EPARAMA NAGALU v THE STATE (AAU0003 of 2010)

COURT OF APPEAL — CRIMINAL JURISDICTION

CALANCHINI AP, CHANDRA and BASNAYAKE JJA

4, 28 September 2012

Criminal law — appeals — appeal against conviction — robbery — unlawful use of motor vehicle — directions to assessors — identification — alternative minor charge — receiving stolen property — whether lesser offence of cognate character — separate trial — inconsistent statements — individual opinions by assessors — no miscarriage of justice — alternative conviction — sentence — Court of Appeal Act s 23(1) — Criminal Procedure Code ss 121, 169 — Penal Code ss 292, 293(1)(a), 313.

The appellant was convicted of robbery and unlawful use of a motor vehicle. The only evidence connecting the appellant to the offences was a mobile phone that was seized during the course of the appellant's arrest. The assessors accepted the complainant's evidence as to his ownership of the mobile phone and rejected the appellant's version that he had purchased the phone from a supermarket and therefore, held the appellant guilty of the charges.

Held –

(1) The judge should have considered and directed the assessors as to the provisions set out in s 169 of the Criminal Procedure Code Cap 21 regarding a conviction for a minor offence that the accused was not charged with. There was no suggestion that the original charge of robbery of the mobile phone was bad in law. Receiving stolen property under s 313 of the Penal Code is a lesser offence of a cognate character than the offence of robbery under s 293(1)(a) of the Penal Code.

Attorney-General v Vijay Parmanandan [1968] 14 FLR 6; *Director of Public Prosecution v Solomone Tui* [1975] 21 FLR 4, followed.

(2) The conviction for robbery of the mobile phone cannot be supported having regard to the evidence. In its place the Court substitutes a conviction for receiving stolen property under s 313 of the Penal Code. The convictions for robbery of cash and for counts two and three cannot be supported having regard to the evidence, and the convictions are quashed.

Appeal against conviction allowed in part.

Cases referred to

Alipate Vokai and 21 Others v Reginam [1981] 27 FLR 16; *R v AVES* (1950) 34 Cr App R 159 (CCA); *R v Moghal* (1977) 65 Cr App R 56, considered.

Appellant in person.

L Fotofili for the Respondent.

[1] Calanchini AP. On 2 November 2009 the Appellant was convicted on two counts of robbery contrary to s 293 (1) (a) of the Penal Code Cap 17 and one charge of unlawful use of a motor vehicle contrary to s 292 of the Penal Code. The convictions followed a four day trial in the High Court before the learned Judge and three assessors. The Appellant was charged jointly with a co-accused on these three charges. The co-accused was also charged with a further four counts and was acquitted on all charges. The three assessors unanimously found the Appellant guilty on each charge. The learned Judge accepted the verdicts and convicted the Appellant accordingly. Upon conviction the Appellant was sentenced on 18 December 2009 to a total sentence of 6 years imprisonment.

Leave to appeal

[2] The Appellant applied initially for leave to appeal both conviction and sentence. When the application came before the Resident Justice of Appeal, the Appellant did not pursue his application for leave to appeal against sentence. The Appellant was given leave to appeal against the conviction on 21 February 2011. The learned Resident Justice of Appeal noted that the only evidence linking the Appellant to the offences was an alcatel mobile phone which one of the victims identified as belonging to him. I shall refer in more detail to this aspect of the evidence later in this judgment.

Prosecution's case

[3] The case against the Appellant may be stated briefly. On 20 September 2008 at about 4.45am Taitusi Qoli was seated in the driver's seat of a 7 seater van Registration No FJ 696. The van was for hire. It was parked at the Hanson Supermarket in Makoi. Asleep in the van was Aman Chand who was the day shift van driver. Three Fijian youths approached Taitusi and asked to be taken to Omkar Road Narere. On arrival at Omkar Road one of the youths put a screw driver to the driver's neck and threatened him not to resist. The youths stole $33, the driver's wallet and driving licence. He was put in the back of the van and his body tied with cord. The youths then drove around in the van until about 6.30am when the other driver Aman Chand woke up. A screw driver was put to his neck and he was warned not to resist. He was also tied up with cord. The youths stole $133 and his alcatel mobile phone valued at about $9.95. The youths then continued to drive around until they abandoned the van and the two drivers at about 8.45am at Samabula.

Summing-up

[4] In his summing-up the learned Judge told the assessors that although the complainants gave evidence, none of them were able to visually identify the Appellant as one of the persons who offended against them. As the learned Judge noted that was an obvious difficulty for the State. So far as the Appellant was concerned, the only evidence connecting him to the offences was his possession of an alcatel mobile phone, the ownership of which was the subject of *"a contest between him and Aman Chand."* The Appellant gave evidence that he had bought the phone. Aman Chand gave evidence that the phone had his mark – a scratch on the inside of the mobile phone, visible by opening the back of the mobile phone. At this point it is convenient to refer to that part of the learned Judge's summing up to the assessors that discusses the evidence against the Appellant. Paragraph 29 states:

> *"_ _ _ the only evidence against (the Appellant) is the claim by the Police that the alcatel mobile phone found in his sitting room belongs to Aman Chand. In Court Aman Chand said the phone was his, and pointed to his mark at the back of the phone where you put in the sim card. (The Appellant) in his sworn evidence said the phone was his. He says he bought it from a supermarket two months ago and he has lost the receipt. The phone is worth $9.95 and as a matter of logic, there must be a lot of our citizens who own similar phones. You have seen both Aman Chand and (the Appellant) give evidence in court and being subjected to cross-examination by opposing counsel. Which of the two wtinesses' evidence you accept or reject, is a matter for you. If you say the phone belongs to Aman Chand, then the fact it was in (the Appellant's) house is strong inference that he was involved in the crimes against Taitusi and Aman on 20 September 2008. It you say otherwise then (the Appellant) had no role in the offence against Taitusi and Aman on 20 September 2008."*

[5] Then in paragraph 32 the learned Judge concluded with the following remarks:

> *"_ _ _ if you are satisfied beyond a reasonable doubt that the alcatel mobile phone belongs to Aman Chand, and you are sure of (the Appellant's) guilt, you must find him guilty as charged on counts 1, 2 and 3. If you are not satisfied beyond a reasonable doubt that the alcatel mobile phone belongs to Aman Chand and you are not sure of (the Appellant's) guilt, you must find him not guilty as charged on Counts 1, 2 and 3."*

Verdict

[6] It is apparent that the assessors and then the learned Judge accepted the evidence of Aman Chand in preference to the evidence given by the Appellant. Having accepted the only evidence that linked the Appellant to the events of 20 September 2008, the assessors found the Appellant guilty on all three counts in accordance with the directions given by the learned Judge.

Grounds of Appeal

[7] The Appellant filed amended grounds of appeal dated 24 February 2010. The grounds of appeal relate to (a) whether there should have been separate trials for the co-accused (ground 2) (b) inconsistencies in the evidence and prior statements by the complainant Aman Chand (ground 3) (c) the need for individual verdicts on each count (ground 4) and (d) what was described as the late invention by the complainant of a scratch mark at the back of the mobile phone (grounds 5 and 6). There was also a ground of appeal asserting that the learned judge did not adequately address the Appellant's defence in his summing up to the assessors (ground 1).

[8] At the hearing of the appeal the Appellant informed the Court that he would rely on the written submissions dated 4 August 2012 and filed on his behalf. Counsel for the Respondent indicated that there was only one significant ground of appeal, which was perhaps only raised indirectly by the Appellant in his first ground but clearly identified by the learned judge who heard the leave application. That ground related to the only evidence linking the Appellant to the offences and the adequacy of the learned judge's directions to the assessors in relation to that evidence. In that regard there are some observations which it is necessary to make concerning the evidence.

The Alcatel mobile phone

[9] The first matter to note is that the offences were committed on 20 September 2008. It would appear that the alcatel mobile phone was seized by police during the course of the Appellant's arrest at his residence on 6 October 2008. That was some 16 days after the offences were committed. Although this fact was apparent from the evidence before the Court below it was not referred to by the learned judge in the course of his summing up.

Identification

[10] Secondly, there was no material before the Court below to explain why neither the Complainant Aman Chand nor any of the witness were able to identify the Appellant as one of the offenders. There was no material in the Record to indicate that the offenders were masked at the time the offences were committed. There did not appear to be any physical impediment to identification. Although they wore *"pompoms",* their faces were visible.

Ownership of the mobile phone

[11] On the evidence adduced by both the State and the Appellant, it was open to the assessors to conclude that the evidence given by the Complainant as to his ownership of the mobile phone was to be preferred to the evidence given by the Appellant. There can be no issue on that. However, in deciding to prefer the Complainant's version as to ownership, which in view of the guilty verdict it must be assumed was the case, the assessors had done no more than conclude that the Complainant at the time of the offences was the owner of the alcatel mobile phone. It also follows that the assessors accepted that the mobile phone identified by Chand was the same mobile phone that was recovered in the Appellant's residence some 16 days later. However in the absence of any other evidence, and there was none, this does no more than establish that the Appellant had acquired possession of the phone unlawfully.

[12] Having established that the mobile phone was acquired unlawfully, it does not automatically follow that the unlawful acquisition was as a result of committing robbery of the phone 16 days earlier. It was equally possible that the Appellant had acquired the mobile phone as a purchaser or recipient of stolen property. The defence of ownership raised by the Appellant was rejected since his evidence had not been accepted by the assessors.

[13] However it was the task of the State to prove that the Appellant had committed the offence of robbery of the mobile phone beyond reasonable doubt. Yet the evidence left open the equally possible scenario that it had been acquired as stolen property.

The directions to the assessors

[14] Under these circumstances it is necessary to determine whether the direction to the assessors was appropriate. The learned judge had told the assessors that if they accepted the Complainant's evidence as to ownership *"and you are sure of (the Appellant's) guilt, you must find him guilty as charged on count Nos 1, 2, and 3."* Although it is not clear what was meant by the words *"and you are sure of the Appellant's guilt",* it is clear from the directions in paragraph 32 of the summing up that the assessors were directed to return guilty verdicts in respect of all three counts, if they accepted the Complainant's evidence as to ownership.

Alternative minor charge

[15] In my judgment the learned judge should have considered and directed the assessors as to the provisions set out in s 169 of the Criminal Procedure Code Cap 21 with particular reference to s 169 (2) which states:

> *"When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."*

[16] I am assisted by the observations of Hammett CJ in *Attorney-General v Vijay Parmanandan* [1968] 14 FLR 6 at 15:

> *"In my view an offence cannot be regarded or treated as a "minor offence" under s 164 (later s 169) of the Criminal Procedure Code of Fiji unless it has at least the two following characteristics:*
>
> *Firstly – That it is an offence of a cognate character to the offence actually charged, and*

Secondly – That it is a less grave offence than the offence actually charged, in the sense that it carries a lower maximum punishment upon conviction than that carried by the offence actually charged.

_ _ _

Under subsection (2), however, there is the distinction that if the facts which are actually proved reduce the offence charged to a minor offence the accused can be convicted on the minor offence although he was not charged with it."

[17] There is, however, a limitation placed on the exercise of this jurisdiction when the initial charge is bad in form. *In Director of Public Prosecution v Solomone eTui* [1975] 21 FLR 4 Grant CJ observed at 7:

"The powers conferred by s (169 (2)) of the Criminal Procedure Code _ _ _ of substituting a conviction for a minor _ _ _ offence cannot be exercised by an appellate court when the original charge is bad in law _ _ _."

[18] In the present appeal there was no suggestion that the original charge of robbery of the alcatel mobile phone was bad in law.

[19] The offence of robbery under s 293(1)(a) of the Penal Code carries a maximum penalty of imprisonment for life. In respect of receiving stolen property the maximum penalty in the case of a felony is imprisonment for fourteen years and in the case of a misdemeanour the maximum penalty is seven years. The offence of receiving stolen property under s 313 is, therefore, a lesser offence than the offence of robbery under s 293 (1)(a).

[20] The question remains whether the lesser offence is of a cognate character. The ordinary dictionary meaning may be considered to determine the meaning of cognate. The Shorter Oxford English Dictionary defines *"cognate"* to include something *"akin in origin, allied in nature and hence akin in quality; having affinity."* As the learned judge noted in his summing up in respect of robbery under s 293(1)(a) the prosecution must establish, amongst other things, that the Appellant stole the complainant's alcatel mobile phone. I am satisfied that this requirement being an essential element in establishing the offence of robbery under s 293(1)(a), is sufficient to conclude that receiving stolen property under s 313 is a lesser offence of a cognate character.

Receiving stolen property

[21] However the question remains whether the facts that the State managed to prove at the trial were sufficient to establish the offence of receiving stolen property. In other words was acceptance by the assessors (a) the alcatel mobile phone which was found in the Appellant's residence by Police belonged to the complainant and (b) the same mobile phone was stolen during the course of the robbery sufficient to enable the Court to enter a conviction for receiving stolen property.

[22] Under s 313 (1) of the Penal Code a person who *"(1) receives any property (2) knowing that property to have been stolen or obtained under circumstances which amount to felony or misdemeanour is guilty of an offence of the like degree (whether felony or misdemeanours) _ _ _."*

[23] Of course, the fact that the alcatel mobile phone was found in the Appellant's residence (and hence in his possession) was prima facie evidence that he had received the mobile phone. So far as knowledge is concerned, the position was clearly stated by Goddard LCJ in *R v AVES* (1950) 34 Cr App R 159 (CCA):

"Where the only evidence is that an accused person is in possession of property recently stolen, a jury may confer guilty knowledge (a) if he offers no explanation to account for his possession, or (b) if the jury are satisfied that the explanation he does offer is untrue."

[24] In this case it can reasonably be assumed that the assessors, by returning a unanimous verdict of guilty on the charge of robbery in respect of the mobile phone, accepted the complainant Chand's evidence as to his ownership and rejected as untrue the Appellant's version that he had purchased the phone from a supermarket.

[25] In view of the above I am satisfied that, properly directed on the alternative charge of receiving stolen property it was open to the assessors to find the Appellant guilty of that charge and for a conviction to be entered by the learned judge.

[26] In my view there was insufficient evidence to allow the robbery charge in respect of the mobile phone to go to the assessors. Furthermore there was no evidence before the assessors in relation to the robbery charges relating to the money from Chand, nor in relation to the count of robbing Qoli nor in relation to the count of unlawful use of the motor vehicle. Those charges should not have been considered by the assessors.

Remaining grounds of appeal

[27] I now turn to consider the remaining grounds of appeal. It is appropriate to make some brief observations which, however, do not affect my view as to the disposition of this appeal.

Separate trial

[28] First, in respect of the ground that alleges that the Appellant was denied a fair trial on account of the learned trial Judge's failure to direct a separate trial for the Appellant.

[29] Under s 121 of the Criminal Procedure Code the State may join co-accused in one charge or information who may then be tried together when (a) the persons are accused of the same offence committed in the course of the same transactions; (b) _ _ _; (c) the persons are accused of different offences provided that all offences are founded on the same facts, or form or are part of a series of offences of the same or a similar character and (d) the persons are accused of different offence committed in the course of the same transaction.

[30] Apart from this provision, at common law, the issue of separate trials has always been a matter for the trial judge in the exercise of his discretion to ensure that the accused receives a fair trial.

[31] However, as was observed by the Court of Appeal in *R v Moghal* (1977) 65 Cr App R 56 at 62:

"_ _ _ we think that only in very exceptional cases is it wise to order separate trials when two or more are jointly charged with participation in one criminal offence."

[32] In the absence of a clear prejudice to one of the co-accused it is in the public interest that defendants who are jointly charged should be tried together. The effect of s 121 is that such a charge is joint and several and as a result alleges a separate offence against each of the defendants.

[33] This Court considered the issue of joinder of co-accused in one count under s 121 of the Criminal Procedure Code in *Alipate Vokai and 21 Others v Reginam* [1981] 27 FLR 16. At 22 the Court stated:

"In our opinion s 121(c) and (d) are to be construed in the light of the words used by Lord Diplock in the House of Lords in DPP v Merriman (1972) 56 Cr App AR 766 at 796:

"Where a number of acts of a similar nature were connected with one another, in the time and place of their commission or by their common purpose, in such a way that they could fairly be regarded as forming part of the same transaction or criminal enterprise, it was the practice, as early as the eighteenth century, to charge them in a single count of an indictment. Where such a count was laid against more than one defendant the jury could find each of them guilty of one offence only, but a failure by the prosecution to prove the allegation, formerly expressly stated in the indictment but now only implicit in their joinder in the same count, that the unlawful acts of each were done jointly in aid of one another, did not render the indictment ex post facto bad or invalid the jury's verdict against those found guilty. To quote Hawkins again: "On such indictment _ _ _ some of the defendants may be acquitted and others convicted; for the law regards the charge as several against each, though the words of it purport only a joint charge against all.""

[34] In my opinion this statement covers the position here. In the present case it was open to the assessors to convict or acquit either of the persons charged following a direction as to the law by the learned trial judge. I would reject this ground of appeal

Inconsistent statements

[35] I can consider grounds 3, 5 and 6 together as they relate to issues concerning evidence. It is significant that none of the statements made by the complainant to the police prior to the trial were put into evidence at the trial. The complainant Chand did admit to making an inconsistent statement concerning his driving the van to Omkar Road. He was cross-examined on this and the scratch mark by which he identified the mobile phone as his. It would appear, although it is not clear from the notes, that the cross-examination suggested that this was a recent invention of his. These matters were not expressly discussed by the learned judge. However, he does direct the assessors to issues of accepting and rejecting evidence in paragraph 30 of his summing up. He said in that paragraph that:

"You have observed the way they gave evidence, the way they respond to cross-examination, re-examination, the way they dress to court, their manners and demeanours generally."

[36] The only evidence before the assessors on the issue of who was driving the van was the answer given by the complainant Chand during the course of his being cross-examined by Counsel for the Appellant. It was one of those matters that the assessors were asked to consider in terms of how the complainant as a witness responded under cross-examination. The issue did not require, in my judgment, a specific direction from the learned judge.

[37] In my judgment the evidence given by the complainant concerning ownership of the mobile phone including his answers in cross-examination was adequately addressed by the learned judge and its acceptance or rejection was a matter for the assessors as the answers went to credibility not admissibility. I would reject all three grounds of appeal.

Individual opinions by assessors

[38] The remaining ground of appeal claims that the learned judge failed to direct the assessors to render individual opinions on each of the counts. This ground may be dealt with briefly. In paragraph 13 of his summing up on page 25

of the Record the learned judge expressly directed the assessors that they should consider guilty or not guilty verdicts separately in relation to counts 1, 2 and 3 so far as the Appellant was concerned. I would reject that ground of appeal.

No miscarriage of justice

[39] In addition, I would apply the proviso to s 23(1) of the Court of Appeal Act Cap 12. In other words, in respect of these grounds, even if I am not correct in my conclusion that there is no merit in any of them and that one or more of them may be decided in favour of the Appellant, I would not allow the appeal on the basis that, in respect of those grounds and to the extent that the conviction was the result of any one of them, there has been no miscarriage of justice.

Alternative conviction

[40] It does however remain to be determined what should this Court do in respect of the alternative minor offence of receiving stolen property. Under s 23(1)(a) of the Court of Appeal Act this Court is empowered to allow an appeal against conviction on the ground, amongst others, that it cannot be supported having regard to the evidence.

[41] Therefore, and for the reasons stated above, I would allow the appeal against convictions on count 1 in respect of the robbery of the alcatel mobile phone belonging to Aman Chand on the basis that it cannot be supported having regard to the evidence. In its place I would substitute a conviction for receiving stolen property under s 313 of the Penal Code. The evidence of the complainant concerning ownership which must have been accepted by the assessors and which was a finding that was open to them, together with the rejection of the Appellant's evidence on the question of ownership establishes the offence of receiving stolen property. Had the assessors been so directed, there was evidence that established beyond reasonable doubt that the Appellant was guilty of receiving stolen property.

[42] In my judgment the convictions for robbery of $133.00 cash in count 1 and for counts 2 and 3 cannot be supported having regard to the evidence. The appeal is allowed in respect of those counts and the convictions are quashed.

Sentence

[43] For the conviction of receiving stolen property under s 313 of the Penal Code I would impose a sentence of imprisonment of four years from the date of sentencing being 18 December 2009. In accordance with s 18(6) and s 19 of the Sentencing and Penalties Decree 2009 I fix a non-parole period of three years and six months.

[44] **Chandra JA.** I agree with the judgment of Calanchini AP.

[45] **Basnayake JA.** I agree with the reasoning and the conclusions in the judgment of Calanchini AP.

The Orders of the Court are:

1. Appeal allowed in respect of convictions for counts 1, 2 and 3.
2. Convictions on counts 2 and 3 are quashed.
3. Conviction on count 1 is quashed in part as to the robbery of $133.00 cash.
4. Conviction on count 1 is quashed in part as to the robbery of the mobile phone and a conviction for the offence of receiving stolen property is substituted as a minor offence pursuant to s 169(2) of the Criminal Procedure Code.

5. The Appellant is sentenced to 4 years imprisonment from 18 December 2009 with a non parole period of 3 years and 6 months.

Appeal allowed in part.