IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 16 OF 2020

BETWEEN : **AVINESH SACHIN**

APPELLANT

A N D : **STATE**

RESPONDENT

Counsel : ***Mr. M.N. Khan for the Appellant.***
: ***Mr. A. Singh for the Respondent.***

Date of Hearing : ***24th of September, 2020***
Date of Judgement : ***27th of October, 2020***

JUDGMENT

Background

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

COUNT 1

Statement of offence

Theft: Contrary to Section 291 of the Crimes Act 2009.

Particulars of Offence

Avinesh Sachin and **Raveendran Nair**, on the 24th day of April, 2015 at Lautoka in the Western Division stole Mitsubishi 4M40 engine valued at $7,000.00 the property of Lautoka Hospital, with intention to deprive the said Lautoka Hospital.

2. The accused has pleaded not guilty to the said charge and the matter has proceeded to trial. At the conclusion of the trial the learned Magistrate having convicted the accused of the said offence and has imposed a sentence of 20 months of imprisonment, of which a period of 12 months is suspended for a period of 5 years.

3. Being aggrieved by the said conviction and the sentence, the accused (The Appellant) has submitted this appeal on the 06th of March 2020, within the allocated time.

Grounds of Appeal

4. As for the amended grounds of appeal filed on the 10th of July 2020, the appellant canvasses the said conviction and the sentence on the following grounds; (in verbatim)

<u>**Appeal Against Conviction**</u>

a) The Learned Magistrate erred in law and in fact in convicting the Appellant in all the circumstances of the case.

b) That the Learned Magistrates had erred in law when he shifted the onus of proof to the Appellant when he had ruled in:

i. <u>**Paragraph 12 of the Judgment that:**</u>

"Evidence of the PW1, PW2 and PW3 taken together shows that engine in question is the one that removed from the GN 177 which belongs to Lautoka Hospital. Even though counsels for the accused persons tried to adduce that engine is a different one, court find that have failed to create any doubt in the Prosecution evidence."

ii. <u>**Paragraph 20 of the Judgment that:**</u>

"Cross-examination failed to create any doubt in the Prosecution case or to discredit evidence."

iii. <u>**Paragraph 21 of the Judgment that:**</u>

"Now it is the duty of the Court to check whether they could create any doubt in Prosecution case."

iv. **Paragraph 23 of the Judgment that:**

"It is clear that both accused are submitting that engine was sold with the consent of the Pritika Deo. However, accused could not submit any meeting report or call anyone who was in the meeting while such decision was taken."

v. **Paragraph 25 of the Judgment that:**

"In line with the above findings it is highly unlikely that things shall happen the way accused submit in their evidence. I therefore, find the evidence of the accused persons are highly improbable and disbelieve the evidence. Thus they fail to create any doubt in the Prosecution case."

vi. **Paragraph 26 of the Judgment that:**

In the light of the said analysis I conclude that Prosecution has proved the count beyond reasonable doubt and accused has failed to create any doubt to the Prosecution case. Accordingly I find both accused are guilty for the count of "Theft" and convict them for the same."

c) The Magistrate erred in law and fact in finding that the engine was removed from GN 177.

d) The Magistrate erred in law and fact in finding that the engine in question was owned by the Lautoka Hospital.

e) The Magistrate erred in law and fact in finding the Appellant guilty and in ruling that a multitude of circumstantial evidence and/or suspicion in the matter has led to proof of guilt in the matter.

f) That the learned Magistrate erred in law and fact in not upholding the Defence submission of no case to answer in the matter and acquitting the Appellant at that stage.

g) That the Learned Magistrate erred in law and misdirected himself on the evidence by relying on the credibility of the Prosecution witnesses when clearly their credibility was questionable.

h) That the Learned Magistrate erred and misdirected himself on the evidence by not fully considering the case put forward by the Defence; and

i) That based on all the evidence in the matter it was unsafe and/or unsatisfactory to convict the Appellant in all the circumstances of the case as the Honorable Court could not have been satisfied of proof of the case beyond reasonable doubt.

Appeal Against Sentence

a. That the Appellant appeals against sentence being manifestly harsh and excessive and wrong in principal in all the circumstances of the case.

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.

c. That the Learned trial Magistrate had not placed sufficient weight to the mitigating factors when sentencing the Appellant.

Analysis

5. Before dealing with the above stated grounds of appeal, I would consider the essential elements that the prosecution should have proved in this case in proof of the offence of 'Theft'. As correctly cited by the learned Counsel for the appellant in paragraph 9 of his submissions, they are;

i) The Accused,
ii) Dishonestly,
iii) Appropriates the property belonging to another,
iv) With the intention of permanently depriving the other of the property.

Since these are the essential elements, the rest of the contents in the information are not of much importance other than for the accused to understand the allegation properly.

It is apparent the learned counsel has been carried away by the particulars of the alleged offence as he deviating from above quoted paragraph 9 of his

submissions, submits in paragraph 28 of the submissions a set of different requisites.

6. I have carefully considered the led evidence in this case. The identity of the accused is not disputed. The engine was stolen from within the hospital compound from it was kept at a garage for a long time. It was a defective removed engine. However, when considered the ownership of the said engine, it belonged to the Lautoka hospital and there exists no doubt about it.

7. It is the accused who has sold it to the PW4 for a sum of $250.00. Therefore, the accused has disposed of the said engine with an intention of permanently depriving the owner, the Lautoka hospital. Though the accused state that he removed it with the authority of the PW3 and gave her the money ($100.00), when PW3 testified it was never suggested from her.

8. Though the said engine could have written off from the books and sold as scrap metal, there is a procedure to be adopted and complied with. The value of the engine and the vehicle it was originally fixed or removed from, are not the ingredients of the alleged offence of theft.

9. It is apparent that the accused has suggested from the PW3 that he has disposed of the engine with her consent. It could be assumed that suggestion was made strictly on the instructions of the accused. Therefore even in absence of afore mentioned evidence as to the alleged act of removing or the ownership, the prosecution should succeed. If that was the case of the appellant, the only issue would be dishonest intention. It is clear and understandable, that State properties cannot be disposed of by word of the mouth. Further, if the accused raised it as a defence, then it would be his duty to prove that to the standard of balance of evidence.

10. When analysed the all available evidence, it is clear that the prosecution has proved the alleged offence. The learned magistrate has then proceeded to consider the defence case. In absence of any reasonable doubt and the prosecution proving the alleged offence beyond reasonable doubt, the learned magistrate was correct in considering the defence case to see whether it creates a reasonable doubt in the prosecution case.

11. Now I will proceed to consider the consequences of the above successful discharge of the burden by the prosecution. I agree with and endorse that the

accused bears no burden and the burden of proving the case beyond reasonable doubt casts entirely on the prosecution. When the prosecution discharges their burden successfully, the accused would be found guilt and convicted. If the prosecution failed to discharge the said burden the accused should be acquitted.

12. I do agree that the accused need not prove anything. However, that right remains only until the prosecution proves their case beyond reasonable doubt. Therefore, once the prosecution proves their case beyond the threshold, if the accused fails to create a reasonable doubt the accused should be found guilty. As for the ground (b) though the Appellant challenges the judgment, the learned Magistrate was correct to have considered the accused's case and see whether it creates a reasonable doubt.

13. Therefore, I do not see any merit in any of the 9 grounds from (a) to (i) submitted against the conviction and accordingly dismiss the same.

14. Now I will analyse the grounds against the sentence. The recommended tariff for the offence of theft as for the case of (**Ratusili v State** [2012] FJHC 1249; HAA 011.2012) is from 2 months to 3 years.

15. The sentencing tariff shown out in the said case of Ratusili (Supra) is as follows;

    (a) For a first offence of simple theft the sentence range should be between 2 to 9 months.
    (b) Any subsequent offence should attract a penalty of at least 9 months.
    (c) Theft of large sums of money and theft of breach of trust, whether first offence or not can attract sentences of up to 3 years.
    (d) Regard should be had to the nature of the relationship between the offender and the victim.
    (e) Planned thefts will attract greater sentences than opportunistic thefts.

16. The learned Magistrate has picked the starting point of 18 months. Thereafter the learned Magistrate has considered the breach of trust and premeditation in enhancing the term. It should be noted that the starting point of 18 months was selected in consideration of the said element of breach of trust, value of the stolen articles and that it was a planned theft. Therefore it amounts to double counting. Further the real value of the stolen article is far below the

quoted price of $7,000.00. Therefore I do not see any aggravating factors to be considered.

17. Accordingly, I will quash the sentence of the learned Magistrate and impose a 12 months of imprisonment and suspend it for a period of 3 years, instead.

18. Subject to the said adjustment in the sentence this appeal is disallowed and dismissed.

Chamath S. Morais
Judge

At Lautoka
27th of October, 2020

Solicitors: *Messrs. Nazeem Lawyers, Ba, for the Appellant*
Office of the Director of Public Prosecutions, Lautoka, for the Respondent