IN THE HIGH COURT OF FIJI
AT LAUTOKA IN THE WESTERN DIVISION
APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO. HAA 47 OF 2023
(Ba Magistrates Court Criminal Case No: 424 of 2017)

BETWEEN: **MIKAELE KOROI**

APPELLANT

AND

STATE

RESPONDENT

Counsel: Appellant in Person
Ms R. Uce for Respondent

Date of Hearing: 08 March 2024
Date of Judgment: 28 March 2024

JUDGMENT

1. This is a timely appeal filed by the Appellant in person against the conviction recorded by the learned Magistrate at Ba.

2. The Appellant was charged with two counts of Aggravated Burglary contrary to Section 313 (1) (a) & (b) and one count of Theft contrary to Section 291(2) of the Crimes Act No. 44 of 2009. The Appellant pleaded not guilty to the charges in the High Court. Exercising the powers vested in the High Court under Section 4(2) of the Crimes Act, the matter was remitted to the Magistrates Court at Ba to be tried in extended jurisdiction.

3. At the trial in the Magistrates Court, the Appellant representing himself pleaded not guilty to both charges. Since there were admissions in the record of caution interview, a *voir dire* inquiry was run. Having heard the police witnesses and the Appellant, the Learned Magistrate held the caution interview admissible at the trial. At the ensuing trial, four witnesses were called by the prosecution and, for defence, only the Appellant gave evidence. The record of caution interview and the exhibits, alleged to be the stolen property, were tendered in evidence at the trial. In her Judgment, the Learned Magistrate found the accused guilty of both counts and was convicted. On 21 July 2023, the Appellant was sentenced to 2 years and 01 month imprisonment immediately and the remainder of 7 months to be suspended for a term of 5 years.

4. On 22 July 2023, the Appellant filed his timely appeal and on 7 August 2023 he filed grounds of appeal appealing his conviction only. On 4 October 2023 he filed an additional ground.

5. The Grounds of Appeal were as follows:

   (a) That the learned trial Magistrate has fallen into error of law when she failed to give the Appellant the right of election as per Section 4 (1)(b) of the Criminal Procedure Act on the charge of Aggravated Burglary contrary to section 313 (1) (A), (B) of the Crimes Act 44 of 2009.

(b) That the learned Magistrate erred in law thus failed to analyse the caution interview statement with evidence, which was conducted unfairly, improperly where the prosecution failed to prove the confession with evidence beyond reasonable doubt.

(c) That the learned Magistrate erred in law in fact where she did not properly consider and give directions in her judgment in respect of circumstantial evidence.

(d) That the learned Magistrate erred in law when she failed to give direction in her judgment regarding the alleged confession contained in the caution interview in particular as to how to approach it and the weight to be attached to the disputed confession.

(e) That the learned Magistrate erred in law and in fact when she failed to consider that the truthfulness and voluntariness confession was a matter for her to decide in the light of all evidence in the matter of failure to give direction with regards to truthfulness and voluntariness.

(f) That the learned Magistrate erred in law and in fact to admit the confession in *voir dire* as there was serious doubt the voluntariness and the truth or correctness of the said confessions for the reasons *inter alia* that prime prosecution witness Iosefo Rainima's statement was not produced as evidence-in-chief to confirm that the stolen items were received by him.

(g) That the search list was prepared without the station diary entry by the investigation department.

(h) That the learned Magistrate has erred in law and in fact when she misdirected herself about the evidence contained in the caution interview of the Appellant

in respect of its truth and for credibility and weight to be given to the confessions.

(i) That the learned Magistrate erred in law to consider during the trial within trial the Appellant's rights under the 2013 Constitution were violated section 13 of the Constitution.

(j) That the learned Magistrate erred in law when he failed to consider and thus to give warning regards to the inconsistency evidence given by the police prosecution witnesses.

Additional Ground (a) Right of Election

6. I shall first deal with the additional ground of appeal purely on law. The Appellant contends that he was denied the right of election to select the forum in which he should be tried. The Appellant was charged with Aggravated Burglary contrary to Section 313 (1) (a) & (b) and one count of Theft contrary to Section 291(2) of the Crimes Act No. 44 of 2009. Aggravated Burglary contrary to Section 313 (1) is described in the section as an indictable offence. Therefore, in terms of Section 4(1) of the Crimes Act, the Appellant shall be tried by the High Court.

7. However, by virtue of Section 4(2) of the Crime Act, notwithstanding the provisions of sub-Section 4(i) above, a judge of the High Court has a discretion, invest a magistrate with jurisdiction to try any offence which, in the absence of such order, would be beyond the magistrate's jurisdiction.

8. There is no right of election is provided in law for an accused who is charged with an indictable offence. Therefore, there was no need for the Learned Trial Judge to put the right of election to the Appellant. This ground has no merit.

9. Rest of the grounds of appeal can be boiled down to two main issues, namely whether the Learned Magistrate properly analyed the evidence at the *voir dire* hearing when she decided to admit the caution statement at the trial proper and whether she failed to properly direct herself on circumstantial evidence.

Grounds (b), (f) and (i)

10. Grounds (b), (f) and (i), as they could be gathered from Appellant's submission at the hearing, concern Learned Magistrate's assessment of the evidence at the *voir dire* hearing. Let me first deal with that.

11. At the *voir dire* hearing, the three police witnesses presented evidence while only the Appellant gave evidence for the Defence. The Learned Magistrate found the police witnesses to be consistent and credible. She rejected the evidence of the Appellant which she found to be inconsistent. She gave reasons for her finding at paragraphs 19 and 20 of her Ruling dated 30 December 2022.

12. The Appellant in his cross-examination did not put to the arresting officer (PW 1) that he was assaulted at the police stations or during transportation. A reasonable explanation had been given by PW 1 for the delayed transport. It was never put to the interviewing officer (PW2) that he or any other police officer had threatened or assaulted the Appellant before or during the caution interview. Although a medical report was shown by the Appellant to PW2, it was not tendered by the Appellant in his evidence so that it could be considered by the Learned Magistrate. The witnessing officer (PW3) maintained that the Appellant was not threatened or assaulted during the interview. The Learned Magistrate found the grounds advanced by the Appellant to be inconsistent with the evidence of the Appellant and rejected the evidence of the defence.

13. At the appeal hearing, the Appellant claimed that the witnesses who gave evidence in the case under appeal gave evidence in another matter (Crim. Case No 420 of 2017) as well which was heard by the same Magistrate and, in that particular matter, by her Ruling dated 19 April 2023, she held the caution interview inadmissible on the basis that the prosecution failed to prove the voluntariness of the admissions in view *inter alia* of the injuries noted in medical report that was tendered.

14. In the 2023 matter (Crim. Case No. 420 of 2017), the Appellant was charged with another person. There is no dispute that the Appellant was arrested for a series of offences of house breaking and robbery and, when he was taken into police custody for this matter, he was also questioned for other matters as well. At the *voir dire* hearing in that matter, unlike in the case concerning the present appeal, the medical report had been tendered in evidence for the perusal of the Learned Magistrate and, at paragraph 25 of her Ruling, she had considered the same and the injuries noted therein. Furthermore, the Appellant chose not to given evidence in that case.

15. In the 2023 matter (420-2017), the Learned Magistrate found some discrepancies between what the police witnesses said in evidence and what was noted in the station diary. The police witnesses were not able to justify the injuries noted in the medical report that was obtained two days after the Appellant was produced in court. On that basis, the Learned Magistrate ruled the caution interview inadmissible.

16. The *voir dire* Ruling concerning the present Appeal is reflected in page 133 of the Court Record. Upon a comparative analysis it would be noted that the *voir dire* hearing in respect of the present appeal was conducted in 2022 whereas the *voir dire* hearing in the other matter was conducted thereafter in 2023. In the 2022 *voir dire* hearing, which is the subject of the present appeal, three police witnesses gave evidence for the State whereas only two of them gave evidence in the *voir dire* hearing in the other matter that was heard in 2023. No station diary or medical report was tendered in evidence in 2022 matter. In the *voir dire* proceedings concerning the present appeal, the grounds of *voir dire* were confined to the issue of whether the Appellant was threatened by the police

officers at the caution interview and nothing in his grounds was there of him being assaulted during the interview.

17. The finding of the court must be based on the evidence adduced at the hearing. The decision turns on the facts and circumstances of each individual case. As was elaborated earlier, the circumstances under which the decisions have been made in each case were different although the judicial officer presided over in both proceedings happened to be the same. The mere fact that the Learned Magistrate had come to a different conclusion in a case that she heard subsequently does not mean that the finding she made in the previous case is wrong. Therefore, there is no basis for the grounds of appeal raised challenging the Learned Magistrate's finding at the *voir dire* hearing.

18. The Learned Magistrate had the opportunity to revisit her finding at the *voir dire* hearing in the light of the evidence led at the trial proper. The same police witnesses who testified at the *voir dire* proceedings as to the voluntariness, fairness and the constitutionality of the caution interview, produced evidence at the trial proper as well and maintained the position they had taken at the *voir dire* hearing.

19. The Learned Magistrate has in fact considered the inconsistencies of police witnesses. She observed some inconsistencies between the station diary entries and the evidence of the police witnesses. However, she found them to be not significant to affect the credibility of the version of event of the prosecution case. The Learned Magistrate also considered the medical report and the evidence of the Appellant and was satisfied that the confessionary statements were voluntarily given. She specifically stated at paragraph 30 of her Judgement that the discrepancies do not affect the prosecution's case in establishing the truthfulness of the record of interview and concluded that the Appellant had told the truth in his caution statement. In coming to that conclusion, she had the opportunity to consider the other evidence led in trial, specifically the evidence concerning the recovery of stolen items, the search warrant and the search list exhibited at the trial etc.

Other Grounds

20. All the other grounds can conveniently be considered together. It would appear that the Judgment of the Learned Magistrate is not solely based on the confession made by the Appellant in his caution interview. In addition to the confession, the prosecution had relied on the factual presumption of recent possession of stolen items. The ground (c) appears to concern this factual presumption when it states that *the Learned Magistrate erred in law and fact when she did not properly consider and give directions in her judgment in respect of circumstantial evidence.*

21. The circumstantial evidence can, and often does, clearly prove the commission of a criminal offence, but two conditions must be met. Firstly, the primary facts from which the inference of guilt is to be drawn must be proved. No greater cogency can be attributed to an inference based upon particular facts than the cogency that can be attributed to each of those facts. Secondly, the inference of guilt must be the only inference which is reasonably open on all the primary facts that are so proved. Equally, it must be shown that when taken together, the only reasonable inference that can be drawn is incompatible with the innocence of the accused. The drawing of the inference is not a matter of evidence: it is solely a function of the trial court based on its critical judgment of men and affairs, common sense, experience and reason.

22. In **Rokodreu v State**[1], the Supreme Court comprehensively discussed the common law principle of recent possession of stolen property as follows:

> In common law jurisdictions there is a presumption that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession. In order to apply this presumption, the prosecution is required to establish several requirements:
>
> - Stolen property
> - Recent possession
> - Exclusive and conscious possession
> - When the above factors are established, the possessor has to give an account as to how he came to possess. In other words, he should give a reasonable or plausible explanation.

[1] [2022] FJSC 36; (25 August 2022)

23. The Court of Appeal in **Wainiqolo v State**[2]

> The principal ground relates to the so-called doctrine of recent possession which is that where property has been stolen and is found in the possession of the accused shortly after the theft, it is open to the court to convict the person in whose possession the property is found of theft or receiving. It is no more than a matter of common sense and a court can expect assessors properly directed to look at all the surrounding circumstances shown on the evidence in reaching their decision. Clearly the type of circumstances which will be relevant are the length of time between the taking and the finding of the property with the accused, the nature of the property and the lack of any reasonable or credible explanation for the Accused's possession of the property.

24. Let me now deal with the issue of how the Learned Magistrate in her judgment considered and analysed the circumstantial evidence in relation to the factual presumption of recent possession of stolen items.

25. It was in evidence at the trial that a search had been conducted on a search warrant by the police at the Appellant's house on 17 August 2017, approximately 10 days after the alleged offence, where some stolen items have been recovered. They included home theater speakers and DVD players, by their very nature were not fast moving items. The stolen items and the search list which contained a list of items alleged to have been stolen from the complainant had been exhibited at the trial. The complainant had established the identity of the stolen items at the police station and at the trial.

26. There had been no dispute that the stolen items were recovered from the possession of the Appellant's house in the presence of the Appellant and his brother Isefo Rainima. The same was acknowledged by the Appellant by signing the search list. The Appellant In his evidence further acknowledged that the stolen items were recovered from his possession. In view of this evidence, the Learned Magistrate had a reasonable basis to draw the factual presumption that the Appellant was the thief.

---

[2] [2006] FJCA 49; AAU0061.2005 [28 July 2006]

27. Once the basis for the factual presumption has been established by the prosecution, the accused has an evidential burden to present a plausible explanation on evidence to negate the effect of the presumption.

28. The Appellant in his evidence said that the items that were seized by police were sold to him. But he had not revealed the source from which those items were purchased either to the police or to the Court. The Learned Magistrate in paragraph 33 of her Judgment disbelieved the evidence of the Appellant that the items recovered had been sold to him. She observed that the Appellant offered no further evidence other than stating in his evidence that the items recovered had been sold to him. It would be noted that the Appellant, although in his evidence said that the stolen items were sold to him, he had not given that explanation to police in his caution statement.

29. Although the accused has no burden to prove anything in a criminal trial, when a factual presumption has been established, the explanation must be made available on evidence and it must be plausible. On the evidence placed before her, the Learned Magistrate was entitled to disbelieve the evidence of the Appellant as far as his explanation was concerned where she was merely paying lip services.

30. No prejudice has been caused to the Appellant by his brother Iosefo Rainima not being called or his statement not being tendered as part of the prosecution case. Ground (f) has no merit.

31. In ground (h) the Appellant contends that the Learned Magistrate has erred when she misdirected herself about the evidence contained in the caution interview of the Appellant in respect of its truth and for credibility and weight to be given to the confessions. I am not convinced that the Learned Magistrate erred in this respect. She has in fact considered the evidence led in trial to satisfy herself that the Appellant had told the truth in his confessionary statements.

32. In many commonwealth jurisdictions, as a matter of policy, the confessionary statements are allowed to be admitted in to evidence in the interest of justice even if they were found to have been obtained unlawfully. For example Section 27 Indian

Evidence Act and Evidence Ordinance of Sri Lanka which codify the common law rules of evidence recognize this policy. While Sections 25 and 26 exclude confessions made by a person to a police officer or confessions made by a person while in custody, Section 27 carves out an exception in respect of cases where the confession is made in the form of information leading to the discovery of a fact, for example, stolen goods. The rationale behind this policy is that the finding of the fact ultimately proves that the suspect has told the truth.

33. The Fiji Constitution appears to have recognized this policy. Section 14 (2) (k) of the Fiji Constitution provides that *every person charged with an offence has the right to not to have unlawfully obtained evidence adduced against him or her unless the interest of justice require it to be admitted.*

34. Ascertainment of truth is no doubt the ultimate objective of the administration of justice. The Learned Magistrate having considered the evidence placed before her has achieved that objective. She has properly considered the evidence in light of the confessionary statements in coming to the conclusion that the Appellant told the truth at his cation interview. In doing so, the Learned Magistrate correctly drew the inference based on proved primary facts to find the Appellant is the thief.

35. There is no basis for the allegations mounted by the Appellant and for the grounds of appeal. The appeal against conviction should be dismissed.

36. The Following Orders are made:

(a). The appeal is dismissed.

(b). The Judgment of the Learned Magistrate at Ba is affirmed.

HIGH COURT OF FIJI
LAUTOKA

Aruna Aluthge

Judge

28 March 2024

At Lautoka

Solicitors:

Office of the Director of Public Prosecutions for State