IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

Appeal No. 3 of 1966

Between:

PAUL BINATAKE TOKATAKE Appellant

- and -

REGINAM Respondent

A.I.N. Deoki for Appellant
B.A. Palmer, Senior Crown Counsel, for Respondent

JUDGMENT

This is an appeal against conviction and sentence of two years' imprisonment passed by the High Court of the Western Pacific sitting in first instance at Bairiki in the Gilbert and Ellice Islands.

The appellant was charged under subsection (2)(a) of section 17 of the Larceny Act, 1916, of the United Kingdom, which, by virtue of section 15 of the Western Pacific (Courts) Order-in-Council 1961 is applicable to and forms part of the law of the Gilbert and Ellice Islands Colony. He was charged under that section with the theft between 1.11.63 and 30.6.64 on Canton Island in the Phoenix Group, of certain sheets of aluminium roofing belonging to the Colony's Government, he being during that period the acting District Commissioner of the Island.

At his trial the appellant was unrepresented and since his conviction, being dissatisfied with the decision of the trial court, he has appealed to this Court and has drafted the grounds of appeal in person. Those grounds of appeal specified, in respect of the conviction, only two grounds, namely error in interpretation from the Gilbertese language into English in respect of one matter,

and inability on his part to call certain witnesses in his defence because they had already left the Colony and were not readily available. As regards the sentence the appellant complains that it is too severe having regard to the circumstances. 90

Mr. Deoki appeared for the appellant, and, in our opinion, has quite rightly conceded that he is unable to support either of the grounds of appeal raised by the appellant. We agree with him in this. But he has also not taken the opportunity which was open to him, both prior to the hearing of this appeal, or, with the expressed consent of Mr. Palmer appearing for the Crown during the hearing of this appeal, to seek leave to amend the grounds of appeal to include the general issue as to whether the weight of evidence taken as a whole is adequate to sustain the conviction. We think in this case that Mr. Deoki ought to have availed himself of this opportunity in the interests of his client, and to have argued before us the general merits of the case. However that may be, we do not consider that this Court is in any way estopped by failure to plead that issue in the grounds of appeal, from reviewing in the interests of justice, the evidence as a whole. Indeed, we would go further and say that it is the duty of this Court to satisfy itself that no miscarriage of justice should occur, and this we propose to do.

Now, in this case it is alleged that the appellant, being the acting District Commissioner of Canton Island and having general dominion over government stores, stole the building material in question. The greater part of the facts in this case are not in dispute. Indeed almost the only item which is in any way disputed is the question of intent to steal. It is not disputed that at all material times the appellant was a government servant. It is not disputed that the aluminium roofing in question belonged to Government, nor is it disputed that the appellant caused that roofing to be crated up, and that it was put by P.W.D. carpenters into five separate wooden crates. It is also not disputed that four of those crates (Ex. D, E, F and G) were, at the appellant's direction, placed in a vacant house which was capable of being locked and that that house contained not only those crates but also other boxes containing the personal effects of the appellant. The fifth crate (Ex. H) was placed beneath the appellant's own house. It is not disputed that subsequently all the goods in the vacant house, including the four crates, were moved at the appellant's direction out of the house and placed in what

is called the "boatshed" together with a quantity of general cargo awaiting shipment to Tarawa Island by the vessel 'Nivanga' by which ship the appellant was himself finally to leave Canton Island. This is accounted for by the fact that that house was required for use by an incoming family. It is not disputed that when the ship arrived at Canton Island to collect passengers and goods building materials would not be accepted on board. And finally the appellant, though he says he does not know about this as he states that he had by that time left the island, does not dispute that the crates containing the sheets of roofing material in issue were taken from the "boatshed" and placed in the house of one Kiantongo, the eighth prosecution witness, and that those crates then bore Kiantongo's name and were subsequently - some four months later and after enquiry was raised in Canton Island by telegram from the Accountant-General - handed over by Kiantongo to the District Commissioner who had succeeded the appellant. None of these facts are in dispute. It is further established, and is not contested by Mr. Palmer, for the Crown, that the appellant was at all material times in possession of roofing material and building cement of his own which in the circumstances he abandoned in Canton Island for the use of Government on his departure.

It was alleged in the Court below that the appellant caused the roof sheeting to be crated up and stored in the vacant house together with his own personal effects and subsequently to be moved with those effects to the "boatshed" with the intention of appropriating them and taking them away with him when the ship 'Nivanga' sailed, and that only because of the fact that the vessel could not accept such cargo did he fail to carry out that intention. It was further alleged that thereupon the appellant gave the material to Kiantongo, the eighth prosecution witness, as a gift of the stolen property, telling him that the contents of the crates were his own property.

Before considering in detail the actual evidence led in support of the Crown's Case or the inferences drawn by the learned trial Judge, it is fair to say at the outset that we are forcibly struck by the inherent improbability of theft in these circumstances. It seems to us at first sight most unlikely that anyone in his right senses would act in the way in which it is alleged that the appellant acted. It manifestly lay within his power to restore the goods to Government without causing the least suspicion. But the allegation is that he gave them to a third person, as an act of larceny, when at the same time he gave to

Government similar stores which were genuinely his own. ... 92
these circumstances, unless the prisoner pleads guilty or otherwise clearly admits his criminal intent, it seems to us that a very strong case is required before reasonable doubts can be dispelled.

Mr. Palmer for the Crown has drawn our attention to three main points upon which he contends that the learned trial Judge was entitled to find as he did, bearing in mind that, unlike this Court, the Judge had the benefit of seeing and hearing the witnesses and the appellant.

Firstly, Mr. Palmer points out that in the evidence of the witness Namakaina Tuaia, the seventh witness for the prosecution, when he is speaking of the crating up of the 5th crate (Ex. H), the witness specifically states that the appellant directed him to "make the crate firmly so that when it was winched up it would not break". Mr. Palmer points out that this statement is consistent only with an intention on the part of the appellant to cause that crate to be loaded into a ship. It is, however, to be observed that although Namakaina says that other persons were present - including the sixth and the twelfth prosecution witnesses (namely Teteua Noa and Bureniman respectively) - when this significant direction was given by the appellant, neither of those witnesses appear to have heard it; on the contrary Teteua (P.W.6) states that he does not "remember him (the appellant) giving any reason for using a sheet of iron in that way", namely for making the crate. Although the appellant gave evidence on oath in his own defence at the trial and was cross-examined at length, this point was not put to him nor referred to in his evidence. Notwithstanding, therefore, that the learned trial Judge commented in his judgment upon the independent position of the witness Namakaina and upon the favourable impression which he made, it remains that proof of the reference to the winching of the crate, Exhibit H, is dependant solely upon the evidence of one witnesswhen, according to that same witness, the reference was made in circumstances which renders it surprising that that part of his evidence should be unsupported by other persons who were present at the time. Furthermore, the trial Judge accepted the possibility at least that the crating of the sheet metel in question may originally have not been ordered for a dishonest purpose.

Secondly, Mr. Palmer has drawn our attention to the evidence of Tabunaweti Takoa, the fifth prosecution witness. It was he who succeeded the appellant as the acting District Commissioner of the Island, and whose duty it was

to take over the responsibilities of the appellant which included a "hand-over" of Government stores. In his evidence the witness says that he did take over the stores and that only a small quantity of timber was handed over, but no aluminium roofing material. Mr. Palmer has quite properly invited us to drew the inference that the failure of the appellant to hand over these stores to his successor can be consistent only with an intention to misappropriate. In this connection we consider it unfortunate that the evidence as to the handing over of the stores was not pursued in greater detail; for it must be conceded that the point might have been an important one in the circumstances of this case. There is, however, no evidence as to how this operation was effected. No inventory appears to have been taken, or delivery and receipt notes signed respectively by the appellant and the witness. It may be that all this was in fact done, but it is not clear from the evidence. The Crown submits that the evidence of the appellant as regards the handing over of the stores is unsatisfactory. The appellant says that it is unusual for Government stores, as opposed to confidential books, cash and the like, to be handed over, but that in this case he did so but made no reference to the roofing material in the boatshed as Kiantongo (P.W.8) was a sufficiently senior officer to see to that. We agree that this does not sound very satisfactory and we find it hard to accept that Government stores ought not to be handed over from one official to another with meticulous care. But however that may be, the evidence as to how the taking over of the stores was effected in this case is sketchy to say the least. If in fact, as the lack of evidence on the subject leads us to suspect, the handing over was carelessly done, then the inference, if any, to be drawn from that evidence is the less convincing. In this connection we notice that the learned trial Judge mentions the matter right at the conclusion of his judgment, almost it would appear as an after thought, in support of the conclusion to which he had already come. In the circumstances, while conceding that this evidence gives rise to a degree of suspicion as to the alleged criminal intention of the appellant, we do not find that an inference of guilt is one necessarily to be drawn. 93

And finally Mr. Palmer draws our attention to the evidence of Kiantongo (P.W.8). While he concedes that the learned trial Judge has leant very heavily upon the evidence of this witness in coming to the conclusion which he did, he submits that there is no reason why the Judge should not have done this. The all- important part of the evidence of

that witness is to the effect that about two days 94
ship 'Nivanga' arrived at Canton Island the appellant told him, in the presence of other persons, that he wished to give him, as a gift, his personal roof sheeting which was then lying pending shipment in the "boatshed" because the vessel could not take that cargo. The witness says he accepted the offer. That conversation did not take place in the boatshed where the crates were stored but in the carpenter's shed. The second all important part of that witness's evidence relates to the same day and is to the effect that in furtherance of the gift the appellant, again in the presence of other persons, had taken him to the boatshed and pointed out the 4 cases (Ex. D, E, F and G) containing the aluminium sheeting belonging to Government and had actually assisted in loading it onto a truck belonging to the appellant himself and had instructed the witness to take it to his, the witness's, house.

Now, if the above two portions of Kiantongo's evidence are to be relied upon beyond reasonable doubt, which it is the duty of the prosecution to establish, the evidence against the appellant is indeed strong and in our opinion might reasonably support an inference of guilt on his part. The question which exercises us is whether that is indeed the case. The learned trial Judge also directed his mind, and, with respect, quite rightly, to the extent to which that witness's evidence might properly be accepted, for he was at pains to consider in his judgment whether in the circumstances of the case as a whole and in particular having regard to the possession by him of the allegedly stolen goods, that witness should himself be considered an accomplice and his testimony relied upon only subject to corroboration. That the all-important parts of that witness's evidence as mentioned above stand uncorroborated is clear. It seems to us surprising that the witness should not name any of the persons who he says were present when the appellant made him the offer of the roofing material. Kiantongo expressly states that the appellant actively assisted in the removal of the crates from the boatshed to Kiantongo's house. If this is correct, it is difficult to understand why Police Constable Tabuia, the eleventh prosecution witness, did not see the appellant when the crates were being conveyed to Kiantongo's house, when he specifically mentions Kiantongo and Takahiri as being occupants of the truck in which the crates were being conveyed. Far from corroborating Kiantongo's story, therefore, the evidence of this latter witness goes to support the appellant when he denies that he took part in moving the crates from the boatshed to Kiantongo's house.

There is a further possible discrepancy between the evidence of Kiantongo and that of Tabuia in that the latter, though the evidence unfortunately does not make the matter entirely clear, appears to be speaking of a time after the vessel 'Nivanga' had left the island with the appellant on board.

To return now to the question as to what weight should reasonably be placed on the witness Kiantongo's evidence. The learned trial Judge has found as a fact that that witness should not be regarded as an accomplice. It appears, however, from his judgment that that finding of fact is based entirely on the testimony of the witness himself. Mr. Palmer drew our attention to certain other points in the evidence which might tend to show that the learned Judge's conclusion in that respect was justified. In any event it seems to us that a simple finding that the witness is not an accomplice is not, in the circumstances of this case, the end of the matter. Even if it is conceded that Kiantongo was not an accomplice but an innocent receiver, he was, on evidence which is not in dispute, in a most invidious position, namely that of being liable to be found, approximately four months after the alleged disappearance of the goods and also after enquiries had already been instituted by the Accountant-General, in possession of the missing goods labelled with his name. It is not inconceivable that even an innocent man might be tempted to stray from the truth in order more positively to establish hisinnocence at a subsequent enquiry. We do not say that this was the case, but we do feel that the witness's evidence, especially having regard to the fact that upon it the case against the appellant stands or falls, requires to be scrutinised with great caution, notwithstanding the learned Judge's finding that Kiantongo could not be considered an accomplice.

Finally there are the following further matters which have given us cause for anxiety. The first of these is the evidence relating to the placing of Kiantongo's name on the crates in issue. The learned Judge has come to the conclusion, a conclusion which in his judgment he refers to as "inescapable", that the name of Kiantongo (P.W.8) was placed on the relevant crates on the instructions of the appellant. The appellant denies this. When the evidence is examined it appears to us that the conclusion that the witness Bureniman, the twelfth prosecution witness, was necessarily acting on the appellant's instructions with regard to the naming of the crates is not justified. The fact that the Court found it necessary to declare Bureniman a hostile witness does not add anything to the evidence which he in

fact gives; it may well render what evidence he does give subject to doubt. The witness does not say that he was 96 acting on the appellant's instructions, but on those of Namakaina. Namakaina in his turn says he took his instructions from Bureniman. The suggestion that in fact Bureniman was carrying out the directions of the appellant has, in our opinion, nothing to support it except a possible inference to be drawn from his relationship to the appellant, for practical purposes that of his adoptive son. Bureniman, it will be noted, was 22 years of age. We do not think that can, by itself, amount to any degree of proof.

The second matter upon which we feel we should comment is the extraordinary evidence relating to the warning given to the appellant by the witness Kourabi six or seven months before the arrival of the ship 'Nivanga'. That witness admits the conversation and states categorically that he did warn the appellent not to take Government stores. This he says took place at the time when the appellant directed the crating up of the roofing material in question. The learned Judge dismissed in his judgment this evidence as of apparently little consequence in face of the other evidence in the case. But, in our view, this evidence, which was tendered as evidence against the appellant, renders the appellant's behaviour, if he is indeed to be accounted guilty, even more extraordinary. As indicated earlier in this judgment, that the appellant should steal these goods and give them away to another person in the circumstances of this case, while at the same time abandoning his own material to Government is extraordinary enough; but that he should do so after receiving a specific warning not to do so by Kourabi, himself a responsible official of Government, is completely incomprehensible.

The third matter to which reference need be made is the comment made by the learned trial Judge in the course of his judgment with reference to the inference to be drawn from the fact that the appellant left his own roofing materials and cement for the use of Government. The Judge says:

> "Such an action on his part could quite conceivably be intended by him to mask his wrongful disposition of government property and is not inconsistent with guilt of the offence charged."

We can find no justification for such an inference, and the fact that it was drawn may well have been prejudicial to the appellant.

The final matter which we think should be taken into account is that the evidence leaves it uncertain whether Kientongo's name was put on the crates before it

became known that the crates could not be shipped in 'Nivanga'. If, as is possible, this was done earlier, then it would appear to rule out any suggestion that the appellant had intended in the first instance to steal the goods for his own benefit.

In all the circumstances we are of opinion that a strong case is required to establish the guilt of the appellant. In our view the learned Judge was not justified, on all the evidence before him, in coming to the conclusion that there was no reasonable doubt as to the criminal intention of the appellant. In the result, in all the circumstances, which we have most carefully considered, we do not think that it would be safe to allow this conviction to stand.

The appeal will be allowed and the conviction and sentence quashed.

(sgd.) R. H. Mills-Owens
PRESIDENT

(sgd.) C. C. Marsack
JUDGE OF APPEAL

(sgd.) Jocelyn Bodilly
JUDGE OF APPEAL

SUVA,
4th APRIL, 1966.