IN THE HIGH COURT OF FIJI

AT SUVA

APPELLATE JURISDICTION

Criminal Appeal No. HAA 018 of 2014

BETWEEN	:	**VILIAME DAUSIGA**
		Appellant
AND	:	**STATE**
		Respondent
BEFORE	:	**HON. MR. JUSTICE PAUL MADIGAN**
Counsel	:	Appellant in person Ms. J. Fatiaki for the State
Date of hearing	:	11 August and 9 September 2014
Date of Judgment	:	8 October 2014

JUDGMENT

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1. On the 3rd day of July 2014 after trial the appellant was convicted in the Suva Magistrates' Court of the following two offences:

Count 1

Statement of Offence

Damaging Property: contrary to section 369(i) of the Crimes Decree No. 44 of 2009

Particulars of Offence

Viliame Dausiga on the 21st day of May, 2014 at Suva in the Central Division, damaged the rear right quarter glass of vehicle registration number ER210 valued $100, the property of Fanhong Meng.

Count 2

Statement of Offence

Theft: contrary to section 291(1) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

Viliame Dausiga on the 21st day of May 2014 at Suva in the Central Division, dishonestly appropriated [stole] cash $10.00 (FJD), 1 x universal charger valued $85.00 all the total value of $195.00 the property of Fanhong Meng.

2. He was sentenced the following day to two concurrent terms of imprisonment of 11 months and 22 months respectively.

3. The appellant now appeals timeously against his conviction on the first count of damaging property and against his sentence on the second count of theft.

4. His grounds of appeal against conviction on the first count are :

   (i) The conviction is unsafe because the State relied on circumstantial evidence with no direct evidence to link the appellant to the crime of damaging property.

   (ii) The Magistrate misdirected himself on the elements of the first count and failed to astute (sic) that the State cannot prove the said elements beyond reasonable doubt leading to a miscarriage of justice.

   (iii) That the appellant was unrepresented at trial.

5. His grounds of appeal against sentence are:

(i) That the Magistrate erroneously failed to start his sentence within the range of tariff of a simple larceny which reflects the gravity and status of the second count.

(ii) The Magistrate failed to take into account time spent on remand for this case.

6. On the 19th September after the hearing of this appeal, the appellant purported to file further grounds of appeal which pursuant to s.249(4) of the Criminal Procedure Decree were too late and therefore not acceptable.

7. The facts of the case were that in the evening of 21st May 2014 the complainant was having dinner with her husband in a restaurant. They had parked their vehicle ER 210 in a car park nearby. During dinner police came into the restaurant and told her that her vehicle had been damaged. On going to the vehicle she saw that the rear side quarter glass window was broken. On being shown a charger (Exhibit P.1) she identified it as her charger but never said it had been left in the vehicle.

8. A police officer, Jack, was on night patrol. Having seen one boy near the car park acting suspiciously he told him to go home. He then went into the car park and saw another boy sitting in the back seat of ER210. When the police approached that boy got out of the vehicle and tried to hide behind a tree. He was arrested and he was identified as this appellant. The police then saw the damaged window. This officer, Jack, did not refer to any stolen property.

9. A second police officer, Romiune, said he went into the car park and saw the appellant in the back seat of ER210. He had a charger (Exhibit P1) in his pocket. He saw the car window was damaged.

10. The State tendered the caution interview and charge statement of the accused/appellant by consent.

11. The unrepresented appellant elected not to give evidence in his defence.

The Judgment

12. The learned Magistrate rehearsed the evidence in his judgment and then went on to remind himself of the burden of proof. He then "analysed" the evidence by finding that the circumstantial evidence that the accused was inside the vehicle

and that he tried to hide when seen and also that he was in possession of the stolen charger led to the "only inference I can take is that the accused committed these two offences that day. Also he failed to give any valid reason about what he was doing in the vehicle that night". He then went on to say that he was satisfied "that the prosecution has proved this charge beyond reasonable doubt" (my emphasis). Lastly he found the accused guilty of the two offences and convicted him accordingly.

The Sentence

13. For the damaging property offence the Magistracy quite properly found that there was no set tariff but then purported to set the tariff as between three months and twelve months' imprisonment. He went on to find as an aggravating feature that the accused had "shown disregard of (sic) the property rights of the people in this country".

14. He took 9 months as a starting point and added 6 months for the aggravating feature bringing the sentence to 15 months. He then reduced it by 4 months for mitigating features to 11 months which was his final sentence.

15. For the offence of theft he took a high starting point of 20 months with again an increase of 6 months and discount of 4 months for the same reasons arriving at a final sentence of 22 months. He made the two sentences concurrent.

Analysis

16. The third ground of appeal against conviction was that he was unrepresented at trial and this Court will deal with that ground first as the appellate Courts have made clear pronouncements of this ground as an appeal point.

17. The 2013 Constitution affords a litigant the right to counsel. Section 14(2) states:

> *"(2) every person charged with an offence has the right ... 2(d) to defend himself or herself in person or to be represented at his or her own expense by a legal practitioner of his or her own choice and to be informed promptly of this right or if he or she does not have sufficient means to engage a legal practitioner and the interests of justice so require, to be given the services of a legal practitioner under a scheme*

for legal aid by the Legal Aid Commission, or to be informed promptly of this right".

18. In **Ratu Inoke Takiveikata (Ruling No.2)** HAC 0005.2004S Gates J. (as he then was) said in respect of an identical provision in the 1997 Constitution:

*"The courts will try to see that an accused is able to brief and be defended by counsel of his or her own choice. But it is well accepted that this is not an absolute right (**Dunkley v. R** [1995] 1 AC 419, 427".)*

19. The Court record shows that the first time the appellant appeared before the learned Magistrate on the 23rd May 2014 "Right to counsel: waived". It must be presumed that an experienced Magistrate such as heard this case would have explained his rights to counsel to him and it was his own election not to be represented. This appellant is no stranger to the system having appeared in court on at least 7 previous occasions. In waiving his right, it cannot now be used as a ground of appeal that he was unrepresented at trial.

20. The ground of appeal against conviction fails.

21. The conviction of the appellant was based on the irresistible inference from circumstantial evidence. The accused did not give evidence as is his right of course. However the State did as part of their case produce the appellant's interview under caution which contained exculpatory answers to the allegations. It is the Magistrates duty to consider and the accused's right to have considered, his interview under caution if it is part of the evidence and especially when the accused is unrepresented.

22. Gates J (as he then was) said in **Anaia Nawaqa & others** HBM 14 of 2000L :

"it is a safe and sound practice in Fiji, as was done here, for the prosecution to provide the Magistrate with copies of the accused's police interview where the accused is not represented. When deciding whether he could safely enter a conviction to the very serious charge of rape and after examining each statement and the medical report, the Magistrate where appropriate could raise with each of the appellant's who had provided an exculpatory explanation, whether each still persisted with that line of defence".

and later

"Magistrates will then exercise good judgment in choosing which elements of an offence need to be raised with an unrepresented accused."

23. Obviously this must remain not only good practice but mandatory practice on the part of a Magistrate. If in this case the Magistrate had turned his mind to what the accused said in his caution interview, he might well have come to a different conclusion despite the fact that the unrepresented accused did not give evidence.

24. In his interview under caution, the accused/appellant talked of at least three other persons loitering in the area at the time, including the one man whom the police had told to go home. He said he did not break the window of the car and that he had found the charger on the ground beside the car.

25. There was no suggestion at trial that the interview was tainted by impropriety or fabrication and there is no reference anywhere in the record or the judgment that the Magistrate had considered those exculpatory answers.

26. No witness was able to say they saw the accused break the window and therefore the circumstances of the accused sitting in the car, being in possession of the charger, and trying to hide when the police approached is not an irresistible inference that he broke the window when there is at least another young man around who the police thought was loitering, Another could have broken the window and this appellant could have then taken advantage of that, sat in the car, and tried to escape when the police came.

27. This Court is of the view that the conviction is unsafe. The Magistrate has not considered the record of interview and he has failed to refer to the police evidence that another man was there acting suspiciously.

28. The conviction for damaging property is quashed and the sentence set aside.

29. To that extent the first two grounds of appeal against conviction succeed.

The Theft Charge

30. The appellant appeals the sentence in this case, submitting that it is excessive and no time was allowed to him for the period he has spent on remand.

31. What is immediately remarkable and troubling about this charge is that for some odd reason he is charged with theft of the charger and of $10 cash. The $10 cash added to the value of the charger being $85 brings the total amount stolen being to the value of $195 (?), according to the charge.

32. Nowhere in the evidence, no where in the caution interview and nowhere in the judgment or sentence is the $10 mentioned. It remains a mystery why it is included in the charge and it remains a mystery why nobody including police prosecutor, counsel attending or Magistrate ever bothered to peruse the charge.

33. There can be no doubt that the appellant did steal the charger, either by finding or by being in recent possession – he even admits it in his caution interview (picked up from the ground near the car). The charge is not duplicitous, the two thefts being so closely related as to form a single activity (see **Merriman** H.L. [1923] AC 584), however, there must be some evidence on one element of the charge ($10) and there must be some certainty as to the total value stolen which is incorrectly stated in the charge.

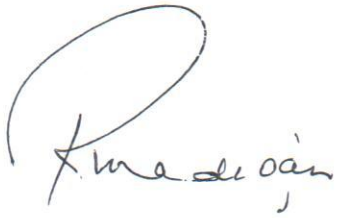
34. Given that the appellant has been tried without reference to an item he was charged with is unfair. He was never informed by the Police in his interview that it was alleged he had stolen $10 (and therefore a breach of s.13(1)(a) of the Constitution). In terms of s.15(1) of the Constitution the accused has the right to a fair trial and it is quite apparent that this right was also breached in this trial with its erroneously worded charge containing an element that was never dealt with.

35. It is evident from the record that this trial was rushed through without due attention to detail, without relevant evidence being called and in prejudice to the rights of an unrepresented accused.

36. For the second charge of theft, I quash the conviction and set aside the sentence.

37. The accused's appeal against sentence falls away, but it should be noted that the sentence was excessive and no time was allowed for the time he spent on remand.

38. If the appellant is not serving a sentence on any other matter he is to be released from custody forthwith.



P.K. Madigan
Judge

At Suva
8 October 2014