

IN THE MAGISTRATES' COURT OF FIJI

AT TAVUA

CRIMINAL JURISDICTION

Criminal Case No. 52 - 2014

STATE

-v-

IOWANE SERU

Before : RM Fotofili L.
For The Prosecution : WPC Chand A. [Police Prosecution]
For The Defendant : In Person
Trial Date : 27th April 2020
Date of Judgment : 4th August 2020

JUDGMENT

BACKGROUND

1. The defendant has denied the following charge which was preferred by the prosecution:

Statement of Offence

THEFT: Contrary to section 291 of the **Crimes Act** No. 44 of 2009.

Particulars of Offence

IOWANE SERU on the 7th day of February, 2014 at Dramasi, Tavua in the Western Division stole a horse valued \$500.00 the property of **ASISH CHANDRA**.

2. The defendant first appeared on the 28th of April 2017 and was granted bail. The Legal Aid Commission [LAC] appeared for the defendant as a duty solicitor.

3. The case was recalled on the 3rd of June 2014 where full disclosures were served on the defendant and he was given time to apply to the LAC for legal representation.
4. The case was recalled on the 14th of July 2014 where the defendant said that he had not applied to LAC and now wished to represent himself.
5. His plea was also taken on this day where he pleaded not guilty to the charge.
6. When the case was called on the 11th of November 2014, the defendant failed to appear and a warrant of apprehension was issued for him.
7. The warrant remained unexecuted by the 11th of July 2016.
8. On this date, the court ordered a trial in *absentia* based on the formal application by the prosecution supported by a Notice of Motion and a supporting affidavit.
9. The court record is silent as to how the defendant came to be present, but on the 21st of August 2017 a trial was held before my brother Magistrate where the prosecution called 2 witnesses and closed their case.
10. The court found that there was a case to answer.
11. The defendant was explained his options and he chose to remain silent.
12. The defendant was remanded in custody thereafter and the case was adjourned for judgment.
13. When the case was called on the 26th of September 2017, the prosecution indicated that the defendant was no longer in remand. How that was the case is unexplained in the record. In any event, a warrant of arrest was issued for the defendant by the court.
14. When the case was called on the 12th of December 2017, there is an indication that the defendant had another case and the case was adjourned to the 13th of February 2018.
15. The record between February 2018 until the 4th of May 2018 is unclear whether the defendant was in remand or was at large with the pending warrant of arrest.
16. However when the case was called before me on the 25th of June 2018, the defendant was present and I remanded him in custody.
17. A retrial was ordered.
18. I released the defendant on bail with conditions on the 20th of July 2018.

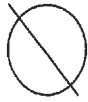
19. The defendant maintained his 'not guilty plea'.
20. Time was given to the defendant to sort out his missing disclosures and apply to the LAC at least between the 13th of August 2018 until the 27th of April 2020.
21. The retrial was held before me on the 27th of April 2020 without the defendant being able to sort out replacing his lost disclosures and legal representation as I was satisfied that he had been given sufficient time and had not provided any good cause for the matter to be delayed.
22. The defendant had been warned earlier on the 1st of November 2019 to be ready for trial with his witness(es).
23. I proceeded with the retrial with the defendant in person.
24. For the retrial before me, the prosecution called 2 witnesses who gave oral evidence.
25. After the prosecution closed their case, I found that there was a case to answer.
26. After explaining the options available to the defendant, the defendant elected to remain silent but called 1 witness.
27. I summarise the oral evidence of the parties below.

PW1

28. Prosecution witness 1 [PW1] is Mr. Asish Chandra.
29. PW1 has a horse and the horse was tied about 20 meters away from PW1's house on the 6th of February 2014.
30. PW1's brother had tied PW1's horse to an iron post.
31. PW1's brother helped PW1 look after the horse.
32. PW1 describes his horse to be reddish brown in colour. It is a male horse with a white mark on its forehead and the brand 'PTP' is on its rear hind leg. The horse has dark brown and black hair.
33. When his horse was with him, PW1 sees the mark on his horse every day.

34. PW1 has had his horse for 3 years prior to 2014.
35. His horse is valued at \$450 as he had bought it from a villager.
36. On the 7th of February 2014 PW1's horse went missing and so he searched for it with the help of his brother Dewash Chandra.
37. The search was done at the Yaqara Pastoral Company grazing land.
38. When he was searching near the security's house at Yaqara, PW1 saw his horse.
39. When PW1 saw the horse, he could not see his brand as the side where his brand was, was not facing PW1.
40. PW1 still recognizes the horse by the white mark on his forehead.
41. PW1 described that an Itaukei boy came out of the security house and jumped on the horse and rode away.
42. PW1 knows the boy as Seru and has known Seru since 2012.
43. The boy used to come to the village where PW1 stays. The boy visits PW1's neighbour. The boy also works as a labourer in the cane field. PW1 remembers seeing the boy about 2 times a week.
44. That boy or Seru is the defendant.
45. PW1 described that the closest he reached his horse during the search was from about 50 meters away.
46. It was around midday when PW1 saw his horse.
47. Nothing obstructed PW1's view.
48. In 2019 the defendant's father came to PW1 and asked if the horse could be replaced as the defendant is sickly. The father came to PW1 on his own.
49. PW1's horse has been missing ever since.
50. When cross examined, PW1 repeated that it was the defendant he saw riding the horse.
51. The defendant's father works as a security at Yaqara. The father questioned PW1 later that afternoon why PW1 was at the land at Yaqara.

69. DW1 is aware that the defendant is alleged to have stolen a horse on the 6th or 7th of February 2014.
70. At the time, DW1 held the post of 'stockman'.
71. DW1 described that casual labourers will herd cattle from one part of the farm to another in-order that the cattle is counted.
72. At the time of herding, the defendant was riding a horse belonging to the Company.
73. DW1 gave the defendant a reddish brown male horse.
74. The Company brand was on the horse and the age of the horse will be inscribed on the side of the horse. The Company brand is as follows:



75. That horse which the defendant was riding has now died.
76. That horse does not have a white mark or patch.
77. Horses that are reddish brown in colour are not unique and are common for horses that belong to the Company.
78. When cross examined, DW1 accepted that the defendant was a casual labourer.
79. DW1 remembers that the defendant was employed as a casual labourer in 2014 as DW1 was the team leader at the time.
80. DW1 denied that he is trying to save the defendant.
81. The defendant's father also had 2 male horses with one coloured white and red and one coloured brown.

BURDEN AND STANDARD OF PROOF

82. I remind myself that the burden is on the prosecution to prove the allegation as the defendant is presumed innocent until proven guilty.

83. Even if I reject the evidence adduced by DW1 on behalf of the defendant, that does not necessarily mean that the defendant is guilty.
84. I remind myself that the prosecution must satisfy me beyond a reasonable doubt or I must be sure that it is the defendant who committed the offence, before I can find him guilty.

ELEMENTS OF THE OFFENCE

85. The defendant is charged with theft which is contrary to section 291 of the **Crimes Act 2009**.
86. The elements, all of which the prosecution are to prove beyond a reasonable doubt are:
 - i. **The Defendant;**
 - ii. **Dishonestly;**
 - iii. **Appropriated property;**
 - iv. **Property belongs to another; and**
 - v. **The defendant intended to permanently deprive the other of the property.**
87. Dishonest is dishonest according to the standards of ordinary people and is known by the defendant to be dishonest [section 290 of the **Crimes Act 2009**].
88. Treating a property as if it was yours without the consent of the owner is tantamount to appropriating the property [section 293 (1) of the **Crimes Act 2009**.
89. Property can include real property or personal property [section 288 of the **Crimes Act 2009**]. A horse can fall into this category.
90. A horse which is sufficiently tamed to serve some purpose for a human falls into the category of a domestic animal pursuant to section 2 of the **Protection of Animals Act 1954**.
91. Horses or cattle are defined as stock under the **Brands Act 1928**.
92. It may be interesting to note that it is not required to have stock branded unless the person keeps more than 4 heads of stock and this is pursuant to section 4 of the Act.

93. When dealing with the offence of theft, property can be deemed to belong to someone if that person has some proprietary interest or has possession or has control of the property [section 289 (1) (a) and (b) of the Crimes Act 2009].
94. Intention to permanently deprive is not necessarily what it says. In law, a person can intend to permanently deprive a person of property if the person appropriates the property belonging to another even without meaning the other to permanently lose the property [or temporarily use] and the person's intention was to treat the property as his or her own to dispose of regardless of the other's rights [section 300 (1) (a) and (b) of the Crimes Act 2009].
95. Intention is when someone means to engage in that conduct [section 19 (1) of the Crimes Act 2009] .
96. Someone's intention can be gauged from surrounding circumstances or circumstantial evidence or from direct evidence such as a confession [Kural v. The Queen (1987) 70 ALR 658] .
97. It is inevitable that circumstantial evidence exists in every case.
98. I remind myself that circumstantial evidence can be powerful evidence but it must be considered with care in-order to avoid speculation. The circumstantial evidence must be consistent with the defendant having committed the act or the guilt of the defendant but that also the facts must negative any other reasonable conclusion that may exonerate the defendant. At the end of the day, the court must be satisfied beyond a reasonable doubt of the defendant's guilt [Varasiko Tuwai v.The State Criminal Appeal Number CAV 13 of 2015 (26th August 2016) at paragraph 51 to 53.
99. Recent possession of a stolen item or items can be circumstantial evidence. What is recent will depend on each case. The principle too cannot work if it is not established that the item was in fact stolen.
100. The case for the prosecution rests on identification of the defendant riding the horse which the defendant disputes to be true or accurate.
101. I remind myself of the principles enunciated in the House of Lords decision of R v Turnbull (1976) 63 Crim App R 132 which is accepted in this jurisdiction see for example Wainiqolo v The State [2006] FJCA 70; AAU0027.2006 (24 November 2006).
102. An honest witness can be a mistaken witness. I also remind myself to carefully assess the circumstance under which the purported identification was made. Some questions or factors that needs to be considered in-order to assess the strength of the identification can be considered as follows:

- I. How long did the witness have the defendant under observation?
- II. At what distance?
- III. In what light?
- IV. Was the observation impeded in any way, as for example by passing traffic or a press of people?
- V. Had the witness ever seen the defendant before?
- VI. How often?
- VII. If only occasionally, had he any special reason for remembering the defendant?
- VIII. How long elapsed between the original observation and the subsequent identification to the police?
- IX. Are there any material discrepancies between the description of the defendant given to the police by the witnesses when first seen by them and his actual appearance?
- X. Are there any specific weaknesses appearing in the identification evidence?
- XI. The circumstances in which the identification by each witness came to be made are crucial. For instance, seen at the scene of offence or somewhere else?

103. The same principles would apply to the identification of PW1's horse.

104. I do not think that it is necessary that all of the factors mentioned above must be met in each case but digesting the evidence in light of the above factors will indicate whether the identification evidence is sufficient.

ANALYSIS

105. I have no trouble accepting DW1's evidence that he is the grandfather of the defendant and he was the 'stockman' in February 2014 at the Company at Yaqara.

106. The defendant was employed as a casual labourer and helped herd cattle at the Yaqara.

107. I also accept DW1's evidence that reddish brown horses are not unique at Yaqara.

108. DW1 has close to two decades of experience working at Yaqara.

109. I did not see any reason why I should reject DW1's evidence regarding the above points. I found him credible and reliable.

110. DW1 was also convincing when he denied that he is trying to save the defendant.

111. However, DW1 does not specify in his evidence on which date in February 2014 he gave a male horse reddish brown in colour to the defendant to ride.

- 112.** The horse given to the defendant had the Yaqara company brand and it has no white mark or patch.
- 113.** I believe DW1 that the defendant was given and rode a male horse reddish brown in colour in February 2014 for the purpose of working at Yaqara as a casual labourer.
- 114.** Although he does not carry any burden, the defendant has established that he was in possession of a male horse which is reddish brown in colour in February 2014.
- 115.** The case rests on whether I accept the identification evidence of one or both of the prosecution witnesses.
- 116.** Both the prosecution witnesses who are brothers were natural and appeared to be forthright when giving their evidence.
- 117.** I believe PW1 that he has a male horse. The purpose of having the animal is largely immaterial in this case.
- 118.** I accept the description given by the prosecution witnesses. It is a male horse most likely a stallion [although being sure is the standard], it is valued at \$450 and that PW1 owns it and had the horse for about 3 years. It is reddish brown in colour with a white mark on its forehead and the brand 'PTP' on one of its rear hind leg.
- 119.** PW1's family helps him look after the animal.
- 120.** I accept that the horse was tethered on the 6th of February 2014 and it was missing on the 7th of February 2014 and both the prosecution witnesses went searching for it at Yaqara.
- 121.** I accept that they were given permission to search at Yaqara.
- 122.** I accept and I am sure that both the prosecution witnesses know and have seen the defendant before. The defendant comes to their neighbourhood. The parties know each other and this is unchallenged by the defendant.
- 123.** The prosecution witnesses do not specify how long they had the defendant and or the horse under observation at Yaqara. I am sure though that it would have been several minutes and I do not think that both the defendant and the horse was stationary all throughout the time they were observed.
- 124.** PW1 said that the defendant came out of the security house, got on a horse and rode away.

125. I accept too that that they would have been observing the horse for approximately the same time they observed the defendant.
126. I accept that it was at midday that the prosecution witnesses saw the defendant with a horse. There was no obstruction.
127. For one, the weakness in the identification evidence is that the witnesses do not detail what the defendant was wearing.
128. In addition, the closest any of the prosecution witnesses came to the defendant and the horse was about 50 meters.
129. PW1 said that he saw the defendant from about 50 meters away.
130. PW2 said that he saw the defendant from about 200 meters away.
131. Despite the distance and lack of description about what the defendant may have been wearing on the day, I am still sure that the prosecution witnesses are not mistaken and that they did see the defendant on the 7th of February 2014 around midday at Yaqara.
132. The defendant has not filed any alibi notice and has not given alibi evidence and so the prosecution's evidence remains undisturbed and I make the finding that it was the defendant whom PW1 and PW2 saw.
133. As for the horse, PW1 said that he did not see his brand on the horse as the side where the brand was, was not facing PW1.
134. PW1 said that there was a white mark on the forehead of the horse the defendant was riding that day.
135. Yaqara is a well-known agricultural area. It is also established by the defendant's witness that the defendant was in possession of a horse similar in colour to PW1's horse although the white mark on the forehead may not be present in all of the similar coloured horses.
136. PW1 does not describe how big or how obvious this white mark or patch is and how he could see that from 50 meters away let alone his brother who saw the horse from 200 meters away.
137. Even if there was a white mark on the forehead of the horse the defendant was riding on the 7th of February 2014, I would think that more is needed to convince this court or any other court that it surely was PW1's horse that the defendant was riding.

138. The prosecution witnesses also do not mention whether the horse which the defendant rode had hair or a mane. Also bear in mind that both the prosecution witnesses do not have consensus on what is the colour of the hair. PW1 says it's black while his brother says it is brown.
139. It was the defendant who the prosecution witnesses saw on the 7th of February 2014 at Yaqara at around midday. I am also sure that the defendant was riding a horse at the time. I am not sure whether the horse the defendant was riding belongs to PW1.
140. If it is established that the defendant was riding the horse belonging to PW1, that potentially could be strong circumstantial evidence that he stole the horse from PW1 especially when the horse went missing the night before from where it was tethered.
141. Consequently because I am not sure whether the horse which the defendant was riding at the material time belongs to PW1, all elements of the offence of theft are not proven beyond a reasonable doubt.
142. I accept that the defendant's father offered to compensate PW1 for his missing horse but I do not find this to be circumstantial evidence of any guilty conscience. Suspects and defendants or their family wish to settle cases for various reasons such as to avoid embarrassment, avoid the inconvenience and expense of coming to court. There are other reasons and it is not necessarily because of guilt. There is also no evidence that the defendant was privy to this approach made by his father to PW1. It appears to be a unilateral approach by the defendant's father.

CONCLUSION

143. For the reasons I have explained above, the prosecution has not discharged their burden and met the necessary standard of proof.
144. I do not find the defendant guilty and I acquit him of the charge of theft contrary to section 291 of the Crimes Act 2009.
145. 28 days to appeal.



At Tavua this 4th day of August, 2020.

LISIATE T.V FOTOFILI

Resident Magistrate