

**IN THE MAGISTRATE'S COURT**  
**AT NADI, FIJI**

**Criminal Case No. 458/2011**

**STATE**

**v**

**JOSEVA TUI TIKOISUVA**

Before : Resident Magistrate Mrs. Nirosha Kannangara  
For Prosecution : Sgt Dinesh Chand  
Accused : Ms. Diroi for the Accused Person  
Date of Judgment : 27<sup>th</sup> August 2018

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**JUDGMENT**

**Introduction**

1. The Accused is charged for the offence of THEFT contrary to Section 291(1) of the Crimes Act of 2009.
2. The Particulars of Offence are JOSEVA TUI TIKOISUVA, on the 21<sup>st</sup> day of May 2011 at Nadi in the Western Division dishonestly appropriated a Sony Ericson G 502 mobile phone valued at \$249.00 the property of ISIKELI TABUA.
3. Accused pleaded not guilty for this offence and the case was fixed for hearing on 01<sup>st</sup> November 2017.
4. During the hearing the Prosecution called two Prosecution Witnesses.

5. Following the Prosecution case, Counsel of the Accused Person made an application to file no case to answer submissions and after considering the evidence of the Prosecution witnesses, the Court delivered a ruling on 20<sup>th</sup> April 2018 stating that there is a case to answer.
6. On 14<sup>th</sup> May 2018, the Accused person gave his evidence under oath and did not call any other witnesses for his defense.
7. At the conclusion of the hearing, the learned Prosecutor made his closing submission while the learned counsel for the Defence sought time to file her closing submissions in writing. However, she failed to file her submissions within the time given for that purpose.

#### The law

8. In view of the law the burden is with the Prosecution to prove this charge against the Accused beyond reasonable doubt under Section 57 and 58 of the Crimes Act of 2009.
9. In State v Seniloli [2004] FJHC 48; HAC0028.2003S (5 August 2004) Her Ladyship Justice Shameem in her summing up said :

“On the question of proof, I must direct you as a matter of law that the onus or burden of proof lies on the prosecution to prove the case against the accused persons. This burden remains throughout this trial upon the prosecution and never shifts. There is no obligation upon the accused persons to prove their innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he or she is proved guilty.

The standard of proof in a criminal case is one of proof beyond reasonable doubt. This means that you must be satisfied so that you feel sure of the guilt of the accused persons before you express an opinion that they are guilty. If you have any reasonable doubt as to whether the accused persons committed the offence charged against each of them on the Information, then it is your duty to express an opinion that the accused are not guilty. It is only if you are satisfied so that you feel sure of their guilt that you

must express an opinion that they are guilty. One of the defence counsel asked you if you had the slightest doubt about the accused's guilt. That is not the correct test. The correct test is whether you have any reasonable doubt about the guilt of the accused".

10. Section 291(1) of the Crimes Act of 2009, states as follows:  
*"A person commits a summary offence if he or she dishonestly appropriates property belonging to another with the intention of permanently depriving the other of the property."*
11. In view of section 291(1) of the Crimes Act of 2009, the main elements of the offence of "theft" are that;
  - i. The Accused ,
  - ii. Dishonestly appropriates,
  - iii. Property belonging to another,
  - iv. With intention of permanently depriving the other of the property,
12. Upon considering the main elements of the offense of "Theft", I will now turn to analyse the evidence presented by the parties in order to reach my judgment.

### **Analysis of Evidence**

13. PW1 Isikeli Tubua of 57 years being the Complainant of this case in his evidence stated that on 21<sup>st</sup> May 2011, at the Petrol Shed he pumped petrol to his vehicle and went straight home. Next day he realized his phone is missing. When he dialled his number the Accused answered the phone and agreed to meet him to return the phone at the Fiji Post, next to RB Patel supermarket, Nadi. PW 1 had been there for 2 hours and the Accused had never showed up to return the phone. Then PW 1 had lodged a Police complaint. He picks a call bill from the Vodafone and the said call bill is tendered as Exhibits 1A and 1B and also the photographs of the phone as 2A and 2B.
14. PW 2 Constable PC 3300 Vikash Narayan gave his evidence. In his evidence he stated that after tracing the numbers dialled from the phone, he traced the Accused person and after 2 days the Accused voluntarily handed over the phone to the Namaka

Boarder Police. The Accused at that point was interviewed under caution. The Caution Interview of the Accused was tendered as Exhibit 3. Answer given to question 54 in the Caution Interview, the Accused had admitted that he kept the phone without returning to the owner thinking that nobody will catch him. He also admits that he used the phone to take calls to his sister and friends until the dialling facility was barred by the owner of the phone.

15. The DW1, Accused person states that he came to Namaka and when crossing the Road he found a broken mobile phone by the side of the Road. He has taken the SIM card and installed it in his phone and he finds out that it is a post paid SIM. Thereafter he uses the phone. Next day the owner of the phone had called him and arrangements had been made to return the phone. He states that he came to the meeting point but did not meet the owner therefore he proceeded to Denarau to pick some family members came from Australia. Thereafter he has returned the phone to Namaka Police Station and he states that he had no intention of stealing the phone.
16. At the hearing he denied stating what he admitted at the caution interview is not true.
17. In view of the evidence presented by the Prosecution and the defence, the main issue to be determined in this case is that whether the Accused had the intention to commit this crime. The Accused did not deny the physical elements of this offence. He states that he did not have an intention of keeping it. However, it was transpired when adducing evidence that the Accused returned the phone after the Police phoned him. At the cross examination he was asked why he didn't return the phone to Namaka Police Station as he was living at CAAF Compound, Namaka, 200 meters away from the Police Station. He stated that he didn't have time.
18. Section 300 of the Crimes Act describes the intention of permanently depriving a person property in the following manner;  
  
“– (1) for the purposes of this Division, if –  
(a) a person appropriates property belonging to another without meaning the other permanently to lose the thing itself; and

(b) the person's intention is to treat the thing as the person's own to dispose of regardless of the other's rights;

the person has the intention of permanently depriving the other of it.

(2) for the purposes of this section, a borrowing or lending of a thing amounts to treating the thing as the borrower's or lender's own to dispose of regardless of another's rights if, and only if, the borrowing or lending is for a period and in circumstances making it equivalent to an outright taking or disposal.

(3) for the purposes of this section, if –

(a) a person has possession or control (lawfully or not) of property belonging to another; and

(b) the person parts with the property under a condition as to its return that the person may not be able to perform; and

(c) the parting is done for purposes of the person's own and without the other's authority –

the parting is taken to amount to treating the property as the person's own to dispose of regardless of the other's rights.

19. Therefore, when analyzing the Accused Person's evidence his subsequent conduct after finding the phone and after Complainant contacting him to return the phone does not support his contention. He has not taken any attempts to return the phone to the owner or to contact the owner thereafter to return the phone or he does not take any initiations to report the matter to the Police or to hand over the phone to the Police. In view of these reasons, I am inclined to disregard the explanation of the accused person's intention.

20. In view of the findings mentioned above, I am satisfied that the prosecution has successfully proved that the accused person is guilty for this offence of "theft" beyond reasonable doubt. Therefore, I hold the accused is guilty for this offence of "theft" and convict him for same.
21. 28 days to appeal.

On this 27<sup>th</sup> day of August 2018.



Nirosha Kannangara  
Resident Magistrate, Nadi.