

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO.: HAA 35 OF 2017**

**BETWEEN:**           **VILIAME SAVOU**

**Appellant**

**A N D:**               **STATE**

**Respondent**

**Counsel:**           Ms. N. Mishra for Appellant  
Mr E. Samisoni for Respondent

**Judgment:**       22<sup>nd</sup> December 2017

**JUDGMENT**

**Introduction**

1. The Appellant had been charged in the Magistrate's Court for one count of Robbery, contrary to Section 310 (1) (a) (i) of the Crimes Act and one count of Assault Causing Actual Bodily Harm, contrary to Section 275 of the Crimes Act.
2. The Appellant was first produced in the Magistrate's Court on the 4th of July 2017. On the 17th of July 2017, the appellant pleaded guilty for both counts. The learned Magistrate then convicted and sentenced the appellant for a period of four (4) years and eight (8) months with non-parole period of four (4) years for the offence of Robbery. He was further sentenced for three (3) months imprisonment for the Assault Causing Actual Bodily Harm and suspended it for a period of twelve (12) months. Aggrieved with the said conviction and the sentence in respect of the first count of Robbery, the appellant filed this appeal on the following grounds:

### *Appeal against the Conviction*

- i) *The learned Magistrate erred in law and in fact when she convicted the Appellant for the offence of Robbery when there was no evidence to substantiate that immediately before committing the said offence (theft) the Appellant used force on the Complainant.*

### *Appeal against the Sentence,*

- i) *The learned Magistrate erred in law by considering the wrong tariff starting point when determining the Appellant's sentence.*
- ii) *The learned Magistrate failed to take into consideration the time the Appellant spent in custody.*

3. The Appellant and the Respondent first appeared in the High Court on the 29th of September 2017. Both parties were directed to file their respective written submissions, which they filed as per the directions. The learned counsel for the Respondent in his written submissions has conceded that all of the appeal grounds have merits. hence, the appeal should be allowed.
4. This matter then proceeded to hearing on the 13th of December 2017, where the learned counsel for the Appellant and the Respondent made their respective oral submissions. Having carefully considered the record of the proceedings in the Magistrate's Court, the written and oral submissions of the parties, I now proceed to pronounce my judgment as follows.

### **Ground I**

5. The first ground of appeal is founded on the contention that the summary of facts as admitted by the appellant has not disclosed and proved one of the essential elements of the offence of Robbery, that is, the appellant had used force on the complainant immediately before committing this offence.
6. Section 174 of the Criminal Procedure Act stipulates the procedure of recording the plea of the accused in the Magistrate's Court, where it states that:

- i) *The Substance of the charge or complaint shall be stated to the accused person by the court, and the accused shall be asked whether he or she admits or denies the truth of the charge.*
  - ii) *If the accused person admits the truth of the charge, the admission shall be recorded as nearly as possible in the words used by the accused, and the court shall convict the accused and proceed to sentence in accordance with the Sentencing and Penalties Act 2009.*
7. Accordingly, the court shall first provide the appellant the substance of the charge, including the facts pertaining to all essential elements of the offence and give him an opportunity to inform the court either he admits or denies the truth of the charge. If the court satisfies that the appellant admitted the truth of the charge, the court shall then proceed to convict the appellant and sentence him accordingly.
8. Justice Gates (as his Lordship then was) in **State v Isaia Saukova (2000) 1 FLR 135** has discussed the duty of the Magistrate in respect of recording the plea of guilt, where his Lordship held that:

*"It is essential that a Magistrate be satisfied that an Accused is admitting facts which amount to all of the legal elements that go to prove the charge in question. Where the Accused is represented by counsel, the Magistrates task is easier. Where the Accused is unrepresented a more onerous burden is cast on the court. But the Magistrate should ensure that the Accused is not simply pleading guilty out of a feeling of remorse for being involved in a result as opposed to causing a result".*

9. The main elements of the offence of Robbery are that:
  - i) The Accused,
  - ii) Commits theft,
  - iii) Immediately before committing the theft, or at the time of committing the theft, or immediately after committing the theft,
    - a) Uses force on another person; or
    - b) threatens to use force then and there on another person —

iii) With intent to commit theft or to escape from the scene; or

10. In this case, the prosecution alleges that the Appellant had used force on the complainant immediately before committing the theft.
11. According to the summary of facts, the appellant had approached and grabbed the mobile phone from the hands of the complainant while she was sitting down at the walkaway along the Suva Point beachfront. The learned counsel for the Appellant argues that the "grabbing" of the mobile phone from the hands of the complainant does not constitute the element of force as required under Section 310 (1) (a) (i) of the Crimes Act. The learned counsel for the Respondent also concurred with the said argument. Accordingly, the main issue that the court is required to determine is whether the grabbing, or suddenly taking the mobile phone from the hands of the complainant constitute the element of force under Section 310 of the Crime Act.
12. The act of "gabbing" of the mobile phone from the hands of the complainant constitutes one of the main elements of stealing, that is taking the possession of the stolen item from the complainant. Apart from that, the summary of facts does not reveal that the Appellant had used any form of force on the complainant immediately before he grabbed the mobile phone from the complainant. Accordingly, I find the summary of facts has not disclosed the element of force used by the Appellant on the complainant immediately before he stole the mobile phone.
13. In view of the reasons discussed above, I am satisfied that the summary of facts has not disclosed all the elements of the offence of Robbery. Accordingly, the appellant has not admitted the truth of the main elements of the offence as charged. Under such circumstances, the learned Magistrate has no jurisdiction to enter a conviction against the appellant pursuant to Section 174 (2) of the Criminal Procedure Act. Accordingly, the conviction and the subsequent sentence imposed by the learned Magistrate against the Appellant pursuant to Section 174(2) of the Criminal Procedure Act is not valid.
14. In view of above conclusion, I do not wish to proceed to determine the two grounds of appeal raised by the Appellant against the sentence.

### Alternative Count of Theft

15. The learned counsel for the Appellant and the Respondent submitted that the Appellant can be convicted for the alternative offence of Theft, as the summary of facts reveals all the main elements of theft.
16. Section 160 and 162 (1) (i) of the Criminal Procedure Act, allows the court to convict an accused for a lesser or alternative **offence**, where it states that:

*“Where a person is charged with an offence but the court is satisfied that the evidence adduced in the trial supports a conviction only for a lesser or alternative offence, the court may record a conviction made after due process for*

*i) any other applicable property related offence where the charge has been burglary or any other property related offence, including -;”*

17. In view of summary of fact, which was admitted by the Appellant in the Magistrate’s Court, I am satisfied that the Appellant is guilty for the offence of Theft, contrary to Section 291 of the Crimes Act. I accordingly find that the appellant guilty for the said offence of Theft, contrary to Section 291 of the Crimes Act and convict for the same.
18. The maximum penalty for the offence of theft is ten years imprisonment. Justice Madigan in Ratusili v State [2012] FJHC 1249; HAA011.2012 (1 August 2012) found that the applicable tariff for theft is between 2 and 9 months, where Justice Madigan held that:

*i) For a first offence of simple theft the sentencing range should be between 2 and 9 months.*

*ii) Any subsequent offence should attract a penalty of at least 9 months.*

*iii) Theft of large sums of money and thefts in breach of trust, whether first offence or not can attract sentences of up to three years.*

*iv) Regard should be had to the nature of the relationship between offender and victim.*

*v) Planned thefts will attract greater sentences than opportunistic thefts.*

19. This is a case of opportunistic stealing. The Appellant is twenty two years old and married. The Appellant is not a first offender. He pleaded guilty for this offence at the first available opportunity. Considering these factors, I find seven months of imprisonment is appropriate for this offence of theft.
20. The Appellant had been in remand custody for nearly a month before he was sentenced. I consider the said period of one month as a period of sentence that has already been served by the Appellant pursuant to Section 24 of the Sentencing and Penalties Act. Accordingly, the final sentence for this offence of theft is **six (6) months of imprisonment.**

The Orders of the Court are:

- i) The Appeal is allowed.
  - ii) Conviction for the offence of Robbery is quashed and sentence is set aside.
  - iii) The Appellant is convicted for the offence of Theft, contrary to Section 291 of the Crimes Act
  - iv) The Appellant is sentenced to six (6) months imprisonment with effect from 31st of July 2017.
21. Thirty (30) days to appeal to the Fiji Court of Appeal.



  
R.D.R.T. Rajasinghe  
**Judge**

At Suva  
22<sup>nd</sup> December 2017

Solicitors  
Office of the Legal Aid Commission for the Appellant  
Office of the Director of Public Prosecutions for the Respondent.