IN THE HIGH COURT OF FIJI

AT LAUTOKA

APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO. HAA 72 OF 2016

BETWEEN : JOSUA NATAKURU

APPELLANT

AND : STATE

RESPONDENT

Counsel: **Ms. S. Dunn for Appellant in Person**
Ms. R. Uce for Respondent

Date of Hearing: **8th May, 2017**

Date of Judgment: **31st May, 2017**

JUDGMENT

BACKGROUND

1. The Appellant was charged with one count of Robbery contrary to Section 310 (1) (a) of the Crimes Act 2009.

2. On 23rd May, 2016, the Appellant pleaded not guilty to the charge and opted for a trial before the Lautoka Magistrates Court.

3. The Prosecution called three witnesses for its case and at the close of the prosecution case, the learned Magistrate found a case for the accused to answer. He then read out the charge and rights of the Appellant in defence. The Appellant opted to remain silent and did not offer any other evidence.

4. On 14th October, 2016, the learned Magistrate delivered his Judgment and convicted the Appellant as charged.

5. On 20th October, 2016 the Appellant filed a timely appeal against his conviction before this Court.

6. On 7th March, 2017 and 30th March, 2017, the Appellant, through his counsel, filed an amended petition of appeal against conviction.

GROUNDS OF APPEAL

7. The Appellant submits the following grounds of appeal against conviction only:-

   I. That the Learned Magistrate erred in law by failing to explain the Appellant's right to remain silent after the Prosecution had closed its case; and

   II. That the Learned Magistrate erred in law and fact by failing to consider that element of force being used immediately before the offence was not proved by the Prosecution.

8. The amended Petition of Appeal indicated that the Appellant intends to file amended grounds of appeal against conviction and sentence.

However, the Appellant has filed two grounds of appeal against conviction only.

9. Facts accepted by the learned Magistrate briefly are as follows:

> *On 15th May 2106 at about 7.45 p.m., the complainant was returning home after work. He crossed the road to go home just before Natokowaqa Police Post. Accused came from the back and started talking to him as if he had known him from before. Accused was then putting his hand over complainant's left shoulder. When complainant realized that this person is an unknown person, he tried to stop the accused from holding his hand. Accused then grabbed the complainant forcibly from the back and took his phone from his pocket. Then the complainant ran to the police post and lodged a complaint.*

Ground 1

10. The Appellant claims that the learned Magistrate erred in law and fact by failing to explain the Appellant's right to remain silent after the Prosecution had closed its case;

11. Section 179 of the Criminal Procedure Act provides for the procedure to be followed at the close of the case for Prosecution. Relevant part of the Section states:

> *(1) At the close of the evidence in support of the charge, if it appears to the court that a case is made out against the accused person sufficiently to require the making of a defence, the court shall —*

(a) again explain the substance of the charge to the accused; and

(b) inform the accused of the right to —

(i) give evidence on oath from the witness box, and that, if evidence is given, the accused will be liable to cross-examination; or

(ii) make a statement to the court that is not on oath; and

(c) ask the accused whether he or she has any witnesses to examine or other evidence to adduce in his or her defence; and

(d) the court shall then hear the accused and his witnesses, and other evidence (if any).

12. As per paragraph 4, page 30 of the Court Record, the learned Magistrate was satisfied that the Prosecution had made out a case against the Appellant. The charge was then read to the Appellant in English and he confirmed that he understood the same. This is in accordance with Section 179 (1) (a) above.

13. In paragraph 5, page 30 of the Court Record, the Court had asked the Appellant whether he wanted to give evidence, call witnesses or remain silent.

14. It is noted that Section 179 (1) (b) & (c) above expressly provides that an accused should be asked whether he or she wants to give evidence or call witnesses for its case. The provision does not expressly state that an Accused person should be given his right to remain silent.

15. In ***Vaweqa v State*** [2015] FJCA 152; AAU0119.2011, AAU0038.2013 (3 December 2015) as referred to by the Appellant, the Court held:-

> *"The appellants also submitted that they were not informed of their right to remain silent. Even though Section 179 (1) (a) does not give specifically such right, such right is implied in the section. The appellants being unrepresented during the trial I hold such right should have been expressly stated to the appellants by the learned Magistrate."*

16. As per paragraph 5, page 30 of the Court Record, the learned Magistrate had informed the Appellant of his right to remain silent. The Appellant had clearly stated that he had no witnesses and that he wished to remain silent. Therefore, the Learned Magistrate had complied with Section 179 (1) (a) above.

17. The Appellant states that he chose to remain silent but that this right was not properly explained to him and that this raised confusion for him. The Appellant also states that he chose to remain silent but failed to understand the consequences and thereafter he made an attempt to make an application before the Honorable Court.

18. There is nothing indicated in Section 179 that the right to remain silent or the consequences of opting for such right should be explained to an accused person.

19. Article 14 (2) The Constitution of the Republic of Fiji reads:

Every person charged with an offence has the right—

(j) to remain silent, not to testify during the proceedings, and not to be compelled to give self-incriminating evidence, and not to have adverse inference drawn from the exercise of any of these rights;

20. The statement in ***Vaweqa v State*** (supra) (quoted above) that *'although Section 179 (1) (a) does not expressly specify such right, it is implied in the section'* is consistent with the constitutional right articulated in Article 14 (2)(j).

21. In my opinion it is sufficient to expressly state the right in a language that he or she understands to an unrepresented accused. The learned Magistrate had complied with the provision by giving the right to remain silent to the Appellant in English, the language he preferred.

22. Even if it's arguable that it is implied from the provision that the learned Magistrate should have explained such right and its consequences, the Appellant was not prejudiced because he exercised his right to remain silent and in any event did not offer to give evidence or call any other witnesses. The learned Magistrate as judge of both fact and law would have directed himself not to draw any negative inference when the Appellant opted to remain silent.

23. Therefore this ground fails.

Ground 2

24. The Appellant contends that the learned Magistrate erred in law and fact by failing to consider that element of force being used immediately before the offence was not proved by the Prosecution.

25. The Appellant was charged with one count of Robbery contrary to Section 310 (1) (a) of the Crimes Act. Section states:

> *A person commits an indictable offence (which is triable summarily) if he or she commits theft and —*
>
> *(a) immediately before committing theft, he or she—*
>
> *(i) uses force on another person; or*
>
> *(ii) threatens to use force then and there on another person — with intent to commit theft or to escape from the scene; or*

26. The particulars of the offence state that accused....***"immediately before such robbery used force on the said Shyamal Naidu."***

27. In paragraph 5 of his Judgment (Page 43 of the Court Record), the learned Magistrate outlined the element of the offence of robbery. One of the elements is that "the Accused used force immediately before doing so" (commit theft).

28. The Appellant has referred to pages 12 and 15 of the Court Record and states that there was no evidence from the Complainant either during examination in chief or cross-examination to satisfy the element of force being inflicted before taking of the mobile phone.

29. I am unable to agree with that statement. In paragraph 1, page 11 of the Court Record, the Complainant stated ***"he grabbed me forcefully he took out my phone".*** In paragraph 8 of the same page, the Complainant states ***"The condition of the lights were visible. I was able to recognize him when he grabbed hold of me".*** In paragraph 3, page

12, the Complainant stated ***"Then he took my phone and tried to grab me forcefully".*** This is the evidence given by the Complainant during examination in chief.

30. In cross-examination, paragraph 10 (last paragraph), page 14 of the Court Record, the Complainant stated ***"Two minutes after I was about to cross the road you came and grabbed hold of me forcefully".***

The Complainant further stated in paragraph 6, page 17 of the Court Record as follows:-

"...I tried to stop him for holding my hand he allegedly grabbed me from the back like this and I wasn't able to do anything. Just a shock was there in my mind. The next thing I know he took out my phone he let me go and I ran to the Police Post."

31. In light of the above, it is clearly noted from the evidence presented in Court that there was sufficient evidence to show that the Appellant had forcefully grabbed the Complainant before he took the Complainant's phone.

32. The learned Magistrate was satisfied that the element of "used force immediately before committing the theft" was proven by the Prosecution. This is indicated in paragraph 24, page 49 of the Court Record when the learned Magistrate stated that ***"the Accused grabbed him forcefully before he took the mobile phone from his pocket."***

33. The Appellant has cited ***Rocatikeda v State*** [2015] FJHC 864; HAA32.2015 (12 November 2015) in support of his argument. The factual scenario was quite different in that case and therefore is irrelevant in this matter. In that case, the summary of facts highlighted that the Appellant

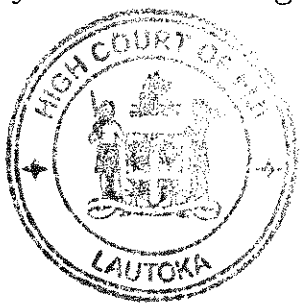
had grabbed the Complainant's handbag from her lap. It was clear to the Court that the summary of fact did not outline that the Appellant had inflicted or used any force on the Complainant before he grabbed her handbag from her lap.

34. In ***Rocatikeda*** (supra) Rajasinghe J held:

> *"According to the summery of facts that tendered in the Magistrate court, the Accused has grabbed the hand bag of Ranjita Narayan from her lap, while she was seated on the front passenger seat of the car registration number HW 300. The summary of facts does not reveal that the accused had use any form of force to any other person either before or after grabbing the handbag. Hence, I find the Summery of facts does not support one of the main elements of the offence of robbery as charged...."*

35. In the present case, it is evident that the Appellant had grabbed the Complainant forcefully before he took the Complainant's phone. Therefore this ground fails.

36. For reasons given, appeal against conviction is dismissed. Conviction recorded by the learned Magistrate on 14th October, 2106 is affirmed.



Aruna Aluthge
Judge

At Lautoka
31st May, 2017

Solicitors: Legal Aid Commission for Appellant
Office of the Director of Public Prosecution for Respondent