IN THE FIJI COURT OF APPEAL

Criminal Appeal No. 23/91

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BEFORE THE HON JUSTICE MICHAEL M HELSHAM
PRESIDENT OF THE FIJI COURT OF APPEAL
AND THE HON SIR MOTI TIKARAM
RESIDENT JUDGE OF APPEAL
AND THE HON MARI KAPI
JUDGE OF APPEAL

FRIDAY THE SIXTH DAY OF MARCH 1992 AT 9.30 A.M.

BETWEEN:	EPARAMA SOGOTUBU	APPELLANT
	-VS-	
	S T A T E	RESPONDENT

MR EPARAMA SOGOTUBU	IN PERSON
MR I MATAITOGA & MISS L LAVETI	FOR THE RESPONDENT

APPELLANT

What I want to tell you is this - for more than a year I have been waiting for my court records. I want to know why it took a year to prepare the case record and serve it on me. The prison authorities made several enquiries in respect of my case record, to the Magistrate Court in Nausori. They gave me the excuse that it was still not ready.

Looking through the case record I find that all the questions I asked in court are not recorded, only the answers were recorded. How does a person know the answer to a question when the question is not recorded. I would say that that is one reason for injustice in the trying of my case and probably, that may have been the reason for the delay in preparing my record because it is not correctly done.

I have found a few contradictory statements in my record that were not considered by the trial Judge. I was charged with damaging property and I pleaded guilty but when the case came out in court I was surprised when I was charged with another offence of robbery. That was inconsistent with the charge given to me. In my statement I was charged with larceny and damaging property. They did not inform me of the charge of robbery. The Judge at the appellate court informed me that I was charged with robbery and that was contradictory.

These offences were committed when I was drunk and the Magistrate and also Justice Jesuratnam agreed with me in their judgment. I did not know what I was doing. I find that if a person is very drunk he will not know what he is doing and that was the same thing that happened to me that day. I explained that in my statement to the Magistrate and the judge agreed with me. That is why I am asking this honourable court if the sentences that were imposed on me on that case be made concurrent with the previous cases. The other two who were convicted with me were sentenced to 18 months.

That is all I wish to say.

JUSTICE M HELSHAM This is an appeal against conviction and sentence. On the 23rd of May 1988 the Accused was found guilty on three charges laid against him. One was the charge of damaging property contrary to Section 324 of the Penal Code; the second charge was the charge of breaking, entering and larceny contrary to Section 300 of the Penal Code and the third charge was the charge of larceny contrary to Section 262 of the Penal Code.

The first charge related to the wilful damage of two fuel bowsers with the damage being valued at $2,500. The second charge was a charge of breaking, entering and stealing a number of items from a shop in or near Nausori. They are listed on page 17 of the record but it is not necessary to refer to them. The total value of the items was put at $631.04. The third charge related to a charge of stealing a bike rider's helmet, total value of $35. The accused was sentenced to 18 months on the first charge of wilful damage, two years on the charge of breaking, entering and stealing which was to be served consecutively to the first sentence and 10 months on the third charge to be served concurrently with the first charge.

He appealed from the decision of the Magistrate who heard the matter and imposed those penalties, to a Judge of the High Court and the grounds of appeal are set out on pages 13 and 14 of the record. It is perhaps interesting but not very relevant to notice that the defence of drunkenness was not raised. The learned Judge of the High Court upheld the convictions and altered the sentences in the sense that he made the sentences all concurrent and he effectively imposed a prison sentence of two years upon the accused. From that decision, the accused has appealed to this court and has raised a number of grounds of appeal including the ground of drunkenness.

I am reminded and I should have noted that the learned High Court Judge had correctly, in our view, altered or reduced the charge of breaking, entering and stealing to a charge of stealing or larceny and on that basis he dealt with the sentences as I previously indicated.

JUSTICE M HELSHAM (CONTD)

It is not necessary to detail the circumstances which lead to the accused being tried. He and two companions had been drinking since (I think the evidence is) 6 O'clock in the morning until later on, they visited the shop where the offence of larceny took place. Combined with it there was a place where some petrol bowsers were situated. Apparently, the accused had a grudge against the proprietor of the shop relating to some transaction that had occured. He entered the premises and went to the hardware section of the store, found an iron bar, proceeded to the garage side and damaged the bowsers with the iron bar. He re-entered the shop, smashed a number of showcases or windows or other glass areas where there were goods stored and was accompanied there with the two persons he had gone to the premises with. They had somehow acquired a sack or sacks, loaded the goods which were either falling out or which they took out of the showcases, into the sacks and they left. They left going in the direction of the hospital where the accused stopped beside a motorcycle and picked up the rider's helmet which was hanging on the handle-bars of the cycle and proceeded to take it away.

He was apprehended after it seems the goods had found their way to another shop some distance away and apparently there was an attempt being made to sell them.

The evidence was overwhelming that these events had occurred. Eye-witnesses indicated that they had not only seen the events but recognised the accused. All three accused were tried together. I think it is only necessary to indicate that the accused apparently did raise the matter of drunkenness at the trial before the learned Magistrate and the Magistrate refers to this. However, he convicted the three accused, imposing on the other two sentences that were not as severe as those which he imposed so far as the Appellant is concerned.

The Appellant appealed, as I have said, to the High Court and the grounds of appeal did not include the matter of drunkenness. However, the matter must have been raised and dealt with there because at page 3 of his reasons for judgment to be found on page 7 of the record, the learned Judge of the High Court said this:-

JUSTICE M HELSHAM (Contd)

" The crux of the appellant's case at the trial was that he was drunk on the occasion in question and admitted that he caused damage to property but denied that he stole anything. It could be inferred from the degree of his intoxication that even if he stole anything he would not have known that he had done so. In fact his statement to the police would suggest that inference. Furthermore there is enough evidence to prove that he was guilty of larceny on counts 2 and 3 in addition to destruction of property on count 1."

Otherwise and as I have said, he adjusted the charge of breaking, entering and stealing to become one of larceny - the High Court Judge took the course that I have already indicated and from that the appellant appeals. There are a number of grounds of appeal including severity of sentence which now becomes obsolete for reasons we will give in a moment.

The only ground to which we think is necessary to refer on this appeal is the ground of drunkenness. The accused admits that he took the iron bar and did the damage which he did. He admitted that to the police constable when he was interviewed on the day following those events. Although there is no direct evidence that the accused actually uplifted any of the goods that were taken away or put them in the sack or sacks which were used to carry them away, there is ample evidence to support an inference that he was involved in this event and was part of a joint enterprise, sufficient to enable the finding of guilty on the charge of larceny to be sustained.

There is no doubt that the charge in relation to the damage to the bowsers is able to be sustained also. The Investigating Officer said that he said in his statement "I only admit damaging the bowsers and the shops" so that the question of drunkenness in relation to those three charges would seem to be lacking in any substance. So far as the charge of the helmet is concerned the accused has said that he has no memory of the matter at all; but there is direct evidence of his having taken the helmet and it was taken almost immediately after the offences had been committed. It is trite law to say that the fact that an accused does not remember having committed an offence is no defence but it is also incumbent upon the Prosecution to establish that the accused was in a state such that he was able to form a wrongful intent.

JUSTICE M HELSHAM (CONTD)

We think, in the light of all the facts that were before the Magistrate - the salient ones which we have mentioned, the absence of any memory is not sufficient in this case in that there is an overwhelming inference to be drawn that the accused was at that time aware of his actions and was in a state capable of forming the intent. Therefore, the court sees no reason to upset the findings of the Magistrate or those of the learned trial Judge and the appeal on conviction will be dismissed.

The matter of sentence ceases to be relevant. After this offence had occurred it seems that the accused was involved in another incident as a result of which he was charged. The trial on the proceedings which are now on appeal came before the Magistrate in May 1988. He was charged on the other offence which had been committed in the meantime in July of 1988 and convicted of seven years imprisonment which was subsequently reduced on appeal to six years. That sentence is said to run at the expiration of the present sentence of two years. That expired in May 1990 and the conviction on the other offence has taken effect. There is nothing that this court can now do in the way of reducing the sentence that will have any benefit for the accused at all.

It could be that the difference between May and July 1988 (2 months) which is the period between the expiration of the adjusted sentence of the High Court Judge and the commencement of the second sentence might be able to be remedied if the accused were to bring some sort of action to have the sentence altered or reduced in relation to the second matter. That would be in relation to a period of two months, whether that is a matter that will exercise the mind of the accused or not, it is not our position to say.

In those circumstances the appeal against sentences will also be dismissed. However, we should not leave this case without reference to the complaint which the Appellant made before us about the delay in relation to the records and the difficulties that he experienced in obtaining the record and the prejudice that resulted from it. This matter was adverted to by the learned High Court Judge on the appeal that came before him

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and we endorse the remarks that His Lordship has made. Beyond that, there is nothing further that we can do. The Order of the court will be that the appeal is dismissed.

Michael Helsham

PRESIDENT

for FIJI COURT OF APPEAL