IN THE HIGH COURT OF FIJI AT SUVA

In the matter of an appeal under section 246(1) of the Criminal Procedure Act 2009.

[APPELLATE JURISDICTION]

LASARO TUBERI

Appellant

APPEAL CASE NO: HAA. 25 of 2024 **V**
[Nausori Magistrate's Court Criminal. Case No. CF. 481 of 2020]

STATE

Respondent

Counsel: Ms. R. Nabainivalu for the Appellant
Mr. Z. Zunaid for the State as Respondent

Appeal Hearing: 18th October 2024
Appeal Judgment: 29th November 2024

APPEAL JUDGMENT

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1. **Lasaro Tuberi**, the Appellant, was charged with the following five counts in CF. 481 of 2020 in the Nausori Magistrate's Court:

COUNT ONE

Statement of Offence

FAILURE TO COMPLY WITH ORDER: Contrary to Public Health (COVID-19 RESPONSE) Public Notice No.7 gazette on 4th April, 2020 by permanent

secretary of Health and Medical Services pursuant to section 69(3)(v) of Public Health Act 1935 and regulation 2 of the Public Health (Infectious Disease) Regulation 2020.

Particulars of Offence

LASARO TUBERI, on the 19th day of June, 2020 at Naduru road, Nausori in the Central Division, without lawful excuse, at 02.40am was arrested by Police Officers at Naduru road breaching the imposed curfew order hours between 10pm to 5am, an order issued by the Permanent Secretary for Health and Medical Services.

COUNT TWO

Statement of Offence

GOING EQUIPPED FOR THEFT: Contrary to section 315(1) of the Crimes Act of 2009.

Particulars of Offence

LASARO TUBERI, on the 19th day of June, 2020 at Naduru road, Nausori in the Central Division, when not at home had with him some articles with intent to use it in connection to a property offence.

COUNT THREE

Statement of Offence

BURGALRY: Contrary to section 312(1) of the Crimes Act of 2009.

Particulars of Offence

LASARO TUBERI, on the 19th day of June, 2020 at Naduru road, Nausori in the Central Division, entered into the dwelling house of **UNAISI LEWATINI** as a trespasser with intent to commit an offence.

COUNT FOUR

Statement of Offence

THEFT: Contrary to section 291(1) of the Crimes Act of 2009.

Particulars of Offence

LASARO TUBERI, on the 19th day of June, 2020 at Naduru road, Nausori in the Central Division, dishonestly appropriated 1 x HP Laptop valued at $2000.00; 3 x Samsung mobile phones valued at $230.00; 1 x portable Huawei wifi valued at $50; 1 x Casio calculator valued at $25.00; 4 x USB valued at $160.00; 3 x body lotion valued at $45.00; 1 x gold ring [wedding band] valued at $120.00'; 1 x diamond face gold ring valued at $300.00; and 1 x 1.8 hybrid Prius car key valued at $300.00, all to the total of $5300.00, the property of **UNAISI LEWATINI** with intention of permanently depriving the said **UNAISI LEWATINI**.

COUNT FIVE

Statement of Offence

SERIOUS ASSAULT: Contrary to section 277(b) of the Crimes Act of 2009.

Particulars of Offence

LASARO TUBERI, on the 19th day of June, 2020 at Naduru road, Nausori in the Central Division, resisted the arrest of **D/Cpl.4509 MESULAME NARAWA** in due execution of his duty.

2. On 1 February 2021 the Appellant being represented by defence counsel Ms. Sharma of the Legal Aid Commission pleaded *not guilty* to all 5 counts and tried accordingly.

3. On 29 March 2022 the learned magistrate ruled a case to answer for counts 1 to 4, but no case to answer for count 5 and acquitted the Appellant accordingly for that particular count.

4. On 15 December 2023 the learned magistrate found the Appellant guilty of counts 1, 2, 3 and 4, and convicted him accordingly.

5. Having heard the Appellant's plea in mitigation, the learned magistrate then on 18 January 2024 sentenced the Appellant with an aggregate custodial term of 2 years 9 months with a non-parole period of 1 year.

6. Having being dissatisfied with his conviction and sentence, the Appellant then lodged a timely petition of appeal on 5 February 2024, and subsequently on 20 September 2024 filed amended grounds of appeal via his LAC counsel pleading the following grounds of appeal against conviction and sentence:

   Conviction

   1. *That the learned magistrate erred in law and in fact when she failed to analyze and discuss the chain of custody of the stolen items to establish the principle of recent possession of the stolen property.*

   Sentence

   2. *That the learned magistrate erred in fact when she gave the final sentence of 2 years 9 months instead of the 2 years 5 months she had reached after her calculation thus resulting to an excessive sentence.*

7. The Appellant seeks that his appeal against conviction and sentence be allowed including any other order(s) this Court deems just.

8. The appeal hearing was held on 28 October 2024, and this is the Court's appeal judgment.

Power of High Court on appeal against conviction and sentence

9. Section 256(2)(a), (b), (c), (e), (f) and (3) of the Criminal Procedure Act 2009 state:

> *256.-(2) The High Court may –*
>
> *(a) confirm, reverse or vary the decision of the Magistrate's Court; or*
>
> *(b) remit the matter with the opinion of the High Court to the Magistrates Court; or*
>
> *(c) order a new trial; or …*
>
> *(e) make such other order in the matter as to it may seem just, and may by such order exercise any power which the Magistrates Court might have exercised; or*
>
> *(f) the High Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.*
>
> *(3) At the hearing of an appeal whether against conviction or against sentence, the High Court may, if it thinks that a different sentence should have been passed, quash the sentence passed by the Magistrates Court and pass such other sentence warranted in law (whether more or less severe) in substitution for the sentence as it thinks ought to have been passed.*

Appeal against conviction

10. The Appellant contend that the learned magistrate erred in law and in fact when she failed to analyze and discuss the chain of custody of the stolen items to establish the principle of recent possession.

Chain of custody of evidence

11. In Kumar v State [2023] FJCA 125; AAU132.2018 (27 July 2023) the Fiji Court of Appeal, at paragraphs 27 and 34, explained the term **chain of custody** and made some observations on how law enforcement agencies may handle chain of custody to prevent tampering, contamination, or loss of the evidence principally to maintain the integrity and reliability of the evidence:

*[27] In criminal cases, the **chain of custody** refers to the chronological documentation and control of the physical evidence involved in a case. It ensures that the evidence is properly collected, preserved, handled, and accounted for from the moment it is discovered until tested by an analyst but not essentially until it is presented in court, for the absence of physical evidence in court per se is not a bar to a successful prosecution. The chain of custody is crucial to maintain the integrity and reliability of the evidence and to prevent tampering, contamination, or loss. By maintaining a clear and documented chain of custody, the legal system aims to ensure that the evidence presented in court is admissible, reliable, and has not been compromised or tampered with. It helps protect the rights of the accused by ensuring that the evidence is handled properly and that its integrity is upheld throughout the investigation and legal proceedings. ...*

*[34] However, before parting with this ground of appeal I wish to make some helpful observations with regard to the steps that may be taken and strived to be achieved by law enforcement agencies to maintain the integrity and reliability of the evidence and to prevent tampering, contamination, or loss. **However, these are only key aspects of the chain of custody process and not rules of law or procedure which means that breach of one or more of them alone may not lead to a breach in the chain of custody**.*

1. *Identification and Documentation: When evidence is collected at a crime scene, it is identified, described, and documented in detail. This includes information such as the date, time, and location of the collection, as well as the names of the individuals involved in the process.*
2. *Sealing and Packaging: The evidence is properly sealed and packaged to protect it from contamination, damage, or loss. Containers, bags, or other appropriate packaging materials are used, and seals or evidence tape are applied to ensure the evidence remains intact.*
3. *Documentation of Custody Transfers: Whenever the evidence changes hands or is transferred from one person to another (e.g., from the crime scene investigator to the evidence technician, or from the evidence technician to the forensic laboratory), each transfer is documented, including the date, time, location, and the individuals involved.*

4. *Storage and Security: The evidence is stored in a secure and controlled environment to prevent unauthorized access, tampering, or degradation. Proper storage conditions, such as temperature and humidity controls, may be required for specific types of evidence.*
5. *Monitoring and Recordkeeping: The chain of custody is continuously monitored and documented throughout the handling process. Each person who comes into contact with the evidence must document their activities, such as examinations, tests, or analyses performed, to maintain a complete record of the evidence's movement and condition.*
6. *Courtroom Presentation: When the case goes to trial, the evidence is presented in court. To establish its authenticity and reliability, the prosecution must demonstrate an unbroken chain of custody. This involves providing detailed testimony and documentation, including all the individuals who had possession of the evidence and the steps taken to preserve its integrity.*

Fiji Police Standing Orders & chain of custody of evidence

12. The Fiji Court of Appeal in Kumar v State (supra) also deliberated on the applicability and effect of the **Fiji Police Standing Orders** on the chain of custody of evidence, and held at paragraphs 28 – 29:

> *[28] The appellant's challenge to the chain of custody seems to be twofold. One is that SC Peni had failed to comply with the Fiji Police Standing Orders by not signing the exhibits with the time and date. Cpl. Eloni admitted in his evidence that neither him nor SC Peni made any marks or signature on the white plastic bag, even though it is required under the Force Standing Orders, however, in my view, the learned judge had correctly stated that the Fiji Police Standing Orders were not laws but only the guidelines for the best and good practices to be adopted during the investigations and ultimately it was the court that had to determine whether the integrity of the substance uplifted at the appellant's house was preserved without any interference or contaminations with any foreign substances until it was tested and documented.*

[29] In Temo v State [2022] FJCA 63; AAU117.2016 (26 May 2022) the Court of Appeal said, '[25] The Standing Orders will have the same effect as 'judges rules' and it is well recognized that they do not have the force of law and hence their non-compliance by itself would not render a particular act or conduct illegal or incapable of being acted upon. Nevertheless, it is important to bear in mind that their compliance is most desirable since they play a crucial role in determining fairness and breaches of them are generally not condoned. …'

Doctrine of recent possession

13. In Allen v State [2024] FJCA 44; AAU122.2019 (28 February 2024) Mataitoga, RJA of the Fiji Court of Appeal held at paragraph 8:

[8] For the doctrine of recent possession to operate certain prerequisites should be satisfied namely:
i) That the accused was in possession of the property;
ii) That the property was positively identified by the complainant;
iii) That the property was recently stolen;
iv) That there are no co-existing circumstances, which point to any other person as having been in possession: Boila v State [2021] FJCA 184; AAU049.2015 (4 May 2021) and Batimudramudra v State [2021] FJCA 96; AAU113.2015 (27 May 2021).

14. In Timo v State [2019] FJSC 1; CAV0022.2018 (25 April 2019) the Supreme Court of Fiji held at paragraph 17:

… In cases where a defendant is found to have been in possession of property which has been stolen very recently, so that it can be said that he was in recent possession of it such that it plainly calls for an explanation from him about how he came to be in possession of it, and either no explanation is given, or such explanation as is given is untrue, the court is entitled to infer, looking at all the relevant circumstances, that the defendant stole the property in question or was a party to its theft. And if the property had been stolen in a burglary or a robbery, the court is entitled to infer, again looking at all the relevant circumstances, that the defendant took part in the burglary or the robbery in which the property was stolen: see, for example, Blackstone's Criminal

Practice 2016, paras F.63-F.64, and applied in Fiji in Wainiqolo v The State [2006] FJCA 49 and Rokodreu v The State [2018] FJCA 209.

Application of principles on chain of custody & doctrine of recent possession

15. Considering the Appellant's ground of appeal against conviction in light of the principles on chain of custody of evidence and doctrine of recent possession, and upon carefully perusing the evidence adduced in the course of the trial, I find as follows:

a) As to the **chain of custody** of the stolen items particularized under Count 4 of the Charge, Appellant's trial counsel did not raise during trial of the possibility of tampering, contamination, or loss of the stolen items to challenge the integrity and reliability of those evidence including PEX1 - red bag, PEX2 - grey bag, and PEX3 - photographic booklet of the stolen items. However, during this appeal the Appellant raised for the first time the issue pertaining to chain of custody, which I find to be too late, thus will not be considered by this Court to the effect that the pertinent ground of appeal fails and dismissed accordingly. This Court's decision is substantiated by the case of Chand v State [2012] FJSC 6; CAV0014.2010 (9 May 2012) where the Supreme Court did not consider the Petitioner's ground (ix) on the issue of contamination of the DNA samples obtained from the crime scene and victim's toothbrush primarily on the basis that the Petitioner did not raise during trial of the possibility of contamination of the said DNA samples. At paragraph 56 the Supreme Court held, *'[56] In this instant case, we have the unchallenged report of a well known expert of tests done at a very reliable laboratory, and strong evidence of the chain of custody supplied by Mrs. Llewellyn, and we find that in the absence of even a suggestion in cross-examination of the possibility of contamination, it is too late in the day for the Petitioner to put in issue the DNA matching or its reliance by the trial court. In the circumstances, we do not consider that ground (ix) deserves further consideration in this Court, and special leave to appeal on that ground necessarily has to be denied.* Refer to Kumar v State (supra) (FCA).

b) Based on the **doctrine of recent possession**, I find that there is evidence proving *beyond reasonable doubt* that the Appellant was in possession of the recently stolen items, which items were positively identified by the complainant, and the Appellant did not

explain as to how he came to be in possession of the same items. Refer to Allen v State (supra) (FCA) and Timo v State (supra) (SC).

16. For the above reasons, the Appellant's ground of appeal against conviction is hereby dismissed to the effect that the conviction ordered by the learned magistrate is affirmed.

Appeal against sentence

17. The Appellant argue that the learned magistrate erred in fact when she gave the final sentence of 2 years 9 months instead of the 2 years 5 months she had reached after her calculation, thus resulting in an excessive sentence.

18. On an appeal against sentence the appellate court will consider whether the sentencing court below (i) acted upon a wrong principle; (ii) allowed extraneous or irrelevant matters to guide or affect him or her; (iii) mistook the facts; and/or (iv) failed to take into account some relevant consideration.

    Refer to Bae v State [1999] FJCA 21; AAU0015.98S (26 February 1999) and Naisua v State [2013] FJSC 14; CAV 10 of 2013 (20 November 2013), paras. 19 – 20.

19. Section 17 of the Sentencing and Penalties Act 2009 state:

    17. If an offender is convicted of more than one offence founded on the same facts, or which form a series of offences of the same or a similar character, the court may impose an aggregate sentence of imprisonment in respect of those offences that does not exceed the total effective period of imprisonment that could be imposed if the court had imposed a separate term of imprisonment for each of them.

20. The learned magistrate relied on section 17 to arrive at the aggregate sentence of 2 years 9 months with the non-parole period of 1 year.

21. The learned magistrate erred when she arrived at the aggregate sentence of 2 years 9 months imprisonment, and upon careful perusal of the sentencing approach she should have instead

arrived at a lesser aggregate term of 2 years 5 months. This particular error in sentencing was conceded to by both parties to this appeal.

22. On that basis the Appellant's sentence ordered by the learned magistrate of 2 years 9 months imprisonment with a non-parole period of 1 year is hereby **quashed**, and **substituted** with the lesser aggregate custodial term of 2 years 5 months with a non-parole period of 1 year imprisonment effective from 18 January 2024.

23. The learned magistrate correctly held that she was unable to suspend the sentence pursuant to section 26(2) (b) of the Sentencing and Penalties Act 2009.

24. Thirty (30) days to appeal to the Fiji Court of Appeal.

Orders of the Court:

(1) The appeal against conviction is dismissed.

(2) The appeal against sentence is allowed to the extent of quashing the aggregate sentence of 2 years 9 months with a non-parole period of 1 year, and substituting it with the lesser aggregate custodial term of 2 years 5 months with a non-parole period of 1 year effective from 18 January 2024.

Hon. Justice Pita Bulamainaivalu

PUISNE JUDGE

At Suva

29th November 2024

Solicitors

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