

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

**CRIMINAL APPEAL NO. HAA 21 OF 2018**

**BETWEEN** : **THE STATE**

**APPELLANT**

**A N D** : **SHANEIL AUTAR**

**RESPONDENT**

**Counsel** : Ms. S. Naibe for the Appellant.  
: Mr. W. Mucunabitu for the Respondent.

**Date of Hearing** : 23 August, 2018

**Date of Judgment** : 31 August, 2018

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**JUDGMENT**

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**Background Information**

1. The respondent was charged with five counts of dealing in infringing copy contrary to section 121 (1) (d) (i) of the Copyright Act of 1999. After the respondent pleaded not guilty to the charges the matter proceeded to trial.

2. The prosecution called 2 witnesses and tendered 10 exhibits. At the close of the prosecution case, the respondent's counsel made an application for a no case to answer.
3. On 7 March, 2018 the learned Magistrate in his ruling upheld the respondent's application and acquitted the respondent of the charges.
4. The State being dissatisfied with the decision of the learned Magistrate filed a timely appeal as follows:

GROUND ONE

*"The learned Magistrate erred in law and in fact in failing to properly assess the Respondent's criminal liability as "Manager" and therefore, person in charge of the business that offered infringing copies for sale"*

5. The State Counsel submits that the respondent was the person in charge of Movie House a shop selling pirated movies to the public. According to the Copyright Act the first element of the offence is "a person" which applies to anyone in the course of a business offering or exposing for sale or hire infringing copies.

LAW

6. Section 121(1) (d) (i) of the Copyright Act of 1999 reads:

*"(1) A person who, other than pursuant to a copyright licence-*

*(d) in the course of a business-*

*(i) offers or exposes for sale or hire;*

*an object that is, and that the person knows or ought reasonably to know is, an infringing copy of a copyright work, commits an offence."*

7. The elements of the offence the prosecution must prove beyond reasonable doubt are as follows:
- (a) A person who;
  - (b) in the course of a business;
  - (c) offers or exposes for sale or hire;
  - (d) an object that is, and that the person knows or ought reasonably to know is, an infringing copy of a copyright work, commits an offence.
8. The learned Magistrate upheld the respondent's application of no case to answer on the basis that the accused was an employee and not the owner of the business and that the owner should have been charged. The learned Magistrate concluded that the first element of the offence had not been satisfied therefore the charges were not made out.
9. The test at the no case to answer stage in the Magistrate's Court was succinctly stated by Shameem J. in the case of *Abdul Gani Sahib v. The State, criminal appeal no. HAA 0022 of 2005* as follows at page 4:
- (a) whether there is relevant and admissible evidence implicating the accused in respect of each element of the offence; and*
  - (b) whether on the prosecution case, taken at its highest, a reasonable tribunal could convict.*
- In considering the prosecution case at its highest, there can be no doubt at all that where the evidence is entirely discredited, from no matter which angle one looks at it, a court can uphold a submission of no case. However, where a possible view of the evidence might lead the court to convict, the case should proceed to the defence case."*
10. The issue dealt with by the learned Magistrate in his no case to answer ruling was whether the correct accused had been brought to court

since the respondent was not the owner of the shop in question. The learned Magistrate at paragraph 14 of his ruling stated inter alia:

*“...I am therefore of the view that the prosecution has not succeeded in adducing relevant and admissible evidence implicating the accused in respect of each element of the offence pertaining to the above charges and taken at its highest, a reasonable tribunal could not convict on it. The Court’s view is fortified based on the following grounds:*

- *In order for the elements to be applicable the business owner, Suresh Autar should have been arrested and not the Accused, who was a mere employee;*
- *The elements will not be applicable for an employee, who is the accused in this instance;*
- *The Police unfortunately have simply arrested the wrong guy.”*

#### **DETERMINATION**

11. The only issue in this appeal is a question of law about the phrase “a person” in section 121(1) of the Copyright Act, 1999. The learned Magistrate when considering the defence application of no case to answer took the view that the phrase “a person” in section 121 (1) of the Copyright Act meant the owner of the business and not an employee of the business. In this regard the learned Magistrate took the view that the wrong person had been charged. The ruling by the learned Magistrate is specific to only one element of the offence.

#### **EVIDENCE**

12. The prosecution called two witnesses namely Terence Peter O’Neill-Joyce the Copyright Expert and the Investigating Officer Inspector Harish Prasad.
13. The investigating officer informed the court that they had conducted an investigation in respect of an allegation of infringement copies of

movies. A search was conducted at the Movie House Shop at two locations in Lautoka.

14. The owner of the shop was the respondent who was present at the time of the search with four others. The respondent had signed the search list of the items taken by the police in their custody. In cross examination this officer agreed that the owner of the shop was not the accused but another person.
15. Section 121(1) of the Copyright Act does not state that the person who is to be charged has to be the owner of the business in question. The law does not restrict itself, a restriction will lead to absurdity. For example, if a business offers or exposes for sale or hire DVD movies which were infringed copies of a copyright work but the owner was out of the country does it mean that the employees can continue carrying on the illegality because it is the owner who can only be charged and brought to justice and no one else.
16. The phrase "a person" in section 121 of the Copyright Act is to be given a wide interpretation which includes all those persons in the course of a business offering or exposing for sale or hire an object that is, and that the person knows or ought reasonably to know is, an infringing copy of a copyright work.
17. There is no ambiguity in the construction of section 121(1) of the Copyright Act. The purpose of the section is to criminalise the making or dealing with infringing objects.
18. Cooke J. said in *Reid v Reid [1979] 1 NZ LR 572 at 594* that the literal rule of interpretation was defined and explained by *Higgins J. in Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 CLR 129 at p. 161-162* as follows:

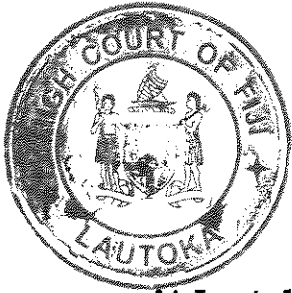
*“The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it; and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means in its ordinary and natural sense, it is our duty to obey that meaning, even if we think the result to be inconvenient or impolitic or improbable.”*

19. The learned Magistrate erred when he did not direct his mind to the law properly.
20. Taking into consideration the evidence adduced in court by the two prosecution witnesses there was relevant and admissible evidence implicating the respondent in respect of each element of the offence and taking into account the prosecution case at its highest, a reasonable tribunal could convict.
21. On the evidence adduced by the prosecution there was a case against the respondent sufficiently to require him to make a defence.
22. This court in accordance with section 256(2) of the Criminal Procedure Act reverses the decision of the Magistrate’s court by setting aside the order of acquittal.
23. It is also noted that the allegation dates to 2010 and the Judicial Officer who presided over this case has left the bench. The learned Magistrate does state at paragraph 13 of his no case to answer ruling *“all evidence as adduced by the prosecution has been weighed and evaluated by the court”* this suggests that all the elements of the offence were satisfied by the prosecution except the first element “a person” which resulted in the acquittal of the respondent.

24. This court is of the view that with the evidence in the copy record the Magistrate's Court can proceed to putting the accused on his defence. From the copy record it is quite obvious that the defence took the position that the owner of the business should have been charged and not the respondent who was an employee. On this basis the learned Magistrate upheld the respondent's no case to answer application. No prejudice will be caused to the respondent if the defence were to open its case before another Magistrate.


### **ORDERS**

1. The appeal is allowed;
2. The order of acquittal is set aside;
3. This matter is remitted to the Magistrate's Court at Lautoka for continuation of the defence case expeditiously;
4. The respondent is bailed on his own recognizance of \$1,000.00 with the usual terms and conditions of bail and is to appear in the Magistrate's court at Lautoka on 6<sup>th</sup> day of September, 2018 for mention at 9am.



**At Lautoka**

31 August, 2018

  
**Sunil Sharma**  
**Judge**

### **Solicitors**

**Office of the Director of Public Prosecutions for the Appellant.**

**Messrs. Vijay Naidu & Associates, Lautoka for the Respondent.**