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IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

Criminal Appeal No. 49 of 1976

BETWEEN:

JAI RAM SHARMA  
(s/o Ram Kissun)

Appellant

- and -

REGINAM

Respondent

G.P. Shankar and S.R. Shankar for the Appellant  
R.E. Lindsay for the Respondent

Date of Hearing : 7th March, 1977  
Delivery of Judgment: 25th March, 1977

J U D G M E N T

MARSACK J.A.

This is an appeal against conviction on two charges of embezzlement entered in the Supreme Court at Labasa on 27th July, 1976. The trial was held before a judge and three assessors. The assessors expressed the unanimous opinion that the appellant was guilty on two of the four charges which had been brought. The learned trial judge accepted this opinion. The appellant was acquitted on charges 1 and 2 but convicted on charges 3 and 4, which were in the following terms:

COUNT 3

"... on the 29th day of October, 1975 at Labasa in the Northern Division being a Clerk or Servant to Fiji Sugar Corporation limited fraudulently embezzled one hundred and sixty one (161) sheets of clear louvre blades to the value of \$86.94 such property being delivered to or received by him for in the name or on the account of the said Fiji Sugar Corporation Limited, his employer."

COUNT 4

"... on the 7th day of November, 1975 at Labasa in the Northern Division being a Clerk or Servant to Fiji Sugar Corporation fraudulently embezzled one only 14" x 10" hand basin with brackets and 1 $\frac{1}{4}$ " gratings valued at \$18.50, three only  $\frac{1}{2}$ " brass stop cocks valued at \$11.40, one only  $\frac{1}{2}$ " brass bib cock and one only  $\frac{1}{2}$ " C.P. Pillar cock valued at \$16.00, one only  $\frac{1}{2}$ " C.P. bib cock valued at \$7.00, one only  $\frac{1}{2}$ " C.P. Shower rose with arm valued at \$7.50 and one tin  $\frac{1}{2}$  pint solvent cement valued at \$3.25, such property to the total value of \$63.65 being delivered to or received by him for in the name or on the account of the said Fiji Sugar Corporation Limited, his employer."

He was sentenced to 18 months' imprisonment, suspended for two years. This appeal is against conviction only and not against sentence.

The relevant facts may be shortly stated. The appellant was employed as a store-keeper by the Fiji Sugar Corporation Limited at Labasa. He gave orders in the name of the Corporation to the Northern Trading Company for a hand basin and other plumbing articles and to Burns Philp Limited for 161 louvre

sheets. The invoices in each case were made out to the Fiji Sugar Corporation Limited. The goods were however not delivered to the Corporation but to the appellant who called at the shop of the Northern Trading Company for the plumbing articles and to the bulk store of Burns Philp Limited for the louvre sheets. After the appellant had taken delivery of the goods concerned, he passed them on to his friend Subramani who used them in the house he was building.

On the 15th November, 1975 a meeting was held by the General Manager of the Fiji Sugar Corporation Limited in Labasa at which the purchase of these items was discussed. The General Manager directed an investigation by the Corporation's Accountant, and as a result of that report he lodged a complaint with the Labasa Police on the 18th December, 1975. On the 19th December, 1975 the appellant forwarded to the General Manager of the Corporation a money order for \$87.00 in payment for the louvres. This was received by the General Manager on the 22nd December, 1975. On the 16th December, 1975 the appellant paid in \$63.65 to the Northern Trading Company representing the Trading Company's account for the hand basin and other plumbing items.

The grounds of appeal were set out under the following headings:

- "1. THAT the learned trial Judge misdirected himself and the assessors on the question of onus of proof and the standard of proof.

2. THAT the learned trial Judge erred in law and in fact in holding that the appellant had the necessary intent to defraud.
3. (i) THAT the failure and refusal on the part of the prosecution to produce -
  - (a) Stores Regulations
  - (b) Sundry Debtors Ledger
  - (c) Stock Sheets Cardat the trial has deprived the appellant of a fair trial.  
  
(ii) THAT the learned trial Judge erred in law and in fact in refusing to order the prosecution to produce at the trial the materials referred to in (i) above.
4. THAT the learned trial Judge did not adequately and properly direct the Assessors and himself as to the defence available to the accused.
5. THAT the learned trial Judge erred in law and in fact in admitting oral evidence as to the contents of stores manual or Stores Regulation in the light of the fact that it was available but the Prosecution did not produce it before the Court.
6. THAT the learned trial Judge erred in law and in fact in not adequately and properly directing the Assessors and himself as to the onus on the Prosecution to rebut the claim of right set by the appellant.

Turning now to the first ground of appeal :  
we are satisfied that this is without merit.  
At the commencement of his summing up, the  
learned trial judge directed the assessors in  
the following words:

" The onus of proving the guilt of the accused in respect of each of the counts in the Information rests fairly and squarely upon the prosecution. That burden remains throughout upon the prosecution and never shifts. The accused is presumed to be innocent until the contrary is proved. The standard of proof is proof beyond reasonable doubt, that is to say, the prosecution must satisfy you beyond any reasonable doubt of the guilt of the accused, before you are entitled to express the opinion that he is guilty. However, the doubt must be a reasonable one, not a mere fanciful doubt."

Later in dealing with the individual counts the learned judge directed the assessors that if they had any reasonable doubt in the matter, it was their duty to express the opinion that the accused was not guilty. In our opinion, the direction was both correct and adequate.

In his argument on the second ground Mr. Shankar contended that an intent to defraud - that is, defraud the Fiji Sugar Corporation - was an essential ingredient of the charges and that this intent was not proved on the evidence. In support of his argument counsel referred to the payment of \$63.65 made to the Northern Trading Company on the 16th December, 1975 and to the fact that on the 19th December, 1975, the appellant sent to the General Manager of the Fiji Sugar Corporation a money order for \$87.00 in payment for the louvres. In this connection reference must be made to the evidence of Subramani who deposed:

" Accused bought hand-basin and fittings. For these I paid \$63.65. I paid him cash.

For the louvres I paid by cheque \$86.94. There were 161 louvre glasses. Cheque drawn on Bank of New Zealand, Labasa. I paid the cheque after accused delivered the louvres."

As the learned trial judge pointed out in his summing up, the payments made or tendered by the appellant were made some two months after the goods had been disposed of and after investigation of the stores accounts had begun. The proved facts show that the goods in issue were ordered by appellant in the name of the Fiji Sugar Corporation, but were delivered to appellant personally; they were then passed over to his friend Subramani for use in the house he was building. There is no suggestion that any responsible officer of the Corporation had authorised this action on the part of the appellant.

In the course of the argument attention was drawn by the Court to the following passage in the summing up namely:-

"The question whether or not the accused had authority to dispose of goods ordered in the name of F.S.C. to Subramani Gounder is, as you will have gathered by now, most important indeed. This is because the question whether the accused was acting fraudulently, i.e. dishonestly must to a large extent depend on whether or not he had such authority or perhaps more specifically whether upon the whole circumstances of the case he had reasonable grounds to believe that he had such

"authority. If the accused has reasonable grounds to believe he had such authority and this is a matter for you to decide on the evidence, then the accused could not have had a dishonest intention or guilty state of mind. But if you feel on the evidence the accused had no reasonable grounds to believe that he had authority to dispose of goods ordered in the name of F.S.C. in any way he liked, then it would appear that he had a dishonest intention when he gave the goods to Subramani Gounder. Whether the accused had a dishonest intention or guilty state of mind when he disposed of the goods is a matter entirely for you."

The ultimate question was correctly stated in the last sentence. Absence of reasonable grounds for a belief may well point to a conclusion that an accused had no genuine belief in the truth of the claim of right which he is making. In such a case the tribunal may be satisfied that he acted dishonestly. A trial judge should make it clear that, while lack of reasonable grounds for a belief may carry much weight as evidence, it is not the real test. The question is not whether an accused acted reasonably or on reasonable grounds, but whether he acted dishonestly. That is, it is his state of mind which is in issue, and not whether his actions reach the measurable standards of what is considered by others as reasonable. The only claim of authority made by appellant was one to lend goods, and this was stated to be based on p.19 of the Stores Manual. The learned judge fully and carefully dealt with this. He told the assessors that they were "masters of the facts" and that, what-

ever he said on the facts, they must form their own opinions. It was in this context that he told the assessors that it would appear that accused, in the circumstances stated, had a dishonest intention. The assessors were then reminded that the matter was entirely for them. We do not consider that there was any misdirection.

In our opinion, the evidence clearly justified the finding that when the appellant gave the orders in question in the name of the Corporation, he had the intent to defraud the Corporation of the articles purchased. This ground of appeal accordingly **fails.**

The third ground is based upon a claim by the appellant that certain documents issued or in possession of the Corporation, and in particular the Stores Regulations contained a provision authorising employees of the Corporation to do what he did. In the course of his statement given at the trial the appellant said:

"When I was employed by F.S.C. as storekeeper in Labasa, I was told that the Stores Manual was my bible and I was to follow instructions contained in it.

At page 19 I am authorised to lend materials to individuals and private firms."

In this respect it is to be noted that the clause on which the appellant specifically relied is said to have contained an authority to lend materials to individuals



and private firms. But there can be no suggestion of a loan of the louvre sheets, the wash basin and other plumbing articles which are in issue here. They were obviously and admittedly delivered to Subramani for incorporation in the house which he was building, and there was no suggestion that they should ever be taken out of the house and returned to the Corporation. Moreover, there is no evidence that they were articles which the Corporation did or would require for its own use. There can be nothing in the alleged page 19 of the Stores Manual which assists the appellant. No argument was presented to the Court as to the manner in which any of the other documents specified would have supported the appellant's claim to authority for what he did.

As to the failure or refusal of the prosecution to produce the documents in question, two points we think are clear: first, that there is nothing to show that the prosecution was in possession of the documents concerned; second, the onus is on the defence to produce, or to take steps to have produced, documents on which the defence relies. The proper course for the defence to follow would have been to issue a subpoena duces tecum to any person who had access to the documents and could be called on to produce them in Court. Reasonable notice must be given by the party asking for production of the documents. In the present case notice was not given until the day of the hearing, some half-hour before the court opened. In these circumstances, the learned trial judge was

thoroughly justified in refusing the order for production; not only on the ground that the notice was unreasonably short, but also that it had not been shown that the prosecution had possession of or access to the documents concerned. This ground of appeal therefore fails.

In his argument on the fourth ground, counsel for the appellant contended that once a claim of right had been set up by the accused in the Court below, the onus lay on the prosecution to disprove that claim. But nothing was put forward to support the claim of right made by the appellant and there was, accordingly, nothing which the prosecution had been called upon to disprove. There must be some foundation for a ground of defence set up before any onus lies on the prosecution to prove affirmatively that that ground of defence has no merit. The learned trial judge, in our opinion, directed the assessors fully and correctly on the issues raised at the trial; and we can find no merit in this ground of appeal. This covers also the ground set out as No.6.

With regard to ground No. 5 we are unable to find any oral evidence as to the contents of the Stores Manual or other Corporation documents which is in any way prejudicial to the appellant. The evidence by the General Manager of the Corporation that -

"Accused had no authority to purchase goods on Fiji Sugar Corporation order form for his own use. He had no right to dispose F.S.C. goods as he wished"

is certainly admissible evidence and cannot be described as hearsay.

In the result we are of the opinion that the appeal cannot succeed on any of the grounds put forward, and the appeal is dismissed.

(Sgd.) T.J. Gould  
VICE PRESIDENT

(Sgd.) Charles C. Marsack  
JUDGE OF APPEAL

(Sgd.) T. Henry  
JUDGE OF APPEAL

25th March, 1977.