

SATHYAA HETTIGE JA

- [1] This is a special leave to appeal application from the decision of the Court of Appeal dated 28th September 2012 allowing the appeal and quashing the convictions on counts 1, 2 and 3 in respect of the robbery of mobile phone and unlawful use of motor vehicle and substituting a conviction of Receiving stolen property as a minor offence pursuant to section 169 (2) of the Criminal Procedure Code.

Brief Outline of Facts

- [2] Taitusi Qoli was driving a seven seater van bearing registration no. FJ 696 for hire, on 20th September 2008 at about 4.45 am he had his van parked at the Hanson Supermarket in Makoi. Asleep in the van was Aman Chand who was the day shift van driver. He was obviously resting to enable him to drive at the day time. Three Fijian youths approached Taitusi and asked to be taken to Omkar Road Narere. On arrival on Omkar road one of the youths put a screw driver on Taitusi's neck and warned him not to resist. The group of youths then stole his \$33.00, wallet and driving licence. And thereafter the youths robbed Aman Chand of his mobile phone valued at \$9.95. The youths proceeded to tie him up and put him in the back of the van.
- [3] The petitioner was tried in the High Court of Fiji at Suva together with another co-accused for the following offences:
- (i) Robbery under section 293 (1) (a) of the Penal Code (Cap.17) for robbing Aman Chand of \$ 133.00 in cash and an Alcatel mobile phone valued at 9.95 at Narere in the Central Division on the 20th September 2008.
 - (ii) Robbery contrary section 293 (1) (a) of the Penal Code for robbing Taitusi Qoli of \$33.00 in cash, a NIKE wallet valued at \$3.99 and a provisional Group 2 driving licence, on 20th September 2008 at Narere in the Central Division.

- (iii) Unlawful Use of Motor Vehicle contrary to section 292 of the Penal Code for unlawfully and without colour of right , but not as to be guilty of stealing took for their own use vehicle registration number FJ696 at Narere in the Central Division on 20th September 2008.

[4] In the High Court the petitioner was found guilty pursuant to an unanimous verdict of the assessors on all 3 counts on 2/11/2009 and was sentenced to a period of 6 years on count 1 and was given a 6 years imprisonment on count 2. The petitioner was sentenced to a 3 months imprisonment on count 3. All the sentences were ordered on 18/12/2009 to be served concurrently.

[5] The petitioner appealed against the conviction to the Court of Appeal and the Court of Appeal quashed the conviction on 28/09/2012 on all three counts and substituted a conviction on count 1 for a lesser offence of receiving stolen property. The Court of Appeal further proceeded to sentence the petitioner and imposed a sentence of 4 years imprisonment for the lesser offence with a non-parole period of 3 years and 6 months commencing from 18.12.2009.

Grounds of Appeal

[6] The principal grounds of appeal advanced by the petitioner against the decision of the Court of Appeal are as follows.

- (a) The Court of Appeal erred in law by failing to rectify the conviction that is founded on a charge that is defective or bad in law;
- (b) The Court of Appeal erred in substituting a conviction for a lesser offence when the original charge was bad in law &
- (c) The conviction (for lesser offence of receiving) is unsatisfactory and cannot stand , having regard to the evidence.

(7) On a careful reading of the above principal grounds of appeal it appears that the petitioner does not challenge the decision of the High Court except for the fact that the petitioner alleges the Court of Appeal failed to rectify the conviction of the trial court.

Jurisdiction

- [8] The exclusive jurisdiction of the Supreme Court to hear and determine appeals from all final judgments of the Court of Appeal is derived from section 8 (1) of the Administration of Justice Decree 9 of 2009.

Section 8 (2) of the above Decree reads as follows;

“an appeal may not be brought from a final judgment of the Court of Appeal unless:

- (a) The Court of Appeal gives leave to appeal on a question certified by it to be of significant public importance; or*
- (b) The Supreme Court gives special leave to appeal”.*

- [9] The jurisdiction of this court to grant special leave to appeal and thereafter to hear the appeal has been conferred on the Supreme Court under section 7 (2) of the Supreme Court Act 1998 however, subject to the criteria contained therein which reads as follows:

“In relation to a criminal matter , the Supreme Court must not grant special leave to appeal unless;

- (a) A question of general legal importance is involved;*
- (b) A substantial question of principal affecting the administration of criminal justice is involved; or*
- (c) Substantial and grave injustice may otherwise occur.”*

- [10] It is to be noted that the petitioner has to satisfy this court that the grounds of appeal urged above would fall within one or more of the threshold criteria in Section 7 (2) of the Supreme Court Act.

- [11] Therefore, the petitioner has a greater burden to pass any one or more of the threshold requirements under Section 7(2) of the Supreme Court Act when seeking special leave to appeal before proceeding to obtain relief under Section 7 (1) of the Supreme Court Act.

Special Leave to Appeal

- [12] Now we will proceed to deal with the ground 1 of the appeal namely the failure to rectify the conviction founded on a defective charge.
- [13] Learned State Counsel in his written submissions has drawn the attention of the court to the relevant provisions in the Criminal Procedure Code in answering the issue contained in ground 1 of the appeal.
- [14] It appears that the petitioner or his counsel had not raised any objection to the “Information” in the trial Court when the Information was read over to the petitioner. Section 274 (1) of the Criminal Procedure Code Cap 21. provides that “*Every objection to any Information for any formal defect on the face thereof shall be taken immediately after the Information has been read over to the accused person and not later*”.
- [15] Section 275 of the Criminal Procedure Code further provides that” *If any Information does not state, and cannot by any amendment authorized by section 274 be made to state, any offence of which the accused has had notice , it shall be quashed either on a motion made before the accused pleads or on a motion made in arrest of judgment.*”
- [16] Therefore it appears that the court has power to quash any Information if any amendment is still frivolous in establishing an offence of which the accused had had notice on an application by way of a motion. There does not appear in the proceedings in the trial court that objection had been raised by the defence stating that the charge was defective or bad in law.
- [17] The petitioner’s grievance that he was convicted of an offence founded on a defective charge or bad in law has been dealt with by the Court of Appeal having carefully considered the law and also dealt with the issue as to whether the trial court fell into error when convicting the petitioner. The Court of Appeal however, in paragraph 15 specifically has stated that the trial Judge should have considered

and directed the assessors as to the provisions contained in section 169 of the Criminal Procedure Code.

[18] It is relevant to state at this juncture that there is provision in the Criminal Procedure Code empowering the court to convict a person of a minor offence though he has not been charged with it. The Court of Appeal in its judgment dated 28/09/2009 has quashed the conviction by substituting a conviction for the offence of receiving stolen property on the evidence in the trial court. Now we proceed to examine the question as to whether the appellate court can substitute a conviction in respect of a lesser offence.

[19] The provisions are encapsulated in Section 169 (1) and 169 (2) of the Criminal Procedure Code which provide as follows:

Section 169 (1) – *“When a person is charged with an offence consisting of several particulars, a combination of some only which constitutes a complete minor offence, and such combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.”*

Section 169 (2) provides as follows:

“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.”

[20] Hammett CJ observed in the case of **Attorney General v Vijay Paramanandan (1968) 14 FLR 6 at page 15** as follows:

“In my view an offence cannot be regarded or treated as a minor offence under section 169 of the Criminal Procedure Code of Fiji unless it has at least 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 sub section 2 , however, there is the distinction that if the facts which are actually proved reduce the offence charged to a minor offence although he was not charged with it.”

- [21] In **Nawaqabuli v R (1977) 23 FLR 160** the court examined the test to see whether a lesser offence is an essential ingredient of the major offence. Mishra ACJ in the above case observed that the offence of robbery with violence includes an allegation of theft and therefore Section 169 of the Criminal Procedure Code authorizes a conviction on the lesser charge.
- [22] In this case the Court of Appeal proceeded to examine the meaning of “cognate character” referred to in the judgment in **Vijay Paramanadan** case (supra) and to see whether ingredients of the lesser offence were *akin in origin* in order to establish the offence of receiving stolen property and the evidence was sufficient to treat the lesser offence of a cognate character.

Paragraph 20 of the Court of Appeal Judgment is reproduced as follows:

“The question remains whether the lesser offence is of cognate character . the ordinary dictionary meaning may be considered to determine the meaning of cognate. The Shorter Oxford Dictionary defines “cognate” to include something “akin in origin, allied in nature and hence in quality ; having affinity” As the learned Judge noted in his summing up in respect of robbery under section 293(1) (a) the prosecution must establish, among 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 section 293 (1) (a) , is sufficient to conclude that receiving stolen property under section 313 is a lesser offence of a cognate character.” (emphasis added)

- [23] It must be stated that the evidence adduced by the prosecution (respondent) in the trial court was that the Alcatel mobile phone was recovered in the petitioner’s house during the course of the police investigation and the arrest of the petitioner on 6th October 2008. The mobile phone was identified by Mr. Chand, the complainant by the scratch mark inside the phone. The assessors were satisfied that the mobile

phone belonged to the complainant. That evidence was sufficient to establish that the petitioner acquired the possession of the mobile phone unlawfully.

- [24] A charge of Robbery with violence includes a charge of theft and section 169 of the Criminal Procedure Code authorized a conviction on a lesser charge: Per Reddy , P, Davies & Ellis, JJA in **Waisake Bulewa v State** (2002) AAU 36 APF HAM22/01S 15 November 2002. In that case the Court relied on the judgment and the reasoning of Mishra ACJ in **Nawaqabuli v R** (1977) 23 FLR 160 wherein it held that the offence of robbery with violence involves an allegation of theft, and said *“the reasoning of Mishra ACJ is the authority for the proposition that a charge of robbery with violence includes a charge of theft and Section 169 authorized a conviction on the lesser charge. On this basis section 181 empowers the court to enter a conviction of receiving as it is correct to say the accused was charged with stealing although in the form of an allegation of robbery.”*

In **Waisake Bulewa** (supra) case the court held that *“we are of course conscious of the fact that the Magistrate declared he acquitted the accused of robbery with violence . He then immediately made his decision to enter a conviction for receiving.....It follows that in agreement with Singh J we consider the appellant was correctly convicted on the lesser charge and no error of has been shown.”*

Exercise of Power of the Court of Appeal

- [25] The State Counsel submitted that the charge or the Information against the petitioner in the trial Court was not defective or bad in substance or in any form and in any event no prejudice or embarrassment was caused to the petitioner. The Respondent further drew the attention of court to the section 24(2) of the Court of Appeal Act which reads as follows:

“Where the appellant has been convicted of an offence , and the Judge could on the information have found him guilty of some other offence , and on the findings of the judge it appears to the Court of Appeal that the Judge must have been satisfied of facts which proved him guilty of that other offence, the court may, instead of allowing or dismissing the appeal, substitute for the verdict found by such judge a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity.”

[26] We find that the Court of Appeal has exercised the power of Appellate Court under section 24(2) of the Court of Appeal Act and acted in finding the petitioner guilty of some other offence and sentenced him in accordance with the law whereas the trial judge failed to direct the assessors on the relevant provisions in section 169 (2) of the Criminal Procedure Code. However, it is to be observed that when the appellate court exercises the statutory power to quash the conviction in graver offence and substitute a lesser minor offence and convict, the court must act with great caution since that course of action will involve a risk of injustice to the accused as the accused needs to have an opportunity to meet the alternative charge in his defence. (See **R v Wilson (Clarence) R v Jenkins (Edward John) and another** (1983) 3 All.E. R P. 448)

[27] **Halsbury's Laws of England** Vol.11 Paragraph 311 at page 181 says that:

“At common law a jury could not convict a defendant of an offence of an entirely different character from that alleged in the indictment; but might convict of a cognate offence of the same character but of a less aggravated nature if the words in the indictment were wide enough to cover such an offence.”

[28] In **DPP v Solomone Tui** (1975) 21 FLR 4 the court observed that substitution of a conviction of a minor offence or kindred offence under previously numbered (Section 163 presently Section 169) of the Criminal Procedure Code cannot be exercised by the appellate court when the original charge is bad in law. However, in the case before us it is clear that there is no evidence in the trial court proceedings that the original charge or information was defective or bad in law.

[29] We conclude that the quashing of the conviction for the offence of Robbery and the substitution of the lesser offence of Receiving Stolen Property and the sentence imposed on the petitioner for the minor offence of receiving stolen property does not constitute any error of law as alleged by the petitioner and is valid and lawful in terms of the judicial pronouncements in Fiji and the provisions contained in the Court of Appeal Act and Criminal Procedure Code.

The Second and Third Grounds of Appeal

[30] The second and third grounds of appeal submitted by the petitioner are similar to the first ground of appeal and we have dealt with all three grounds of appeal in relation to the law and judicial pronouncements and we come to the conclusion that the petitioner has failed to satisfy the threshold criteria encapsulated in section 7(2) of the Supreme Court Act 1998 and the grounds of appeal lack any merit in this application for special leave to appeal.

Conclusion

[31] In view of the above we are of the view that the Court of Appeal has correctly convicted the petitioner on the lesser charge and no error of law, infirmity or any illegality has been shown and therefore, the petitioner's application for special leave to appeal fails.

Accordingly, the application is dismissed.

Hon. Chief Justice Anthony Gates
President of the Supreme Court

Hon. Mr. Justice Sathya Hettige
Justice of the Supreme Court

Hon. Mr. Justice Paul Madigan
Justice of the Supreme Court

Solicitors:

Petitioner in person

Office of the Director of the Public Prosecutions for the Respondent