

**FILIMONI NARAVARAVA v STATE**

HIGH COURT — APPELLATE JURISDICTION

5 SHAMEEM J

7, 14 June 2002

[2002] FJHC 127

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**Criminal law — appeals — petition of appeal against conviction and sentence — whether there is a mitigating circumstance — whether the accused’s right to counsel was violated — lack of representation — Constitution s 28(1)(d).**

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Appellant pleaded guilty to the offence of theft cattle. He was convicted and then released on bail for sentence. He did not appear for sentence. A bench warrant was issued. He was remanded in custody pending sentence for the accused to prove in court his mitigating circumstance. The Appellant was sentenced to 3 years’ imprisonment. He appealed against the conviction and sentence on the grounds that he was not given the opportunity to mitigate before his sentence, his right to counsel was violated, his plea of

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guilt was ambiguous and his sentence was excessive.

**Held:**

(1) The Appellant was not told of his right to counsel before his plea was taken. There was undoubtedly a breach of the Constitution. A breach of this right will lead to the quashing of a conviction where there has been a miscarriage of justice.

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(2) The Appellant was prejudiced by lack of legal representation. If he had been represented there would have been no plea of guilty. The plea of guilty was clearly ambiguous because the Appellant in mitigation raised matters which constituted a defence in law.

Appeal allowed.

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No cases referred to.

Appellant in person

*P. Bulamainivalu* for the Respondent

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**Shameem J.** The Appellant was charged with the following offence in the Tailevu Magistrates’ Court.

*Statement of Offence*

*Theft Cattle: Contrary to section 275 of the Penal Code, Cap. 17.*

*Particulars of Offence*

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Filimoni Naravarava, on the 23<sup>rd</sup> day of December, 1999 at Lodonu, Tailevu in the Central Division, stole a cow valued at \$300 the property of Naomi Waqa.

On 10th March 2000, the Appellant, who was not represented by counsel, pleaded guilty to the charge. The prosecution read out the facts as follows:

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*On 23/12/99, between 8am to 4pm, the accused stole a cow from a farm belonging to Mr Scott and sold the cow to a fisherman Shorab Mohammed for \$300.00. The accused had received \$260.00. He was yet to receive the balance of \$40.00 when this theft was discovered and reported to the police. The accused was interviewed and subsequently charged.*

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The Appellant admitted the facts and was convicted. However, in mitigation he said:

*My brother-in-law gave me the cow. He is now in Kadavu. My sister is at the village.*

The learned magistrate then remanded the Appellant in custody for sentence. On 24 March 2000, the Appellant told the learned magistrate:

- 5 *My brother-in-law gave me permission to sell the cow. He is in Kadavu. His name is Sentiteli Waqa of Niudua village. He is married to my sister who lives at Nananu Village.*

The Appellant was then released on bail for sentence. On 14th April 2000, the Appellant did not appear for sentence. A bench warrant was issued, and was executed at Malolo Island on 20th August 2001. He was remanded in custody, and sentenced on 29th August 2001.

In his sentencing remarks the learned magistrate said that the Appellant had been remanded in custody pending sentence and that “the reason for the remand, was for the accused to prove in Court that his brother-in-law, to give evidence in  
15 Court and support his claim”. Later in the sentencing remarks, he said:

*This court was trying to help the accused, and giving him time to bring forth supportive evidence to his claim before being sentenced. This act of clemency by the court, was abused by the accused. He has demonstrated to this court, that he can fool the court and get away with it.*

20 The Appellant was sentenced to 3 years’ imprisonment.

He now appeals against conviction and sentence. A summary of his grounds of appeal are as follows:

- (1) He was not given an opportunity to mitigate before sentence was passed.  
25 (2) He had not been told of his right to counsel when he was interviewed by the police.  
(3) The magistrate had not told him of his right to counsel and he was thereby prejudiced.  
(4) His plea of guilty was ambiguous because the cow in question had been  
30 given to him by his brother-in-law.  
(5) His sentence was excessive.

### **Legal representation**

The Appellant was not told of his right to counsel before his plea was taken.  
35 There was undoubtedly a breach of s 28(1)(d) of the Constitution. A breach of this right will lead to the quashing of a conviction, where there has been a resulting miscarriage of justice. Was the Appellant prejudiced by lack of representation?

The history I have outlined in this judgment shows that he was so prejudiced.  
40 He admitted the facts, but told the learned magistrate that he did not steal the cow because his brother-in-law had given him permission to sell it. What he was doing, was disputing the facts. If he had permission to sell the cow, (and according to the charge the cow belonged to Naomi Waqa, his sister) he had no fraudulent intention, and he could not have been convicted of Larceny. It has  
45 been said on many occasions, that where an unrepresented accused person pleads guilty to a charge it is the magistrate’s responsibility to ensure that he is pleading guilty to each ingredient of the offence, and that the facts disclose each ingredient. If the plea in any way appears to raise a defence, or to dispute any of the ingredients, the plea of guilty must be set aside, a not guilty plea must be  
50 entered and a trial date set. It is then for the prosecution (not for the accused) to prove, with evidence, each and every ingredient of the offence.

This procedure was not followed in this case. After hearing from the accused that he had permission to sell the cow, and when it became apparent that the Naomi Waqa in the charge is the Appellant's sister, whose husband apparently gave the Appellant permission to take the cow, the learned magistrate ought to have set aside the guilty plea. Instead, he (according to his sentencing remarks) gave the Appellant time to prove his claim. However, the burden of proving the Appellant's guilt was on the prosecution. It never shifted. It was not for the Appellant to find evidence to exonerate himself. It was for the prosecution to prove his guilt.

10 In the circumstances, it is quite apparent that the Appellant was prejudiced by lack of legal representation. If he had been represented there would have been no plea of guilty. Alternatively counsel would have made a formal application to vacate the guilty plea. The plea of guilty was clearly ambiguous, because the Appellant in mitigation raised matters which constituted a defence in law. The grounds of appeal, which allege prejudice because of lack of legal representation, and ambiguity in the plea are therefore successful. The conviction is quashed accordingly.

### Conclusion

20 Because this appeal succeeds on the grounds I refer to above, it is not necessary to consider sentence. The only question remaining is whether this case should be remitted to the Magistrates' Court for a re-hearing.

The offence was allegedly committed in December 1999. The case was not called in court until March 2000. Sentence was not delivered until September 25 2001 (principally because of the Appellant's absence). The petition of appeal was filed on 1st October 2001 but the court record (in breach of the Criminal Procedure Code) was not received by the High Court until 14th May 2002. In the meantime, the Appellant has served a total of 9 months' imprisonment on the basis of a conviction that was wrong in law.

30 In these circumstances, I do not think that a retrial is in the interests of justice. The result of this appeal is therefore that conviction and sentence are quashed. No retrial is ordered.

*Appeal allowed.*

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