IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 248 OF 2018

STATE

-v-

1. **JOHN ISAAC**
2. **SERA CAVE NAIVALURUA**

Counsel: **Mr. Z. Zunaid & Ms. S. Lodhia for Prosecution**
Mr. J. Dinati for Accused

Date of Summing Up: **31 May 2019**
Date of Judgment : **7 June 2019**

JUDGMENT

1. The accused were jointly charged with two counts of Aggravated Burglary and two counts of Theft. The information reads as follows:

COUNT ONE

Statement of Offence

AGGRAVATED BURGLARY: Contrary to Section 313(1)(a) of the Crimes Act 2009.

Particulars of Offence

JOHN ISAAC AND SERA CAVE NAIVALURUA together with another on the 5th June 2018 at, Suva in the Central Division, in the company of each other entered into the premises of ASHLA SINGH as trespassers with intent to commit theft of ASHLA SINGH's property.

COUNT TWO

Statement of Offence

THEFT: Contrary to Section 291 of the Crimes Act 2009.

Particulars of Offence

JOHN ISAAC AND SERA CAVE NAIVALURUA together with another on the 5th June 2018 at, Suva in the Central Division, in the company of each other STOLE 1X 65 INCH Hitachi TV flat screen valued at $3500.00, 1x sharp brand Microwave Oven valued at $400.00 and a toaster, all to the total value of $4000.00 the property of ASHLA SINGH with the intention to deprive ASHLA SINGH of the above properties.

COUNT THREE

Statement of Offence

AGGRAVATED BURGLARY: Contrary to Section 313(1)(a) of the Crimes Act 2009.

Particulars of Offence

JOHN ISAAC AND SERA CAVE NAIVALURUA together with another on the 8th June 2018 at, Suva in the Central Division, in the company of each other entered into the premises of ASHLA SINGH as trespassers with intent to commit theft of ASHLA SINGH's property.

COUNT FOUR

Statement of Offence

THEFT: Contrary to Section 291 of the Crimes Act 2009.

Particulars of Offence

JOHN ISAAC AND SERA CAVE NAIVALURUA together with another on the 8th June 2018 at, Suva in the Central Division, in the company of each other stole 1x Hisense Mentallic refrigerator valued at $2000.00, 1 x Simpson washing machine valued at $1000.00, a round dining table and 4 chairs valued at $1200.00, 2x English chairs valued at $1500.00, 1x black autumn leather chair valued at $1500.00, assorted white plates valued at $300.00, Bakeret Stainless steel pots valued at $600.00, Sony brand stereo valued at $2000.00, 4x chairs valued at $200.00, carved table valued at $1500.00, and 4x chairs $200.00 all to the total value of $11,800.00 the property of ASHLA SINGH with the intention to deprive ASHLA SINGH of the above properties.

2. The trial was conducted before three assessors. Prosecution called five witnesses and, at the end of the Prosecution's case, the accused were put to their respective defences. The accused exercised their right to remain silent. Two witnesses were called for Defence.

3. After a short deliberation, the assessors returned a unanimous opinion that both the accused not guilty on each count.

4. I review evidence on my own Summing-Up and pronounce my judgment as follows:

5. There are no eye witnesses to these alleged burglaries and thefts. The Prosecution heavily relies on circumstantial evidence, particularly the inference that is generally drawn by courts of unaccounted recent possession of stolen property. The Prosecution also relies on admissions of the accused in their respective caution statements.

6. The law on recent procession of stolen property is succinctly stated. If, recently after the commission of the crime, a person is found in possession of the stolen goods, that person is called upon to account for the possession, that is, to give an explanation of it, which is not unreasonable or improbable, because, the reasonable inference is that the person must have stolen the property and committed the offence incidental thereto, which is burglary in this case.

7. It would appear that in Fiji, under the Crimes Act, recent possession of stolen goods does not give rise to a legal presumption of guilt of theft or any other associated offence. Rather it constitutes a material fact from which an inference of guilt of theft or associated offence can be drawn. But the strength of the inference will depend on the surrounding circumstances.

8. English Court of Appeal decision of *R. v. Aves*, [1950] 2 All E.R. 330, contains a clear statement that recent unexplained possession alone may be sufficient to raise a permissible inference of guilt. In that case, a conviction for receiving stolen goods was appealed. The question was whether the jury had been properly directed in accordance with the *Schama and Abramovitch* direction. Lord Goddard C.J. said, at p. 330:

> "Where the only evidence is that an accused person is in possession of property recently stolen, a jury may infer 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. If, however, the explanation offered is one which leaves the jury in doubt whether he knew the property was stolen, they should be told that the case has not been proved, and, therefore, the verdict should be Not Guilty"

9. There is no dispute in this case that both accused went with another person to the house at No.131 Domain Road (burgled house) on the 5th and 8th of June 2018 and removed the items listed in the agreed facts and, that those items were in the possession of the accused on the 11th June 2018, 3 to 5 days after the alleged thefts and burglaries. There is also no dispute that the property found in the possession of the accused is the property stolen from the burgled house. Therefore, the only issue before the assessors was whether the accused had given an explanation of stolen property which is not unreasonable or improbable.

10. If the fact finders think that the explanation may reasonably be true, the accused is entitled to an acquittal, because the Prosecution has not discharged the *onus* of proof imposed upon it of satisfying the court beyond reasonable doubt. On the other hand, if they are satisfied that the explanation he offers is untrue, they can infer guilty knowledge.

11. Both accused in this case opted to remain silent and did not give evidence, thus no explanation under oath is available. The only explanation is found in the interviews given by the accused to police under caution. Both accused told police that they were assisting one Seta in good faith to relocate the property which they believed to be that of Seta. In the absence of evidence under oath, the assessors were directed to consider the caution statements of the accused as a whole to determine if they had offered an explanation that is reasonable and probable in the circumstances of this case.

12. The assessors were specifically directed as to how they should approach out-of-court statements which are inherently weak evidence in that they are neither given under oath nor tested in cross-examination. Despite this inherently weak nature of caution statement evidence, the assessors still found the explanation given by the accused reasonable and

probable which, in my view, is not supported in evidence. It is my considered view that, if the assessors considered the caution statements as a whole and other evidence led in trial, they could not reasonably have come to the conclusion they reached.

13. Prosecution contends that the accused lied to police to cover up their involvement in these offences. It does not deny the involvement of a third person in the commission of these offences. However they deny that this third person is Seta. Prosecution says that Seta is an imaginary person introduced by the accused to cover up the real identity of the third person who was complicit in committing these offences.

14. Let me now explain why I should find the assessors wrong in coming to their conclusion with regard to the credibility and reasonability of the explanation the accused had offered.

15. According to the caution statement of the 1st accused, he (1st accused) had never heard of this Seta until he received a call from his wife Sera, the 2nd accused of this case, at around 10am to 12pm on the 5th June, 2018. Sera told the 1st accused that her brother's close friend namely Seta requested if they could keep his stuff while he was looking for a new house. When the 1st accused asked Sera whether she knew Seta well, Sera mentioned that Seta is a close friend of his brother-in-law, namely, Peni Dagana, and that he went to school together with Peni at St. Ann's in Labasa. The 1st accused appears to have trusted Seta's words because Seta knew everything about his brother-in law, who is dead and gone.

16. The story told by the accused about Seta is highly implausible. This Seta, if he is not a fictitious man, is neither a relative nor a friend of the 1st accused. The 2nd accused concedes that Seta is a friend of her brother- Peni who is deceased. There is no way that they could get Seta's story (that they went to school together) confirmed as Peni is already dead and gone. They do not know the real name of this Seta, his fixed address, his workplace or telephone number. The 1st accused had met Seta for the first time at Yatu Lau Arcade on the same day (5th June 2018), yet, he offered to help this new found friend in an unbelievably generous manner. Both the accused went to Suva Carrier Stand

to hire a carrier for Seta. They went to the (burgled) house with Seta and, upon reaching this house which looked like a government quarters, they loaded some of the items from the house into the carrier and unloaded the same at their house at Rokara. The accused agreed to keep the stuff until Seta finds a house for rent. Not only that, the 1st accused paid the hire of $ 35 to the carrier out his pocket. He went to this house again on the 8th June, 2018, and loaded the rest of the items and unloaded the same at his place at Rokara, albeit his house was full of Seta's goods.

17. Seta is alleged to have told the 1st accused that he used to work for a Chinese Railway company as a construction worker. Seta also said that he is the caretaker of the burgled house. (Mrs. Hazelman vehemently denies that they had employed a caretaker when Mr. Hazelman was away abroad). If the 1st accused is a sensible man, he should have known that a construction worker could not possibly occupy a government quarters with all those luxurious household items. He knew that Seta is such a poor man that he could not pay the carrier $ 35. The 1st accused himself told police that he could not assume that Seta could afford all those items. Still the Defence invites the court to believe this story.

18. Seta had told the 1st accused that he (Seta) is the caretaker of the burgled house and that the owner had gone abroad. If the 1st accused is a sensible man, he could have easily realised that a caretaker, whose job is to take care of the house, is not permitted to move all the valuable household items out of the house when his boss is away.

19. The accused believed that Seta was staying in Narere. Surprisingly, they had not questioned Seta as to why he could not take all his property to Narere straightaway. They did not question why they had to go again to this house for the second time to remove the rest of the items after a lapse of 2 days.

20. The 1st accused told his brother-in-law, Tawase Delasau (PW3), who had visited them at Rokara on 11th June 2018 that he bought all those household items through a buy and sell website on Facebook. He had never told his brother-in-law that those items belong to Seta and that they were there only for safe keeping for Seta. Delasau, being the brother-

in-law of the 2nd accused had no reason to lie to this court of what he heard from the 1st accused. The 1st accused has admitted lying to his brother-in-law in this regard. There is no acceptable explanation given by the 1st accused as to why he lied to his brother-in-law and why he wanted to suppress the truth.

21. The explanation given by the accused to account for the missing TV is unbelievable. Both of them told police that Seta had come and taken the TV from his house when no one was home. Seta had entered the house from the back door which was kept unlocked. When they found the TV missing, Seta had confirmed that he came and took it to his Narere house. It is implausible that the accused left the house having a door left open when such a valuable items are stored inside.

22. The 2nd accused was interviewed under caution at the same time as the 1st accused. The 2nd accused materially contradicted the version of the 1st accused. According to the 2nd accused, Seta had told her that he (Seta) was the **owner** of this house, not the **caretaker**. She had agreed to keep Seta's property until a house is found because Seta had been given only one week to clear-up the house. She had not quarried as to why Seta had to vacate his own property to meet a deadline.

23. The 2nd accused also contradicted on how Seta gained entry to the burgled house. The 2nd accused said that Seta entered from the front door whereas the 1st accused said that Seta entered from the back door and then opened the front door for them. According to the police investigator DC Livai, there had been a big hole in the back door and some louver blades had been removed and damaged. The 1st accused, when he entered the house, could have seen the damage done to the house giving him a reasonable suspicion of a break-in.

24. The Defence Counsel was blaming the police investigator DC Livai for failure on his part to conduct a proper investigation to locate Seta who he said is the real culprit in this case. DC Livai refuting the claim said that he and his police team took every effort to locate this person at the three addresses given by the accused but they could not find such a

person. The contact telephone number given had been diverted. Upon an examination of the telephone call history of the accused, no such number was found in their call up list. He confirmed that the only name given to police was ‘Seta' and the accused failed to disclose the real name and better particulars of this person. DC Livai, being an experienced investigator, having conducted a thorough investigation, finally concluded that this Seta is an imaginary person introduced by the accused to cover up the real identity of the 3rd person involved in the offences.

25. At the pre-trial stage, the Defence Counsel has suddenly discovered that this Seta is none other than Atunaisa Buleiwai, a known criminal living in his own home town. Based on this assumption, he included Atunaisa Buleiwai, who was apparently serving a prison term at that time, as one of the Defence witnesses, but he did not reveal to the State that this witness is the same person whose name is referred to as Seta in the caution statements of the accused. He has not caused the police to record a statement from Atunaisa Buleiwai or conduct further investigations on him. DC Livai vehemently denies that the accused at any point of time had ever approached them to reveal the name Atunaisa Buleiwai until he was confronted with this name in cross-examination. There is no evidence, not an iota of evidence, that this Atunaisa Buleiwai is the same Seta that is referred to in the caution interviews of the accused.

26. The two witnesses called by the Defence could not convince the court that Seta is a real person and also to show that Atunaisa Buleiwai is the same person as Seta whose name is referred to in the caution statements of the accused. In the first place, the witnesses for Defence cannot be relied upon. Tokasa (DW1) is inconsistent in her evidence and she proved herself to be an interested witness for Defence. She said she did not want to see her best friend (2nd accused) going to jail for this matter. She admits that, before coming to court, she discussed about this case with the 2nd accused. Having heard that her best friend is in trouble, she did not go to police to say that this Seta was waiting for Sera at the saloon on the 4th June 2018.

27. According to Lepani (DW2)'s evidence, Lepani's 'cousin Seta' had come back from prison in February 2019, having been jailed last year (2018). The crimes before court were committed in June 2018 and there is no concrete evidence that Lepani's 'cousin Seta' was involved in these crimes. The photograph Lepani showed to court and the description he gave of his 'cousin Seta' do not match with the description of Seta referred to in caution statements. Seta referred to by the accused had been schooling in Labasa with 2nd accused's deceased brother whereas Lepani's 'cousin Seta' is a quite young person who was schooling in Suva from Lepni's house. No link whatsoever is established between Seta referred to by the accused in their respective caution statements and Atunaisa Buleiwai who is said to be the cousin of witness Lepani.

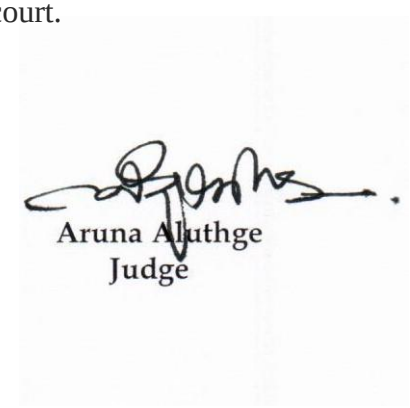
28. Even if it is established that the Seta referred to in the caution interviews is the same person known as Atunaisa Buleiwai, the Prosecution proved beyond reasonable doubt that the explanation offered by the accused is not true so that the court could infer guilty knowledge into their conduct.

29. Having taken into consideration the evidence as a whole, I am satisfied that the explanation the accused have offered is untrue. I impute the guilty knowledge to the accused on each count thus the dishonest intention. Prosecution has discharged the *onus* of proof imposed upon it of satisfying the court beyond reasonable doubt of each accused's guilt on each count.

30. As discussed in ***R. v. Aves*** (supra), recent unexplained possession alone may be sufficient to raise a permissible inference of guilt. This is not a case where the Prosecution is solely dependent on the inference to be drawn of unaccounted recent possession of stolen property. The proved untruthful explanation offered by each accused is complemented by their own admissions in their respective caution interviews putting themselves at the crime scene, both on the 5th and 8th of June, 2018, and admitting to removing the property from the burgled house.

31. I reject the unanimous opinion of assessors. I find both the accused guilty on each count. I convict the 1st and 2nd accused accordingly.

32. That is the judgment of this court.



AT SUVA

7th June, 2019

Solicitors: **Office of the Director of Public Prosecution for State**

MIQ Lawyers for Defence