IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 01 OF 2019

BETWEEN	:	**LUKE KETEWAI**
		APPELLANT
A N D	:	**THE STATE**
		RESPONDENT

Counsel	:	Mr. M. Naivalu for the Appellant. Mr. J. Niudamu for the Respondent.
Date of Hearing	:	15 March, 2019
Date of Judgment	:	29 March, 2019

JUDGMENT

Background Information

1. The appellant was charged in the Magistrate's Court at Tavua for the following offence (as amended):

Statement of Offence

Robbery: Contrary to section 310 (1) (b) (i) of the Crimes Act of 2009.

Particulars of Offence

LUKE KETEWAI on the 11th day of December, 2016, at Vatukoula, in the Western Division, stole $27 cash (Fijian currency) and 1 x duos brand mobile phone valued of $80 all to the total value of

$107 being the property of NILESH KUMAR, and at the time of stealing the said items **LUKE KETEWAI** used force on **NILESH KUMAR** with intent to commit theft.

2. The appellant pleaded not guilty and the matter proceeded to hearing. The appellant was represented by counsel.

3. By judgment dated 25th September, 2018 the learned Magistrate convicted the appellant as charged. On the 10th December, 2018 after hearing mitigation the appellant was sentenced to 3 years, 5 months and 3 weeks imprisonment. There was no non-parole period imposed.

4. Being dissatisfied with the conviction and sentence the appellant through his counsel filed a timely appeal against conviction and sentence as follows:

Appeal against Conviction

a) *That the Learned Magistrate erred in law when he failed to find the Appellant/Applicant guilty of the offence he was charged with and accordingly convict him as charged either in his judgment or his sentence.*

b) *That the Learned Magistrate erred in law and in fact when he applied the law on circumstantial evidence incorrectly in particular when there were two accused persons initially involved in the accident.*

c) *That the Learned Magistrate erred in law and in fact when he convicted the accused far below the accepted standard or proof beyond reasonable doubt in particular when he doubted as to who exactly stole the victim's mobile phone.*

d) *That the Learned Magistrate erred in law and in fact when he found the accused guilty even though there were many inconsistencies and contradictions between PW1 and PW2's evidence.*

e) *That the Learned Magistrate erred in law and in fact when he considered evidence from PW2 even when he noted that there was admittedly enmity by PW2 between him and the accused which was unfair and prejudicial hence the necessity for an independent witness.*

f) *That the Learned Magistrate erred in law and in fact when he accepted PW2's evidence that one Anasa had identified the accused to him in what effectively was hearsay evidence.*

g) *That there was a substantial miscarriage of justice in that the Prosecutions in filing a nolle prosequi above effectively removed the only available evidence against the other accused who had admitted to stealing the mobile phone in his caution interview dated 14 December, 2016 and not the accused thus amounting to material non- disclosure, and misleading the court.*

h) *That there was a substantial miscarriage of justice in that when the Prosecutions allowed PW2 as a witness it did so while not disclosing his statement to the defence as part of disclosures hence amounting to trial by ambush.*

Appeal against Sentence

a) *That the Appellant appeals against sentence being manifestly harsh and excessive and wrong in principle in all the circumstances of the case and that the accused should have had a suspended sentence or a partial sentence.*

b) *That the Learned Trial Magistrate took irrelevant matters into consideration and not taking into consideration relevant legal authorities and circumstances when sentencing the Appellant.*

5. Both counsel filed written submissions and also made oral submissions during the hearing for which this court is grateful.

6. Before proceeding any further it is important to state that the appellant by his counsel had also filed a notice of motion seeking bail pending appeal and also an order to adduce new evidence during the appeal.

7. At the hearing counsel for the appellant informed the court that he did not wish to proceed with the application to adduce new evidence. Furthermore, counsel only filed written submissions for bail pending appeal which was relied upon for the substantive appeal hearing as well.

GROUND ONE

"The learned Magistrate erred in law when he failed to find the appellant guilty of the offence he was charged with and accordingly convicted him as charged either in his judgment or his sentence."

8. The counsel for the appellant submits that the learned Magistrate had failed to find the appellant guilty as charged and also failed to convict him in either his judgment or sentence. Counsel submits that the error was fatal therefore there should be a retrial.

9. Counsel relies on the judgment of the High Court at Labasa in *Iowane Muri Waqabaca v State, criminal case no. HAA 014 of 2010 (3 September, 2010).* In this appeal Thurairaja J. had remitted the matter back to the Magistrate's Court after setting aside the sentence since the learned Magistrate had not entered a conviction on a plea of guilty.

10. In the case of *Waqabaca (supra)* the appellant had pleaded guilty whereas in the current situation, the appellant had pleaded not guilty and the matter proceeded to trial.

11. In *State v Nakautoga (1998) FJHC 174; HAA0130.97 (26 February 1998),* Pain J. after considering some case authorities namely *(R v McLeod (1998) 2 N.Z.L.R. 65)* and *(S v Recorder of Manchester (supra)* made the following observations about the word "conviction":

> *"It is clear from these cases that the word "conviction" can have one of two meanings. That is either the finding of guilt or acceptance of a plea of guilty or the final judicial determination of the case."*

12. In *S v Recorder of Manchester (supra)* Lord Upjohn observed (at page 506):

> *"The primary meaning of the word "conviction" denotes the judicial determination of the case; it is a judgment which*

involves two matters, a finding of guilty or the acceptance of a plea of guilty followed by sentence....

But the word "conviction" is used also in a secondary sense, that is to express a verdict of guilty or acceptance of a plea of guilty before the adjudication which is only completed by sentence"

13. In *David Kio v Reginam 13 FLR 21 (23 February 1967)*, the Court of Appeal held:

> "The *requirement of Section 150(2) of the Criminal Procedure Code Ordinance, 1961, includes that the judgment must state unequivocally that the accused person is convicted or at least that he is found guilty of the offence concerned".*

14. The case of *David Kio (supra)* was cited in *Seru v State 1996 42 FLR 123 (10 July 1996)* where Fatiaki J. observed:

> *"In light of the foregoing there is no doubt in my mind that the absence of a clear and unequivocal 'conviction and sentence' in respect of each count in the charge is, to adopt the language of the Court of Appeal in David Kio's case (ibid at p.24): "... a basic defect and one which is not curable by this Court."*

15. In *Seru (supra)*, the trial magistrate had noted: *"I am seriously of the view that deterrent custodial sentence, though short, is warranted."* He then proceeded to sentence each accused (1-5) to 8 months imprisonment without entering a conviction. In doing so he did not sentence the accused for the first count of criminal trespass in respect of which the accused had earlier pleaded guilty. The trial magistrate's sentencing remarks were only directed at the more serious offence of Assault.

16. The High Court held that in the absence of entering a conviction in clear and unequivocal manner in respect of each count in the charge, the Magistrate's Court had erred. The conviction and sentence were quashed and set aside.

LAW

17. Section 15 of the Sentencing and Penalties Act states:

> *"(1) If a court finds a person guilty of an offence, it may, subject to any specific provision relating to the offence, and subject to the provisions of this [Act]-*
>
> *(a) record a conviction and order that the offender serve a term of imprisonment;*
> *(b) record a conviction and order that the offender serve a term of imprisonment partly in custody and partly in the community;*
> *(c) record a conviction and make a drug treatment order in accordance with regulations made under section 30;*
> *(d) record a conviction and order that the offender serve a term of imprisonment that is wholly or partly suspended...*

18. I accept that the learned Magistrate had failed to mention in his judgment that the appellant was guilty and convicted as charged. Also in the sentence the learned Magistrate found the appellant guilty as charged but failed to convict him.

19. According to section 15 of the Sentencing and Penalties Act if a court finds a person guilty of an offence, it may record a conviction and order that the offender serve a term of imprisonment. The use of the word "may" in section 15 above is not mandatory but directory. Counsel for the appellant

submits that the omission of the word conviction from the judgment and the sentence nullified the entire proceedings.

20. The above submission is misconceived and shallow since counsel ought to peruse the copy record carefully, page 38 states:

"25.09.18
Prosecution: Present: Ms Chand
Accused: Present Ms Baleilevuka
Judgment pronounced in court. Duplicate given to parties. Accused convicted as charged...."

21. When the above was brought to the attention of counsel he stated that the court record should not be relied on. Counsel submitted that the only documents this court should rely on should be the judgment and the sentence nothing else. This submission is also misconceived since the copy record is a true record of the proceedings held in the court below. There is no reason why this court should ignore the copy record in order to ascertain what happened in the court below.

22. The copy record does mention that the appellant was convicted as charged. There is no error made by the learned Magistrate the fact that he omitted to state the word "conviction" in his judgment does not affect the judgment and/or the sentence. For completeness paragraph one of the sentence does state that the court had found the appellant guilty as charged.

23. In the present appeal, after hearing all the evidence during trial, the learned Magistrate was satisfied beyond reasonable doubt that prosecution had proven its case against the accused as charged . The trial Magistrate did record a conviction as per the copy record at page 38 before the appellant was sentenced. Finally there is no substantial miscarriage of justice or prejudice caused to the

accused as a result of the learned Magistrate's omission to state in his judgment and sentence that the appellant has been convicted as charged.

24. The above ground of appeal is dismissed as frivolous.

GROUND TWO

25. This ground of appeal was withdrawn at the hearing.

GROUND THREE

"The learned Magistrate erred in law and in fact when he convicted the accused far below the accepted standard of proof beyond reasonable doubt in particular when he doubted as to who exactly stole the victim's mobile phone."

26. Counsel for the appellant argues that the prosecution had not met the required standard of proof when the learned Magistrate had stated at paragraph 133 of the judgment that the learned Magistrate was unsure who had stolen the other items belonging to the victim.

27. The learned Magistrate at paragraphs 73 to 75 of the judgment correctly reminded himself of the burden of proof and the standard of proof.

28. The paragraph in contention as raised by the appellant is paragraph 133 of the judgment as follows:

"I am unsure though who stole the other items which belonged to PW1 which was in the car."

29. It is unfortunate that the appellant has opted to pick and choose a paragraph from the judgment to justify an error when the context in which paragraph 133 was mentioned needs to be looked at from an holistic view. The following paragraphs of the judgment should be read in conjunction with paragraph 133:

paragraph 131
"I am sure that the defendants used force and only stole PW1's valuable which was inside PW1's front shirt pocket."

paragraph 132
"These valuable approximate to $25.00."

paragraph 133
"I am unsure though who stole the other items which belonged to PW1 which was in the car."

30. The fact that the learned Magistrate had raised doubts on who had stolen the other items of the victim which were in the car does not create a reasonable doubt on the entire charge. The learned Magistrate was satisfied beyond reasonable doubt that the appellant had stolen cash from the shirt pocket of the victim which was part of the charge and sufficient to convict the appellant as charged.

31. There is no error made by the learned Magistrate this ground of appeal is also dismissed as frivolous.

GROUND FOUR

"The learned Magistrate erred in law and in fact when he found the accused guilty even though there were many inconsistencies and contradiction between PW1 and PW2's evidence."

32. Counsel for the appellant states that there was inconsistency between the evidence of PW1 and PW2 yet the learned Magistrate believed them. Counsel referred to the following:

(a) Page 34 of the copy record, line 6 under cross examination of PW2 mentions:

"yes, they were tying him (driver)."

33. Counsel submits this evidence does not connect with PW1's evidence that he was tied up by his assailants. Counsel refers to page 31 of the copy record to support his contention that PW1 did not say he was tied up:

"When I passed one bridge, then I realized my seat belt was tightened from behind. I stopped the vehicle and the vehicle went off road. The accused then held my front pocket from the back where he was. There was a shopkeeper nearby who came to help us. The seat belt got tight my neck got pulled towards the back."

(b) Counsel refers to the evidence of Suren Chand (PW2) on page 34 of the copy record, line 10:

"they were about 9 metres away"

34. Counsel further contends that the victim (PW1) had told the court that his vehicle had veered off the road.

35. A perusal of the evidence of the victim (PW1) and the witness Suren Chand (PW2) does not suggest that there was any material inconsistency and contradiction between the two witnesses going to the elements of the offence.

36. It is human nature that passage of time will affect memory. No two people have the same memory power. Here the inconsistency and contradictions were not material to affect the credibility of both the witnesses. The learned Magistrate who saw the demeanour of the witnesses and heard their evidence believed both these witnesses.

37. The Supreme Court of India in a judgment arising from a conviction for rape in *Bharwada Bhoginbhai Hirjibhai v State of Gujarat [1983] AIR 753, 1983 SCR (3) 280)* made the following pertinent observations in respect of discrepancies in evidence of witnesses as follows:

"Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all important "probabilities-factor" echoes in favour of the version narrated by the witnesses. The reasons are: (1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen: ... (3) The powers of observation differ from person to person. What one may notice, another may not... It is unrealistic to expect a witness to be a human tape recorder: ... (5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment which varies from person to person..."

38. At paragraph 104 of the judgment the learned Magistrate stated the following about PW1 (the victim):

"Despite not believing PW1 on that portion of his evidence, I do believe PW1 that it was the defendant who tightened the seat belt

and grabbed PW1 from behind and took the items out of PW1's front shirt pocket."

paragraph 105

"I observed PW1 when giving evidence and I believe him on that part."

39. The learned Magistrate stated the following when believing Suren Chand's evidence (PW2).

paragraph 114

"For PW 2, I accept that it was by chance that he was outside at the time the incident happened."

paragraph 115

"I also believe PW2 that the defendant ran from the vehicle when others came to help PW 1."

40. Finding of credibility is for the trial court the learned Magistrate after observing the witnesses preferred the evidence of the prosecution witnesses. The learned Magistrate did not fall in error when he made a finding of credibility which he was entitled to since he was able to see the witnesses give evidence and note their demeanour in court.

41. In *Ajendra Kumar Singh vs. R (1980) 26 FLR 1* the Court of Appeal said at page 9:

"...It is also set out in [Director of Public Prosecutions- v- Ping Lin [1975] 3 All ER 175] as has frequently been said that an appellate Court should not disturb a judge's findings unless it is satisfied that a completely wrong assessment of the evidence has been made, or the correct principles have not been applied".

42. After perusing the evidence contained in the copy record I am satisfied that the learned Magistrate had correctly assessed the evidence for the prosecution and the defence in deciding the credibility of the witnesses. There is no compelling reason why this court should interfere with the fact finder's decision in this regard.

43. There is no error shown on the part of the Magistrate when he believed and accepted the evidence of the prosecution witnesses.

44. This ground of appeal also fails due to lack of merits.

GROUND FIVE

"The learned Magistrate erred in law and in fact when he considered evidence from PW2 even when he noted that there was admitted enmity by PW2 between him and the accused which was unfair and prejudicial hence the necessity for an independent witness."

45. The counsel for the appellant states that PW2 had an enmity with the appellant therefore there was a need for the learned Magistrate to find corroborative evidence from some other independent source and not from PW2 which was unsafe and therefore the entire evidence of PW2 ought to have been disregarded.

46. Counsel relies on the case of *Bir Chand vs. The State, Criminal Appeal No. 0013 of 1996 (12 August, 1996)* as the authority in support. The case of *Bir Chand (supra)* was a case of sexual nature where the daughter of the complainant was a witness who had corroborated the evidence of her mother. There was evidence before the court that there had been a previous enmity

between the parties due to a land dispute. Fatiaki J. made a pertinent observation as follows:

"Undoubtedly experience shows that accusations connected with indecency and sexual immorality are easy to make, and when made, very difficult to rebut and court's recognizing thus have developed rules of law and practice....."

47. The case of *Bir Chand (supra)* relied upon by counsel emanated from a complaint of sexual nature and at the time of *Chand's case (supra)* the rule of corroboration in cases of sexual nature was applicable.

48. In the current situation the appellant was charged with the offence of robbery there was no dispute as to identification of the accused. The appellant says since PW2 had told the court that the appellant was the same person who had thrown a stone at his shop indicates there was an enmity between the witness and the accused so his testimony was unfair and prejudicial to the appellant.

49. In cross examination of PW2 there was no suggestion made by the counsel for the appellant that the witness had made up a story to implicate the accused as a result of an enmity. Furthermore, even if the evidence of PW2 was totally disregarded still the evidence of the victim was sufficient to establish the prosecution case beyond reasonable doubt.

50. The learned Magistrate was aware of the enmity that existed between the accused and PW2 and this was correctly and clearly taken into account in the judgment as follows:

paragraph 106

"In addition, I accept that PW2 is not in good terms with the defendant as PW2 holds the defendant responsible for stoning his shop."

paragraph 107

"PW2 was not coy about his dislike of the Defendant when giving evidence."

paragraph 108

"A person can have an animus relationship against another but it does not necessarily mean that they will fabricate stories. It certainly calls for caution when assessing that witnesses' evidence or assessing the evidence of someone who may have an axe to grind against the defendant."

paragraph 109

"Fabrication was in my mind when I heard and observed PW2 giving evidence and also when I retired to consider both what I observed in court and the totality of the evidence on court record."

paragraph 110

"I am satisfied that PW2 was not making up the story despite their uncomfortable relationship."

paragraph 111

"I believe PW2 when he said that he did see the defendant grabbing PW1."

paragraph 113

"If PW2's motive was to get the defendant at any cost, he could easily have said that it was the defendant inside the vehicle although it would have been impossible for PW2 to see the face of the man because of the obstruction."

51. The Learned Magistrate did not err when he accepted the evidence of PW2 despite PW2 informing the court that an enmity existed between him and the accused.

52. This ground of appeal is also dismissed due to lack of merits.

GROUND SIX

"The learned Magistrate erred in law and in fact when he accepted PW2's evidence that one Anasa had identified the accused to him in what effectively was hearsay evidence."

53. The appellant's counsel states that in cross examination by counsel for the accused PW2 had informed the court at page 34 of the copy record as follows:

"He came with Anasa. Anasa is my neighbor. I asked Anasa."

54. Counsel submits that this evidence should not have been allowed since it was hearsay as Anasa did not give evidence.

55. The above answer was given in cross examination by the appellant's counsel. This particular piece of evidence has no relevance to the charge furthermore the appellant never denied he was not the neighbour of PW2.

56. At paragraph 98 of the judgment the learned Magistrate accepted that there was no dispute as to the identification of the

appellant as *"even the defendant when giving evidence admits that he is neighbours with PW2"*.

57. This ground of appeal is dismissed as frivolous.

GROUND SEVEN

'There was substantial miscarriage of justice in that the prosecution in filing a nolle prosequi above effectively removed the only evidence against the other accused who had admitted to stealing the mobile phone in his caution interview dated 14 December, 2016 and not the accused thus amounting to material non-disclosure and misleading the court.

GROUND EIGHT

That there was a substantial miscarriage of justice in that when the Prosecutions allowed PW2 as a witness it did so while not disclosing his statement to the defence as part of disclosures hence amounting to trial by ambush.

58. The above grounds of appeal were abandoned during the hearing.

APPEAL AGAINST SENTENCE

GROUND ONE

"The appellant appeals against sentence being manifestly harsh and excessive and wrong in principle in all the circumstances of the case and that the accused should have received a suspended or a partial suspended sentence."

GROUND TWO

"The learned trial Magistrate took irrelevant matters into consideration."

59. The above grounds of appeal were abandoned during the hearing.

ORDERS

a) The appeal against conviction is dismissed.

b) 30 days to appeal to the Court of Appeal.

Sunil Sharma
Judge

At Lautoka
29th March, 2019

Solicitors
Messrs. Law Naivalu, Lautoka for the Appellant.
Office of the Director of Public Prosecutions for the Respondent.