

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

**CRIMINAL APPEAL CASE NO. HAA 015 OF 2021**

**BETWEEN:**                      **SURENDRA PRASAD**                      **APPELLANT**

**A N D:**                              **STATE**                                      **RESPONDENT**

**Counsel:**                              Mr. S. Sharma for Appellant  
    Ms. S. Latu for Respondent

**Date of Hearing:**                      23<sup>rd</sup> March 2022

**Date of Judgment:**                      27<sup>th</sup> May 2022

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**J U D G M E N T**

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1. The Appellant was charged in the Magistrate's Court sitting in Labasa with one count of Theft contrary to Section 291 of the Crimes Act. Appellant had pleaded not guilty to the count hence, the matter had proceeded to the hearing. The Prosecution had presented three witnesses to give evidence, while the Appellant had opted to exercise his right to remain silent. Subsequent to the hearing, the learned Magistrate, in his judgment dated 28th of July 2021, found the Appellant guilty of the offence of Theft as charged. On the 23rd of August 2021, the learned Magistrate sentenced the Appellant to six month imprisonment period and

suspended it for two years. Aggrieved with the said conviction, the Appellant filed this appeal on the following grounds *inter alia*;

- i) *That the learned Magistrate erred in law and in fact and not considering that there was insufficient evidence adduced by the Prosecution in respect of the identification and description of the stolen item when the Petitioner heavily contested the identification.*
  - ii) *That the learned Magistrate erred in law and in fact in admitting the contradicted evidence of PW1 and PW2 for identification and description of the stolen Rooster.*
  - iii) *That the learned Magistrate erred in law and in fact in convicting the Petitioner on unreliable, inconsistent and contradicted evidence of PW1, PW2 and PW3.*
  - iv) *That the learned Magistrate erred in law and in fact in not considering that the evidence of PW1 and PW2 were manifestly discredited under cross examination. And failed to assess the truthfulness and credibility of the witness.*
  - v) *That the learned trial Magistrate erred in law and in fact in drawing and adverse inference of the Petitioner for exercising his right to remain silent which have prejudicial affected the Petitioners.*
2. The Respondent conceded the first two grounds of appeal, stating that the Prosecution should have produced evidence of the stolen rooster for the identification as the two main Prosecution witnesses gave evidence providing a contrasting description of the stolen rooster.

3. The factual background of this matter is that a rooster belonging to the Complainant (PW1) had gone missing from his compound. His wife (PW2) was informed by one of their neighbours (PW3) that there was a rooster at her compound fighting with her roosters, and then the Appellant, who also lives in the same neighbourhood, came and took the said rooster. The PW1 had then gone to the Appellant's compound and found the lost rooster was among the roosters and hens belonged to the Appellant. PW1 had identified his rooster as he had put a mark on the right side wing of the rooster. Since the Appellant was not at home, the PW1 had gone back. The PW2 had gone to Appellant's house the same day and asked the rooster back. The Appellant had told her to come back on the following day to pick their rooster. However, when she went on the next day, the Appellant had refused to return the rooster. PW2 said that she identified the rooster because she had put marks on both sides of the rooster's wings for identification.
4. Both the PW1 and PW2 had seen the rooster when it was among the roosters of the Appellant. They had identified the rooster from the mark they had put on its wings. However, PW1's evidence of identification of the rooster was inconsistent with the evidence of PW2. Before the learned Magistrate, there was no evidence whether the Police had found the rooster as described by the PW1 and PW2 in possession of the Appellant. If they had uplifted the said rooster, the Prosecution could have provided it in evidence in the form of photographs for the PW1 and PW2 to make a proper identification. In the absence of such evidence, the above inconsistency of the evidence of identification of the rooster goes to the main dispute of the matter, whether they found their rooster in the compound of the Appellant. Based on these reasons, I find it unsafe to rely on the evidence given by PW1 and PW2 to convict the Appellant of this offence.
5. I accordingly make the following orders that:
  - i) The Appeal is allowed,
  - ii) The conviction dated 28th of July 2021 is quashed and the sentence dated 23rd of August 2021 is set aside,

6. The parties have thirty (30) days to appeal to the Fiji Court of Appeal.



A handwritten signature in black ink, appearing to be "R.D.R.T. Rajasinghe", written over a horizontal dotted line.

Hon. Mr. Justice R.D.R.T. Rajasinghe

**At Suva**

27<sup>th</sup> May 2022

**Solicitors**

Sushil Sharma Lawyers for the Appellant.

Office of the Director of Public Prosecutions for the Respondent.