

## IN THE HIGH COURT OF FIJI AT SUVA

In the matter of an appeal under section 246(1) of the Criminal Procedure Act 2009.

[APPELLATE JURISDICTION]

**VUATE RADREKUSA**

**Appellant**

**CASE NO: HAA. 43 of 2020**  
[MC, Navua Criminal. Case No. 497 of 2011]

**Vs.**

**STATE**

**Respondent**

**Counsel** : Ms. S. Hazelman for the Appellant  
Mr. E. Samisoni for the Respondent

**Hearing on** : 27 January, 2021

**Judgment on** : 19 February, 2021

### JUDGMENT

#### *Introduction*

1. The above named appellant (“appellant”) was charged before the Magistrate Court at Navua with one count of burglary contrary to section 312 of the Crimes Act 2009 (“Crimes Act”) and two counts of theft contrary to section 291 of the Crimes Act. The charges read thus;

#### FIRST COUNT

##### *Statement of Offence*

**BURGLARY:** Contrary to section 312 [1] of the Crimes Decree Number 44.

*Particulars of Offence*

**VUATE RADREKUSA**, between the 30<sup>th</sup> day of November 2011 and the 01<sup>st</sup> day of December 2011, at Lomary, Serua, Navua in the Central Division, broke and entered into dwelling house of VEREMO NAYACLEVU, as a trespasser, with intent to steal from therein.

**SECOND COUNT**

*Statement of Offence*

**THEFT:** Contrary to section 291 of the Crimes Decree Number 44 of 2009.

*Particulars of Offence*

**VUATE RADREKUSA**, between the 30<sup>th</sup> day of November 2011 and the 01<sup>st</sup> day of December 2011, at Lomary, Serua, Navua in the Central Division, dishonestly appropriated [stole] 01 Blue Toyota Corona motor vehicle registration number EK 532 valued at \$10,000, 01 Blue wallet valued at \$300, Cash \$70.00, 01 Black Digicel Motorola mobile phone valued at \$70.00, bunch of keys valued at \$50.00, all to the total value of \$1,193, the property of VEREMO NAYACLEVU.

**THIRD COUNT**

*Statement of Offence*

**THEFT:** Contrary to section 291 of the Crimes Decree Number 44 of 2009.

*Particulars of Offence*

**VUATE RADREKUSA**, between the 30<sup>th</sup> day of November 2011 and the 01<sup>st</sup> day of December 2011, at Lomary, Serua, Navua in the Central Division, dishonestly appropriated [stole] 01 JVC Video Camera and Charger valued at \$350.00, 01 Samsung Touch Screen Phone valued at \$300.00, 01 Citizen Wrist watch valued at \$200 all to the total value of \$850, the property of IRENA NAYACALEVU.

2. The appellant was convicted on all three counts after trial on 08/06/20 and was sentenced on 29/06/20 to 15 months imprisonment where the appellant was required to serve the first 09 months forthwith and the balance term of 06 months was suspended for 03 years.

3. Being aggrieved by the conviction and the sentence imposed, the appellant had taken steps to file a document dated 30/06/20 in person, indicating his intention to appeal against the said conviction and sentence and outlining the grounds of appeal. This document was received by the High Court Registry on 14/08/20 and accordingly it was filed 18 days after the expiration of the period within which an appeal should be filed.
4. Thereafter the appellant decided to engage the services of the Legal Aid Commission and accordingly the said Commission filed a formal application seeking leave to appeal out of time dated 23/11/20 raising the following grounds of appeal;

**APPEAL AGAINST CONVICTION**

- a) *That the Learned Magistrate erred in law and in fact in not holding a Voir Dire hearing (trial within a trial) given that the only evidence relied upon is the Appellants confession and considering the Appellant appeared in person.*
- b) *That the conviction was unreasonable and cannot be supported by having regard to the totality of the evidence at trial, in particular, to the following:*
  - a. *Evidence of PW-1/Leone Nayacalevu which casted doubt on the truthfulness of the admissions in the caution interview.*
  - b. *General unfairness of the manner in which the caution interview was conducted i.e having regard to the missing signatures of the Appellant and the absence of any record with the record of interview that the Appellant was given his right to remain silent.*

**APPEAL AGAINST SENTENCE**

- a) *That the Learned Magistrate erred in law in failing to discount the **remand** period spent by the Appellant.*
- b) *That the Learned Sentencing Magistrate caused the sentence to be harsh and excessive by taking the value of the property as an aggravating factor hence enhancing the sentence.*

***Leave to appeal out of time***

5. The counsel for the respondent informed this court on 22/11/20 that he does not object for the granting of leave to appeal.

6. Given the fact that the initial document was dated 30/06/20, the fact that it contains a date stamp of the Suva Corrections Centre indicating the date 04/08/20 and then received by the court registry on 14/08/20, I find that the delay in filing this appeal could be attributed to the process in the corrections centre and not due to the fault of the appellant who is a serving prisoner. On the other hand, the delay is not substantial. Therefore, I find that there is 'good cause' in this case to extend the time within which an appeal should be filed for a period of 18 days. Leave to appeal out of time is accordingly granted.

### *Discussion*

7. When this matter was taken up for hearing on 27/01/21, the counsel for the appellant informed this court that the appellant wishes to abandon the appeal against sentence and also ground (a) of the appeal against conviction. Accordingly, the appeal was confined to ground (b) of the appeal against the conviction.
8. The aforesaid sole ground of appeal had been presented under two limbs. The issue to be determined in this appeal is whether the conviction cannot be supported having regard to the totality of the evidence and in particular, given the evidence of the first prosecution witness ("PW1") and the lapses in relation to the recording of the cautioned interview which provided the only incriminating evidence against the appellant.
9. The crux of the argument of the appellant in relation to the evidence of PW1 which formulates the first limb of the ground of appeal is that, for the reason PW1 did not specify the items that were stolen in his evidence, there was no evidence to support the admissions in the cautioned interview and therefore the Learned Magistrate erred in accepting the admissions in the cautioned interview statement. It is also argued that, for the reason that PW1 stated in his evidence that the vehicle that was stolen belonged to him, the prosecution failed to prove the element in count two

that the 'property belonged to one Veremo Nayacalevu' as per the particulars of the offence.

10. One aspect of the first argument above is the assertion that confessions in a cautioned interview statement cannot be accepted as true unless there is other supporting evidence. The flipside of this assertion is that for the reason that truthfulness of a confession recorded in a cautioned interview statement cannot be assessed in the absence of other evidence independent of the cautioned interview statement to support that confession, an uncorroborated confession is inadmissible in evidence. I took the liberty to use the term 'inadmissible' because the argument raised on behalf of the appellant is that there is no evidential value in an uncorroborated confession.
11. The Court of Appeal in the case of *Kean v State* [2013] FJCA 117; AAU 95.2008 (13 November 2013) and then again the Supreme Court in the case of *Kean v State* [2015] FJSC 27; CAV0007.2015 (23 October 2015) expounded on uncorroborated confessions. In fact the discussion was mainly on the necessity for a trial judge to give a special warning to the assessors in relation to an uncorroborated confession. If the position in Fiji was that there is no evidential value in an uncorroborated confession, then there was no need to deliberate on whether there should be a special warning when it comes to such confessions. Both the Court of Appeal and the Supreme Court held that such a warning is not necessary though an uncorroborated confession should be scrutinised with care. In *Kean v State* [2015] FJSC 27; CAV0007.2015 (23 October 2015), at paragraph 23, Keith J observed thus;

*23. The evidence relating to an uncorroborated confession will always have to be scrutinised with care. As Calanchini P said at [41] in his judgment in the Court of Appeal, it may be appropriate for the trial judge to remind the assessors of particular features of the evidence which may be thought to warrant closer attention. Whether any comment about the evidence should be made, and what that comment should be, are matters for the trial judge. There may be cases in which it is appropriate to comment on the evidence in forceful terms. But to require a standard warning to be given to the assessors by the trial judge, whenever the defendant denies that he confessed his guilt or claims that his acknowledgment of the accuracy of what was attributed to him was forced on him, and there is no other evidence independent of*

*the police corroborating the circumstances in which the confession was made, is in my view a step too far.*

12. The position regarding uncorroborated confessions in Fiji is clear. An uncorroborated confession is admissible in evidence. A cautioned interview statement should be assessed like the evidence given by any other witness in court. Therefore, in determining the truthfulness of a confession, invariably all the evidence adduced before the court should be considered. This does not mean that there should necessarily be other evidence independent of the cautioned interview statement to decide whether a particular confession in that statement is true. If the cautioned interview statement is the only evidence adduced before the court, then the court should consider the entire cautioned interview statement in deciding whether a particular confession recorded in that statement is true. It would be a different situation if what is stated by the accused as recorded in the said cautioned interview statement is not sufficient to decide whether the confessions the accused had made in that statement are true. Therefore the proposition that there should be evidence independent of the cautioned interview statement before the court in order to determine the truthfulness of that statement or a confession recorded therein is clearly a misnomer.
13. Moreover, the mere reason that PW1 had not mentioned the stolen items in his evidence cannot be taken to impeach the truthfulness of the confession of the appellant. A witness may not come up to proof for many reasons. Such failure would not affect the truthfulness of a confession. However the situation would be different if the evidence of a witness which the court would consider credible and reliable is substantially inconsistent with a confession recorded in a cautioned interview statement.
14. The next point raised in relation to the evidence of PW1 is that, in view of the evidence of PW1 that the vehicle that was stolen belonged to him and the fact that it is stated in the particulars of the second count that the said vehicle belonged to one Veremo Nayacalevu who is not PW1, the prosecution has failed to prove an

element of the second count namely, that the property belonged to Veremo Nayacalevu.

15. It is pertinent to note that, what is required to be established when it comes to the offence of theft is that the property that was appropriated by the accused belonged to another. The property should belong to a person other than the accused. The above discrepancy between the evidence of PW1 and the particulars of the offence in relation to the ownership of any property is a variation that should not be regarded as material in view of the provisions of section 182(3) of the Criminal Procedure Act 2009 ("Criminal Procedure Act).
16. Accordingly I find no merit in the arguments raised on behalf of the appellant based on the evidence of PW1.
17. The second limb of the ground of appeal is focused on the cautioned interview statement which was the only incriminating evidence against the appellant in the case at hand. It is the appellant's position that the relevant cautioned interview statement had been fabricated and he did not make that statement.
18. As pointed out on behalf of the appellant, the signature purported be of the appellant and a second signature appears only on the first page of the record of the cautioned interview after question number 03 where the question is on conducting the interview in English. Apart from those two signatures, there is no signature of the interviewee, of the interviewing officer or of the witnessing officer, on that document.
19. The second prosecution witness ("PW2") was the interviewing officer. He had said in his evidence during cross-examination that the appellant refused to sign the record. The third prosecution witness ("PW3") was the charging officer and he had said in his evidence that the appellant refused to give a statement, but signed the charge statement.

20. If an accused refuses to sign the record of interview, Judges Rule IV(f) requires the following steps to be taken;

*(f) If the person who has made a statement refuses to read it or to write the above-mentioned certificate at the end of it or to sign it, the senior police officer present shall record on the statement itself and in the presence of the person making it, what has happened. If the person making the statement cannot read, or refuses to read it, the officer who has taken it down shall read it over to him and ask him whether he would like to correct, alter or add anything and to put his signature or make his mark at the end. The police officer shall then certify on the statement itself what he has done.*

21. It is evident from the relevant record of interview that the above steps have not been taken in this case, a fact that the Learned Magistrate had failed to give his mind to in his judgment.
22. I would expect at least the interviewing officer to make a note on the record of interview that the appellant refused to sign if that was the case. Given the circumstances of this case I find it more probable for the interviewing officer to have forgotten to request the appellant to sign on the record where required. In fact it appears that the interviewing officer had completely forgotten about the requirement to have the record of interview signed including by him after question No 3. Based on this observation, it is my view that the said interviewing officer (PW2) was not telling the truth when he had said in his evidence that the appellant refused to sign.
23. For the reason that the appellant has raised fabrication against the record of interview the absence of the signatures was a crucial issue which required careful deliberation on the part of the Learned Magistrate. In that, it was required of the Learned Magistrate to ascertain whether there is a reasonable and a valid explanation for the absence of the signatures. All this was necessary in order for the Learned Magistrate to decide whether it is proven beyond reasonable doubt that it



was the appellant who gave those answers that are recorded in the disputed record of interview.

24. Upon perusing the impugned judgment, I note that the Learned Magistrate had decided to accept the evidence of PW2, the interviewing officer that the accused gave his answers voluntarily for the reason that the appellant did not dispute the said evidence. The appellant may have given the answers during the cautioned interview voluntarily. But the issue here is whether the answers printed in the record of interview presented in court are indeed those same answers given by the appellant during the interview. The appellant had clearly disputed that by raising fabrication.
25. Having perused the impugned judgment, I am not satisfied that the Learned Magistrate had properly and adequately dealt with this issue. Given the missing signatures in the relevant record of interview, the scarcity of evidence to establish that the answers printed in the said record were given by the appellant and the fact that PW2's evidence that the appellant refused to sign the record of interview is unreliable, I find that it was not open for the Learned Magistrate to conclude that the prosecution has proven beyond reasonable doubt that the record of interview tendered as evidence was not one that is fabricated and therefore the accused had given the answers printed therein. Accordingly, the Learned Magistrate should not have relied on the cautioned interview statement of the appellant which was the only incriminating evidence presented against the appellant during the trial.
26. It is pertinent to note that in the instant case, there was no evidence led on how the investigation was conducted leading to the arrest of the appellant. According to the evidence adduced, a crime was committed where there were no eye witnesses, the accused was arrested and then the accused had confessed. There was opportunity for the police to conduct further investigation on the information they received during the cautioned interview of the appellant and gather other evidence to place the appellant at the crime scene at the material time. But the police had chosen to rely only on the confession purportedly made by the appellant as the only


incriminating evidence against the appellant. Then at least the interviewing officer should have conducted the interview with due diligence and following the proper procedure, so that the admissibility of the relevant record of interview could not be successfully challenged in court.

27. All in all, in my judgment, this appeal should be allowed in view of the issue raised in the second limb of the ground of appeal that was canvassed.

**Orders;**

- a) The appeal against the conviction is allowed;
- b) The convictions entered on 08/06/20 and the ensuing sentence imposed by the Learned Magistrate in MC Navua, Crim. Case No. 497 of 2011 are hereby set aside;
- c) The appellant is accordingly acquitted.



  
Vinsent S. Perera  
JUDGE

**Solicitors;**

Legal Aid Commission for the Appellant  
Office of the Director of Public Prosecutions for the State