

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

**CRIMINAL APPEAL NO. HAA 14 OF 2020**

**BETWEEN** : **DESHWAR KISHORE DUTT**  
**APPELLANT**

**AND** : **STATE**  
**RESPONDENT**

**Counsel** : ***The Appellant appears in person.***  
: ***Mr. T. Tuenuku for the Respondent.***

**Date of Hearing** : ***24<sup>th</sup> of August, 2020***  
**Date of Judgement** : ***25<sup>th</sup> of September, 2020***

**JUDGMENT**

**Background**

1. The Appellant (will be referred to as the accused sometimes) was charged with one count of '*Theft*' contrary to Section 291(1) of the Crimes Act of 2009, in the Magistrates' Court of Nadi. The statement and particulars of the offences states;

**COUNT 1**

***Statement of offence***

**Theft**: Contrary to Section 274 of the Penal Code Cap 17.

***Particulars of Offence***

**Deshwar Dutt**, On the 01<sup>st</sup> day of January, 2017 at Nadi in the Western Division dishonestly appropriated 1 x 115 HP Yamaha Outboard Engine valued at \$23,00.00 the property of Scott Dodd, with the intention of permanently depriving the said Scott Dodd.

2. The accused has pleaded not guilty to the said charge and the matter has proceeded to trial. At the trial the caution interview of the accused was submitted to the court as a part of the evidence by consent. In addition 5 witnesses have given evidence for the prosecution at the trial. At the conclusion of the prosecution case though the accused has moved to make submissions on the basis of no case to answer, it was not proceeded with and the accused has closed his case without offering any evidence on his behalf.
3. The learned Magistrate of Nadi, by Judgment dated 21<sup>st</sup> of February 2020, has convicted the accused for the alleged offence.
4. Being dissatisfied of the said judgment, the accused (The Appellant) has submitted this appeal on the 26<sup>th</sup> of February 2020, within the allocated time.

### **Grounds of Appeal**

5. As for the amended grounds of appeal filed on the 24<sup>th</sup> of July 2020, the appellant canvasses the said conviction on the following grounds; (in verbatim)
  - i) That the Learned Trial Magistrate erred in law by finding the appellant guilty based on the appellants previous history instead of convicting the appellant purely on evidence adduced by the prosecution during the trial.
  - ii) That the Learned Trial Magistrate erred in law by convicting the appellant purely on PW4's evidence in spite of the revelation by the PW4 – per his sworn evidence during cross examination – that he himself was 'not sure' as to who is the actual person initially made the deal with him for the said engine – hence one of the essential element viz identity is in question.
  - iii) That the Learned Trial Magistrate erred in law and in fact when he convicted the appellant of 'Theft' in absence of any evidence touching each and every element of the alleged offence of theft.

- iv) That the Learned Trial Magistrate erred in law by failing to pay attention and direct his mind on overwhelming margin of inconsistencies emerging from the cross examination of PW4, which was contrary to PW4's original statements – hence the learned Magistrate failed to direct himself in accordance with the advice of CA in Gyan Singh v State (1963) 9 FLR 105 per Finlay,VP, Marsack and Knox-Maxer JJA and at the conclusion of the case to weigh all the evidence and then to decide what to accept and what to reject.
- v) That the Learned Trial Magistrate erred in law by failing to independently assess and evaluate both the state and appellants Caution Interview, where the appellant had fully denied the allegation and claimed to be 'home at the alleged time in Nausori' whilst the alleged offence was said to be committed in Nadi some three and half hour drive from the appellant's home.
- vi) That the Learned Trial Magistrate made a pure error of law and fact by finding (at para 18 of his Judgment) that PW4 has provided credible and consistent evidence by finding that the evidence of PW4 links the evidence of engine to only one man and by finding that the evidence of PW4 vis-à-vis the evidence of payment was not challenged during cross examination when the court record is crystal clear that the appellant had contradicted each and every evidence of the prosecution witness (PW4) to the extent that PW4 confessed during cross examination that he is not sure whom he was dealing with in relation to the engine, when the court record clearly reveals that during cross examination (on p44,45,46 & 49) evidence of payments were highly challenged and PW4 gave inconsistent evidence.

### **Analysis**

- 6. Before dealing with the above stated grounds of appeal, I would consider the prosecution case summarily. It is evident that;
  - i) The engine was stolen in the early hours of the 01<sup>st</sup> of January 2017
  - ii) There are no eye witnesses of the theft
  - iii) The accused has sold the engine to the PW4
  - iv) It was sold on the 01<sup>st</sup> of January 2017

Though there were some denial by the accused of the above stated 3<sup>rd</sup> and 4<sup>th</sup> factors, they could be safely concluded on careful consideration of the available evidence.

Therefore, the only way the accused being convicted of theft would be on the basis of the doctrine of recent possession.

7. As for Shameem J. in **Raitamata v The State** [2005] FJHC 207; HAA0020J.2005S (29 July 2005)

*“The doctrine of recent possession furnishes a legal aid and factual basis to found a criminal prosecution. The underlying principle in the doctrine is that a person who is in possession of stolen goods soon after a theft or an associated offence implicates himself in the act of receiving stolen goods or in the associated offences.*

*The Prosecution for it to be benefited from the application must prove that*

- (i) The accused possessed the good*
- (ii) The goods possessed by the accused were the subject matter of the offence as complained by the complainant*
- (iii) There is no explanation from the accused in regard to his possession of the suspected goods.”*

8. Having set out the applicable law, let me analyse whether the Learned Magistrate has applied it appropriately.
9. The first two elements are satisfactorily proved by the prosecution and it is apparent that the learned magistrate was adequately convinced of them.
10. The third element casts a duty on the accused to offer a reasonable explanation. The issue in question would be whether he has provided a reasonable explanation or not.
11. The accused has not offered any evidence and exercised his right to remain silent. He has cross examined the witnesses of the prosecution suggesting one Shalend Sina gave him the said engine to be delivered. This suggestion may not suffice to discharge the duty casted upon the accused of offering a reasonable explanation. However, it is evident that the caution interview of the accused is submitted by consent as a part of the evidence by the prosecution. If the prosecution relies on the caution interview of the accused,

it has to be considered in total and not only the parts of it which may favour the prosecution. In the said caution interview too, the accused stands by his version that the engine was handed over to him by the said Shalend Sina. Therefore, I am of the view that the accused has discharged his burden of giving a reasonable explanation.

12. Now I will proceed to consider the consequences of the above successful discharge of the burden by the accused. The prosecution has not moved or adduced any evidence to disprove the said explanation of the accused. Therefore, the doctrine of recent possession cannot be applied to attribute any culpability to the accused. Furthermore, by tendering the caution interview of the accused by consent, the prosecution concedes to the said contentions. In result the prosecution admits that the said engine was given to the accused by a third party.
13. Therefore, I find that the learned Magistrate was incorrect in finding the accused guilty and convicting him of the offence of theft. Though the basis of this judgment is not a ground of appeal, it would be unfair and unjust to let the conviction stand and it would not be necessary to consider the submitted grounds of appeal.
14. Therefore, I allow the appeal, and set aside the conviction entered by the learned Magistrate.
15. I acquit the accused of the offence of theft.



  
**Chamath S. Morais**  
**Judge**

**At Lautoka**

25<sup>th</sup> of September, 2020

**Solicitors:** *The Appellant appeared in person*  
*Office of the Director of Public Prosecutions, Lautoka, for the Respondent*