an integral element of the charge.*
  - 2) *That the Learned Magistrate erred in law in relying on the decision of State v. Drodroveivali [2004] FJHC 516 to support his findings.*
  - 3) *That the Learned Magistrate erred in law in holding that section 182(2) and (3) of the Criminal Procedure Decree did not apply to remedy the charge.*

#### *Facts in brief*

5. During a search conducted at a shop called 'Smart Video Shop', the police had seized discs allegedly containing infringing copies of the movies *Shutter Island* (17 discs), *Daybreakers* (5 discs), *Invictus* (3 discs) and *Tooth Fairy* (4 discs). The respondent had been present inside the shop behind the counter when the team entered the shop.
6. The officer in charge of the Copyrights Unit who led the search, three employees of Damodar Brothers Limited and two police officers who had interviewed the respondent under caution had given evidence for the prosecution. The prosecution had been able to tender only 14 discs containing the movie *Shutter Island*; 2 discs of *Daybreakers*; 1 disc of *Invictus*; and 1 disc of *Tooth Fairy*. This is because the other discs had gone missing while they were kept in police custody. After the prosecution closed its case, both parties had made submissions on whether there is a case to answer and the learned Magistrate had held that there is a case to answer. The respondent had given evidence.



7. The learned Magistrate in his judgment held that the number of discs mentioned in each charge is an integral element and the failure of the prosecution to produce the total number of discs seized is fatal. The learned Magistrate further concluded that the said discrepancy between the charge and the evidence cannot be remedied in view of the provisions of section 182(2) or 182(3) of the Criminal Procedure Decree (now Criminal Procedure Act).

### **Grounds of appeal**

#### *Ground one*

8. On ground one the appellant assails the learned Magistrate's assertion that the number of discs mentioned in the particulars of offence of each count is an integral element of the offence.

9. Section 121(1) of the Copyright Act of 1999 reads thus;

"121.-(1) A person who, other than pursuant to a copyright licence-

- (a) makes for sale or hire;
  - (b) imports into the Fiji Islands otherwise than for that person's private and domestic use;
  - (c) possesses in the course of a business with a view to committing any act infringing the copyright ;
  - (d) in the course of a business-
    - (i) offers or exposes for sale or hire;
    - (ii) exhibits in public; or
    - (iii) distributes;
  - (e) in the course of a business or otherwise, sells or lets for hire; or
  - (f) distributes otherwise than in the course of a business to such an extent as to affect prejudicially the copyright owner,
- an object that is, and that the person knows or . . . ought reasonably to know is, an infringing copy of a copyright work, commits an offence."

10. Therefore the elements of the offence under section 121(1)(d)(i) are;
  - a) the accused;
  - b) in the course of a business;
  - c) offered or exposed for sale or hire an object that is an infringing copy of a copyright work; and
  - d) the accused knew or ought reasonably to know that the object is an infringing copy of a copyright work.
11. In view of the provisions in section 124 of the Criminal Procedure Act, it is for the accused to prove on a balance of probabilities that the relevant object was offered or exposed for sale or hire pursuant to a copyright licence.
12. The elements that the prosecution is required to prove in order to bring home a particular charge should be discerned from the definition of the offence provided in the relevant statute which the charge is founded on and not by dissecting the particulars provided in the charge.
13. It is manifestly clear that the quantity of the infringed copies does not form part of any element of the offence under section 121(1)(d)(i) of the Copyright Act of 1999.
14. It is pertinent to note that the penalty for an offence under section 121(1) is a fine of \$5,000 for every infringing copy to which the offence relates, but not exceeding \$50,000 in respect of the same transaction, and to imprisonment for 12 months.
15. Therefore, though the quantity or the number of the infringing copies dealt with by an accused does not form part of any element of the offence under section 121(1) of the Copyrights Act, the quantity is an essential factor to be taken into account for the purpose of sentencing. The prosecution on a charge under section 121(1) of the Copyrights Act should be mindful to prove that each copy is an infringing copy of the relevant copyright work when it is alleged in that charge that multiple copies were involved.

16. The contention that the quantity of discs is an integral element in each charge is clearly a misconception. Though a charge relates to multiple infringing copies, it is sufficient for the prosecution to prove that the accused dealt with one infringing copy of the relevant copyright work to bring home a charge under section 121(1) of the Copyrights Act provided that all the other elements of the offence are proved. Therefore, the first ground of appeal is made out.

*Ground two*

17. In his judgment, the learned Magistrate had referred to the case of *State v Drodroveivali* [2004] FJHC 516. This decision deals with the issue of admissibility of photocopies of documents as evidence.
18. Following paragraph in *Drodroveivali* (supra) is helpful to understand the issue that the court dealt with in that case;

*“ . . . These were bank cheques and associated vouchers said to have been used by the accused to steal money from his employer. The first witness was called and led in evidence to a point where he would have enabled production of the first in the series of 8 exhibits. Objection was taken. The defence asked that a point of law be decided on the admissibility of these documents. They were not the originals. They were not carbon copies. They were not photocopies of the original. It became common ground that they were a second copy of a copy of the original. The originals had been stolen. The certified copies of the originals had been lost. I accordingly proceeded to hear evidence on this preliminary issue as a matter of law in the absence of the assessors.”*

19. It is clear that the decision in *Drodroveivali* (supra) has no direct relevance to the case at hand in view of the above paragraph and therefore there is merit in the second ground of appeal.
20. On a close examination of the judgment, I note that the Learned Magistrate had formed the view that the fact that all the discs seized were not available to be tendered as exhibits during the trial creates a doubt on the evidence on the chain of custody of the discs and that he relies on the above decision to



highlight the prosecution's failure to adduce evidence on the chain of custody of the discs from the time they were seized.

21. The appellant submits that there are admissions in the cautioned interview of the respondent that are relevant to determine that the infringing copies referred to in the charges were seized from the respondent and the Learned Magistrate had failed to consider that evidence.
22. All in all, it appears that the misconception that the quantity of discs is an integral element of the offence had led the learned Magistrate not to give his mind as to whether the discs produced before him in evidence are infringing copies of the relevant copyright work that were offered for sale by the accused.

*Ground three*

23. On the third ground of appeal the appellant submits that the learned Magistrate erred by not applying the provisions of section 182(3) of the Criminal Procedure Act in relation to the variation between charges and the evidence adduced with respect to the number of discs.
24. In his judgment, learned Magistrate says thus;  
*"The number of discs being copies of the said movies is an integral element of the charge in all 4 counts. The State has failed to account for the discrepancy between the charge and the evidence raising reasonable doubt that will be exercised in favour of the Accused,*  
...  
*In conclusion the Court finds that such a defect in the evidence is fatal to the charge and it cannot be remedied by reference to section 182(2) or (3) of the Criminal Procedure Decree."*
25. In a previous paragraph, the learned Magistrate also finds fault with the prosecution for not amending the charge to reflect the evidence.

26. Section 182(3) of the Criminal Procedure Act reads as follows;

*"182 - (3) Variance between the charge and the evidence produced in support of it with respect to –*

*(a) the date or time at which the alleged offence was committed; or*

*(b) the description, value or ownership of any property or thing the subject of the charge*

*is not material and the charge need not be amended for such variation."*

27. Relying on the above provisions, the appellant submits that the quantity of the discs is not material because the infringing copies are the 'subject' of each charge and the quantity and the name of the DVD are simply used to describe the 'subject' of each charge.

28. I have no compelling reason to disagree with the appellant in this regard. The quantity of the discs does not form part of any element of the offence charged. As I have stressed earlier, it is sufficient to prove that one copy is an infringing copy though the relevant charge relates to multiple copies. Therefore, the quantity or the number of discs mentioned in a charge under section 121(1) of the Copyrights Act can be in fact construed as part of the description of the subject of the charge.

29. In the circumstances, any variation between the quantity of the discs mentioned in the particulars of the charge and the evidence adduced is not material for the purpose of deciding whether that charge is proved or not. The charge need not be amended due to such variation in terms of section 182(3) of the Criminal Procedure Act. Moreover, a charge under section 121(1) of the Copyrights Act that refers to multiple infringing copies does not become defective due to the failure of the prosecution to prove the existence of the total number of infringed copies mentioned in the charge or that all the copies the charge relates to are infringing copies of the relevant copyright work.

30. Therefore the third ground is made out.




## Conclusion

31. In the light of the forgoing, it is evident that the learned Magistrate's decision to acquit the respondent is flawed and therefore the acquittal should be quashed.
32. The appellant had prayed in the petition of appeal to quash the acquittal and to enter a conviction. Quashing of the acquittal based on the issues raised in the three grounds of appeal does not justify a conviction to be entered in this case. The appellant has not raised a ground of appeal on whether the acquittal was unreasonable and cannot be supported having regard to all the evidence. Therefore the respondent was not given the opportunity to make formal submissions in that regard. In the circumstances, it is not proper for this court to deal with the issue whether a conviction should be entered in this case having regard to all the evidence. Therefore, I would remit the case for a re-trial before a different magistrate.

## Orders;

- i) Appeal allowed;
- ii) The judgment of the Learned Magistrate dated 05/03/14 acquitting the respondent is quashed;
- iii) Case is listed for mention in Court No.1, Magistrate Court of Suva on 26/06/17 at 09.30am before the Chief Magistrate for it to be allocated to a different Magistrate for re-trial; and
- iv) The respondent is warned to appear before the Magistrate Court accordingly.



  
Vinsent S. Perera  
JUDGE

Solicitor for the Appellant : Office of the Director of Public Prosecutions, Suva.  
Solicitor for the Respondent : Messrs Neel Shivam Lawyers, Suva.