

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO. HAA 45 of 2019**

**BETWEEN** : **THE STATE**

**APPELLANT**

**A N D** : **MOHAMMED ILIYAZ KHAN**

**RESPONDENT**

**Counsel** : Ms. S. Naibe for the Appellant.  
: Mr. K. Tunidau for the Respondent.

**Date of Hearing** : 30 July, 2020  
**Date of Ruling** : 14 August, 2020

---

**JUDGMENT**

---

**BACKGROUND INFORMATION**

1. The respondent was charged in the Magistrate's Court at Lautoka as per the following amended charges:

**FIRST COUNT**

**Statement of Offence**

**LARCENY BY SERVANT**: Contrary to section 274 (a) of the Penal Code  
Cap 17.

**Particulars of Offence**

**MOHAMMED ILIYAZ KHAN** between the 31<sup>st</sup> of January, 2008 and 31<sup>st</sup> day of January, 2010 at Lautoka in the Western Division being employed as a Manager by City Spares, stole assorted motor vehicle parts valued at \$50,353.51 the property of said City Spares.

**SECOND COUNT**

**Statement of Offence**

**THEFT:** Contrary to section 291 (1) of the Crimes Decree No. 44 of 2009.

**Particulars of Offence**

**MOHAMMED ILIYAZ KHAN** between the 1<sup>st</sup> day of February, 2010 and 9<sup>th</sup> day of September, 2010 at Lautoka in the Western Division, dishonestly appropriated assorted motor vehicle parts valued at \$21,015.27 belonging to City Spares, with intention of permanently depriving the said City Spares.

2. During the hearing at the Magistrate's Court the prosecution called ten witnesses. After the prosecution closed its case, the learned Magistrate held that the respondent had a case to answer. The respondent was given his options, he opted to remain silent and did not call any witness.
3. On 10<sup>th</sup> April, 2012 the learned Magistrate in his judgment acquitted the respondent on both the counts.
4. The state being dissatisfied with the decision of the Magistrate's Court filed a timely appeal against the acquittal to the High Court.

5. On 3<sup>rd</sup> October, 2012 the High Court dismissed the appeal, the prosecution aggrieved by the judgment of the High Court appealed against the dismissal of the appeal to the Court of Appeal.
6. On 6<sup>th</sup> June, 2019 the Court of Appeal allowed the appeal by the State by setting aside the judgment of the High Court and ordered a rehearing.
7. When the matter was called in this court, it had to be adjourned for five (5) times at the request of the State Counsel since written submissions were not filed. The State Counsel finally filed his submissions on 3<sup>rd</sup> April, 2020, by this time Lautoka City was under a lockdown due to Covid-19 virus outbreak. The matter was called for mention and the respondent's counsel sought time to file his synopsis which was finally done on 30<sup>th</sup> July, 2020 after numerous adjournments.
8. On 30<sup>th</sup> July, when the matter was for hearing Ms. Naibe, the State Counsel asked for an adjournment on the basis that the officer in carriage was engaged in another trial. Considering the age of this appeal this court refused the adjournment sought, Ms. Naibe did not make any oral submissions but relied on the written submissions filed. Mr. Tunidau on the other hand made oral submissions based on his synopsis filed.
9. The brief summary of facts is as follows:

The respondent was employed by a motor vehicle spare parts shop namely City Spares at its Lautoka Branch as a Manager. In the year 2010 there was an audit carried in which it was revealed that spare parts worth \$71, 368.78 had been stolen after the stock cards were falsified.
10. At trial the prosecution exhibited 826 stock cards pertaining to 826 different spare parts. The evidence revealed that all the stock cards were

falsified by entering wrong receipt numbers. The prosecution witnesses informed the court that the false entries on the stock cards were the handwritings of the respondent. The prosecution also adduced evidence that there were frequent cash deposits into the bank accounts of the respondent.

11. The matter was reported to the police and after an investigation the respondent was charged and produced in court.
12. The state aggrieved by the decision of the learned Magistrate appeals against the acquittal of the respondent.

### **GROUND OF APPEAL**

13. The state relies on one ground of appeal only which is:

*The learned Trial Magistrate erred in law and in fact by failing to adequately consider and apply the law relating to circumstantial evidence during the course of his analysis of the evidence led at trial.*

### **STATE'S SUBMISSION**

14. The State Counsel in his written submissions stated that the prosecution had adduced evidence beyond reasonable doubt to prove both the charges against the respondent. Counsel further stated that there was no dispute that the respondent was the Manager of the shop from where a variety of spare parts had gone missing. The stock cards were completed by the respondent and no one else. The prosecution witnesses who were working with the respondent recognized the handwritings of the respondent on all the stock cards.

15. According to the State Counsel an audit carried out revealed that the stock cards contained false receipt numbers. Counsel finally submitted that the circumstantial evidence adduced by the prosecution pointed to the guilt of the respondent and, the only inference that could be drawn is incompatible with the innocence of the respondent.

### **RESPONDENT'S SUBMISSION**

16. The respondent's counsel argued that at trial the essential element of appropriation and taking away of the stolen items were not proven beyond reasonable doubt by the prosecution hence the learned Magistrate had correctly acquitted the respondent. Counsel further stated that no handwriting expert was called to verify the writings on the stock cards to be that of the respondent.

### **DETERMINATION**

17. From the evidence adduced in the Magistrate's Court it is obvious that the prosecution case was substantially based on circumstantial evidence since none of the witnesses had actually seen the respondent commit the offences alleged.
18. The learned Magistrate was aware of the fact that it was for the prosecution to adduce direct or circumstantial evidence to prove both the charges against the respondent which he did mention at paragraph 15 of the judgment.
19. Paragraph 15 of the judgment is as follows:

*"It should be noted that in a criminal case the test is beyond reasonable doubt. The Prosecution can either produce direct or circumstantial evidence to prove a charge. However in the absence of direct or*

*circumstantial evidence to prove the elements of an offence, the Court cannot assume the missing links and convict an Accused person. It is the duty of the Prosecution to prove the elements of the offences the Accused is charged with beyond reasonable doubt. Although the prosecution was able to prove the stock cards had been tampered with by entering false entries I must say that it is not sufficient to constitute the offences of larceny and theft.*

20. In his judgment the learned Magistrate had analyzed the evidence from paragraphs 9 to 12 as follows:

Paragraph 9

*“I have considered the evidence produced by the Prosecution. According to the Prosecution evidence the Accused was employed by a motor spare parts shop named City Spares. The accused was the manager of the said spare parts shop during the period relevant to this case. It was revealed that an audit was done in 2010 and it was found out that \$71,368.78 worth of spare parts stocks had been taken by manipulation of stock cards. Accordingly it was reported to the Police and the Accused was charged for stealing assorted spare parts all to the total value of \$71,368.78 during the said period.*

Paragraph 10

*“The Prosecution tendered 826 stock cards as Prosecution Exhibits pertaining to 826 varieties of spare parts. The evidence of the Prosecution was that all those stock cards were falsified by entering wrong receipt numbers. The Prosecution witnesses gave evidence that the false entries on the said stock cards are the hand writings of the Accused. Furthermore*

*the Prosecution produced evidence that there were frequent cash deposits into the bank accounts which belonged to the Accused.*

Paragraph 11

*However there was no evidence produced by the Prosecution to show that the accused in fact took any spare parts. The whole Prosecution case was all about falsifying stock cards by entering false details. The elements of larceny by servant or theft were not touched by the Prosecution. It should be noted that for the offence of larceny there should be an act of taking or carrying of resulting change of possession of a particular property which is capable of being stolen. Similarly for the offence of theft the Prosecution has to prove that the Accused dishonestly appropriated the property. There was no evidence to establish these elements and no witness said that the Accused stole spare parts valued at \$71,368.78.*

Paragraph 12

*On the other hand the Court cannot assume that the Accused took the items by falsifying the stock cards. There were Prosecution witnesses who worked with the accused at the same parts shop during the periods pertaining to this case. However none of them did say that the accused took the spare parts or effected any change of possession of the missing stocks of spare parts.*

21. According to paragraphs 11 and 12 of the judgment the focus of the learned Magistrate was on direct evidence that nobody saw the respondent steal or effect any change of possession of the missing stocks of spare parts.

22. At paragraph 10 of the judgment the learned Magistrate did mention that there was evidence that the false entries on the said stock cards were the hand writings of the accused, however, there is nothing mentioned about the implication of this evidence on the entire proceedings. The prosecution case was based on circumstantial evidence and this piece of evidence in my view was crucial. A case to answer had been ruled upon by the learned Magistrate on direct and circumstantial evidence adduced by the prosecution yet upon analysis of the evidence an essential element of the charges was found not to be satisfied by the prosecution.
23. Before coming to a conclusion whether there was circumstantial evidence before the Magistrate's Court it is important to consider the evidence of the following witnesses:
- (a) Prosecution Witness One – Ali Sher
24. This witness is the owner of the shop where the respondent was employed as the Branch Manager at Lautoka. Ali has a total of three shops in Ba, Lautoka and Nadi, his primary business is to sell motor vehicle spare parts. The respondent was employed for the past 4 to 5 years.
25. The respondent was not authorized to write anything in the stock cards. It was upon the instructions of Ali that an audit was carried out in the Lautoka shop where the respondent was working. The audit revealed that the stock cards showed receipt numbers which belonged to the other items that were sold, as a result lots of items were missing from the shop. This essentially meant the stock card did not tally with the sales docket.
26. The witness was able to recognize the handwriting on each of the stock cards showed to him. He also stated that the respondent was not



sending the triplicate copies of receipt books to the Nadi Office for the Accountant to check and tally the income received.

27. The witness also maintained that the respondent's handwriting was easily identifiable, since the respondent was a left handed writer whose writing was different from all others. According to the witness the stock cards were falsified by the respondent who had written receipt numbers to balance the stock cards to avoid detection or suspicion.

(b) Prosecution Witness Two – Sanjay Kumar

28. This witness is an Accountant by profession he has a Bachelor of Arts Degree he carried out an audit of City Spares, Lautoka Branch at the request of the owner Ali Sher. The audit report was marked and tendered as prosecution exhibit no. 1A. As part of his audit Sanjay was supplied with stock cards, cash sale dockets and other relevant documents. The major findings in the stock cards were the invoice numbers stated on it. The audit was from 2008 to 2010 this witness informed the court that the dates and quantities noted in the stock cards were false. According to the witness, stocks were removed from the shop by entering false numbers on the stock cards. The total value of the items removed from the shop was \$71,368.78 made up of follows:

(a) Between 31/01/2008 to 31/01/2010 entries 1 to 584, the total amount as a result of falsification of stock cards were \$50,353.51;  
and

(b) From 01/02/2010 to 09/09/2010, entries 585 to 826, the total amount as a result of falsification of stock cards were \$21,015.27.

29. According to the witness the false entries in the stock cards were made to balance the stock cards.

(c) Prosecution witness three -Shiu Mani

30. This witness is currently the stock controller based at the head office in Nadi, prior to this position the witness worked with the respondent at the Lautoka Branch for 4 years and he is familiar with the respondent's handwriting.
31. During the audit of the Lautoka Branch it was revealed that some stock cards had wrong invoice numbers written. The highlighted prosecution exhibits showed wrong invoice numbers were entered in the stock cards. The handwriting in the stock cards was that of the respondent's and all those stocks that had been removed were as per the highlighted portions in the exhibits.
32. When all the exhibits were shown to the witness he confirmed the handwriting were the respondent's. In cross examination the witness explained why he said the handwriting was that of the accused in the following words (page 189 copy record Part 2):

*"I was working with him for 13 years. Every time he used to write things and submit to us. He did cash sale docket and receipt. Those hand writing is similar to the highlighted hand writing on the card."*

(d) Prosecution witness four - Elvin Ram

34. This witness had also worked with the respondent for 5 years and was familiar with the handwriting of the respondent. He went through all the prosecution exhibits namely the stock cards. According to the witness it was the respondent who had written cash sale docket numbers on the stock cards which belonged to other items already sold. The respondent was not authorized to make entries in the stock card but to check the stock cards and to oversee that things were properly done.

35. The witness remembered giving the stock cards to the respondent at his request on some occasions and this witness had also seen the respondent's writing on other documents so he knows the handwriting of the respondent.

(e) Prosecution witness five - Mohammed Shafeel Ali

36. The witness other than confirming what Elvin Ram had informed the court said that he has worked with the respondent for 2 ½ years and that the respondent was a left handed writer who used to write in a slanting manner. The witness had seen the respondent's writing, he denied stealing the items highlighted in the stock cards. On many occasions the witness had seen the respondent handling the stock cards and all the stocks in the shop were under the control of the respondent.

37. In my judgment the evidence of Ali Sher, Sanjay Kumar, Shiu Mani, Elvin Ram, and Mohammed Shafeel Ali is circumstantial, which connects the respondent to the charges but was not taken into account in the judgment.

38. Experience tells us that in a fraud case like this, it is unlikely that a person will be prosecuted on direct evidence, therefore it is not uncommon that circumstantial evidence will be relied upon by the prosecution.

39. Here the learned Magistrate only directed his mind towards direct evidence and overlooked to consider circumstantial evidence and make the necessary inferences which were available for consideration. On the totality of the evidence it was open to the learned Magistrate to make the necessary reasonable inferences about the guilt or otherwise of the respondent but he did not.

40. The learned Magistrate erred when he did not consider circumstantial evidence in his judgment. This failure affected the proper analysis of the evidence which led to a conclusion which was clearly and plainly incorrect.
41. Circumstantial evidence was before the court and there was no reason in my view for the learned Magistrate not to consider this evidence in his analysis (*see Praveen Ram vs. The State, Criminal Petition No. CAV0001 OF 2011 (9 May 2012)*).
42. The error is fatal, the acquittal in the circumstances cannot be allowed to stand. The public interest in the administration of justice demands that where there is sufficient evidence to suggest the obvious the court should consider that evidence.
43. The appeal by the State is allowed.

#### **POWERS OF THIS COURT**

44. Having allowed the ground of appeal it is for this court to decide whether there ought to be a retrial or this court can exercise its powers under section 256 (2) of the Criminal Procedure Act to convict the respondent on the basis of the evidence and sentence him.
45. The allegation dates to the years 2008 to 2010 which is over a decade. The evidence in the copy record is self-explanatory which none of the parties have complained about. In my view any retrial will only delay the finality of the proceedings further and may also prejudice the prosecution on the availability of the witnesses due to time lapse. The evidence is mainly based on paper trail which has been adequately reflected in the copy record.

46. In my judgment a retrial will not be in the interest of justice.

### **CONCLUSION**

47. Considering the evidence adduced in the Magistrate's Court and taking into account the prosecution exhibits as mentioned in the copy record I do not see any reason why a reasonable inference cannot be drawn from the facts of this case by this court. This court is in equally good position as the Magistrate's Court to analyze and evaluate the evidence since the appeal does not involve the question of credibility and reliability of the witnesses but only about drawing a proper inference from the facts proved which has been properly reflected in the copy records.

48. In view of the above, the observations of Lord Reid in *Benmax v Austin Motor Co. Ltd [1955] 1 All ER 326 at page 329* is helpful:

*"...I think that the whole passage...refers to cases where the credibility or reliability of one or more witnesses has been in dispute and where a decision on these matters has led the trial judge to come to his decision on the case as a whole. If that be right, then I see no reason to doubt anything that was said by Lord Thankerton. But in cases where there is no question of the credibility or reliability of any witness, and in cases where the point in dispute is the proper inference to be drawn from proved facts, an appeal court is generally in as good a position to evaluate the evidence as the trial judge, and ought not to shrink from that task, though it ought, of course, to give weight to his opinion..."*

49. The respondent was charged for one count of larceny by servant contrary to section 274 (a) (i) of the Penal Code Cap. 17 and one count of theft contrary to section 291 of the Crimes Act.

50. Section 274 (1) (i) of the Penal Code reads as follows:

*“ Any person being a clerk or servant or person employed in the capacity of a clerk or servant steals any chattel, money or valuable security belonging to or in the possession or power of his master or employer; or is guilty of a felony, and is liable to imprisonment for fourteen years.*

51. Section 291 (1) of the Crimes Act reads as follows:

*“A person commits a summary offence if he or she dishonestly appropriates property belonging to another with the intention of permanently depriving the other of the property.*

52. Section 259 of the Penal Code speaks of theft as follows:

*(1) A person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof:*

*Provided that a person may be guilty of stealing any such thing notwithstanding that he has lawful possession thereof, if, being a bailee or part owner thereof, he fraudulently converts the same to his own use or the use of any person other than the owner.*

*2) (a) The expression "takes" includes obtaining the possession-*

*(i) by any trick;*

*(ii) by intimidation;*

*(iii) under a mistake on the part of the owner with knowledge on the part of the taker that possession has been so obtained; or*

*(iv) by finding, where at the time of the finding the finder believes that the owner can be discovered by taking reasonable steps.*

*(b) The expression -carries "away" includes any removal of anything from the place which it occupies, but in the case of a thing attached, only if it has been completely detached.*

*(c) The expression "owner" includes any part owner, or person having possession or control of, or a special property in, anything capable of being stolen.*

53. The elements of larceny can be summarized as follows:

- (i) the taking and carrying off, resulting in a change of possession;
- (ii) removal without the consent of the owner;
- (iii) property capable of being stolen;
- (iv) the intent to deprive permanently;
- (v) without a claim of right made in good faith;
- (vi) fraudulently.

54. From the evidence the following facts are obvious:

- (a) The respondent was employed as a Manager by the complainant during the dates mentioned in the charges;
- (b) In 2010 there was an audit undertaken upon the instructions of the complainant. All the items in the shop were under the control of the respondent who, however, was not authorized to write on the stock cards.

- (c) The audit revealed motor vehicle spare parts were missing from the shop during the time the respondent was employed as a Manager.
- (d) The prosecution witnesses gave evidence about the hand writing of the respondent they had seen the respondent write on numerous occasions and the respondent being a left handed writer (which was not disputed at trial) had a unique writing style from the others. The defence did not raise any motivation on these prosecution witnesses (former colleagues of the respondent) to falsely implicate the respondent.
- (e) The prosecution witnesses had also stated that the details written in the stock cards were false, the dockets / receipt numbers mentioned in the stock cards belonged to other items that were already sold and was not in respect of the items mentioned in the stock cards. The internal stock taking did not discover any fraud because only the stock card balances were tallied with the items on the shelf.
- (f) Furthermore, all the handwritings in the stock cards were of the respondent and all the prosecution witnesses who were former colleagues of the respondent in their evidence recognized the hand writings on all the stock cards to be that of the respondent. These witnesses also informed the court about situations whereby the respondent would allow a person who was a competitor to come into the shop on several occasions and take motor vehicle spare parts from the shop without any proper documentation or payment.



55. In his defence (from the line of cross examination) the respondent had put forward his contention that he did not write on any of the stock cards as alleged. The prosecution witnesses who had informed the court that the handwritings on the stock cards were that of the respondent's were not writing experts. The respondent denied any wrong doing and was shifting the blame on others. Although no writing expert was called by the prosecution, the evidence of the prosecution witnesses about the handwriting of the respondent was in my view sufficient to connect the respondent to the charges.
56. The prosecution witnesses had made it clear that the handwriting in the stock cards belonged to the respondent and no one else and they were familiar with the handwriting of the respondent.
57. The audit revealed the discrepancies in the stock cards leading to the theft of motor vehicle spare parts from the shop to the value mentioned in the charges. The respondent was not authorized to write on the stock cards and yet his handwritings appeared on all 826 stock cards.
58. After taking into account the above, this court is able to conclude that there is strong circumstantial evidence (when all the evidence is taken together) implicating the respondent in respect of both the charges. On the totality of the evidence there is no other reasonable inference that can be drawn but the guilt of the respondent due to the lack of any reasonable explanation or hypothesis consistent with the innocence of the respondent.
59. Lord Normand in *Lejzor Teper v. The Queen* [1952] A.C. 480 made a pertinent observation about how circumstantial evidence is to be considered by a court at p. 489 in the following words:

*“circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined...because evidence of this kind may be fabricated to cast suspicion on another...It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”*

60. For the first count this court is satisfied beyond reasonable doubt that the respondent between the 31<sup>st</sup> day of January, 2008 and 31<sup>st</sup> day of January, 2010 being employed as a Manager by City Spares stole assorted motor vehicle parts valued at \$50,353.51 the property of City Spares.
61. For the second count this court is satisfied beyond reasonable doubt that the respondent between the 1<sup>st</sup> day of February, 2010 and the 9<sup>th</sup> day of September, 2010 dishonestly appropriated assorted motor vehicle parts valued at \$21,015.27 belonging to City Spares with the intention of permanently depriving the City Spares.
62. In the interest of justice and in accordance with section 256(2) (e) of the Criminal Procedure Act this court sets aside the order of acquittal of the Magistrate’s Court and finds the accused guilty of one count of larceny by servant contrary to section 274 (a) (i) of the Penal Code and one count of theft contrary to section 291 (1) of the Crimes Act and convict him accordingly.

### **ORDERS**

1. The appeal against the order of acquittal is allowed.
2. The order of acquittal by the Magistrate’s Court is quashed and set aside.

3. The respondent is found guilty and convicted as charged.
4. The respondent is remanded in custody for sentencing.



A handwritten signature in black ink, appearing to read 'Sunil Sharma'.

**Sunil Sharma  
Judge**

**At Lautoka**

14 August, 2020

**Solicitors**

**Office of the Director of Public Prosecutions for the State.**

**Messrs Kevueli Tunidau Lawyers for the Respondent.**