IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

Criminal Appeal No. 18 of 1978

Between:

1.	SAMRESSAN s/o Ratnam	First Appellant
2.	BIRJA NAND s/o Bindessary	Second Appellant

v.

REGINAM	Respondent

S.M. Koya for the First Appellant
M.S. Sahu Khan for the Second Appellant
D. Fatiaki for the Respondent

Date of Hearing: 24th July 1978
Delivery of Judgment: 3rd August 1978

JUDGEMENT OF THE COURT

Henry J.A.

First appellant was convicted on five counts of stealing large quantities of sugar from his employers - the Fiji Sugar Corporation Limited which will be called "the Corporation". Second appellant was convicted of five charges of receiving the said sugar knowing it had been stolen. The trial took place before a Magistrate. Each was sentenced to imprisonment. Appeals to the Supreme Court were dismissed. The present appeals are therefore confined to questions of law.

The five offences of which each was convicted may be conveniently grouped as follows:

A. Count 2 in which first appellant was charged with stealing 8 tons of sugar valued at $1,368 on October 2, 1975.

Count 10 in which on the same day second appellant was charged with receiving the said sugar.

B. Count 3 in which first appellant was charged with stealing a similar quantity and value of sugar on October 13, 1975.

Count 11 in which on the same day second appellant was charged with receiving the same sugar.

C. Count 4 in which first appellant was charged with stealing a similar quantity and value of sugar on November 12, 1975.

Count 12 in which on the same day second appellant was charged with receiving the same sugar.

D. Count 5 in which first appellant was charged with stealing a similar quantity and value of sugar on December 1, 1975.

Count 13 in which second appellant was charged with receiving the same sugar on the same day.

E. Count 8 in which first appellant was charged with stealing 16 tons of sugar valued at $2,736 on January 26, 1976.

Count 16 in which second appellant was charged with receiving the same sugar on the same day.

First appellant was acquitted on Counts 1, 6 and 7 and second appellant was acquitted on the corresponding counts 9, 14 and 15. A normal lorry load appears to be 8 tons so one lorry load is involved in A, B, C and D and two lorry loads in E.

First appellant was employed in the Corporation's premises at Ellington Rakiraki as a shipping clerk. From 1975 second appellant operated a sugar selling business from a bulk store at Draunivi. The case for the Crown was that all the sugar was transported by lorries owned by a firm called Midland Transport. In the Courts below it was held that second appellant was an active partner in Midland Transport and that he operated it. This is a finding of fact which cannot be challenged in this Court. The case for the Crown is based quite substantially on documentary evidence. It was claimed that first appellant deliberately excluded from the books of account of the Corporation the quantities of sugar included in the convictions and that it was loaded onto lorries operated by Midland Transport, the first appellant well knowing the sugar had not been paid for. It was claimed that second appellant knew the sugar had not been paid for and that he sold the sugar to innocent purchasers in Nausori and Suva, on the same day as it had been stolen from Ellington. The proceeds were either paid into a bank account operated by second appellant or paid for in cash.

The principal ground of appeal put forward by both appellants was that may of the documents produced were hearsay and therefore inadmissible. To determine this point it is necessary to examine the evidence and the use to which each particular document was put and then to decide whether it was properly admitted in evidence. No objection was taken at the hearing but that does not render admissible

that which in principle is inadmissible. It should be noted that the Crown case is that a system was involved so the whole of the evidence is admissible in considering the proof of each individual charge. Unless, however, the theft is proved the corresponding receiving charge must also fail.

Sugar sales from the premises where first appellant was employed are cash transactions and no sugar purchased ought to be removed before payment is made to the cashier who prepares a receipt in duplicate and an order authorising the supply to be made. Entries are made in a cashier's Order book (Exhibit 25) and a receipt book(Exhibit 26). The top copies of the document from each of these books is handed to the purchaser. The purchaser then hands the cashier's order to the shipping clerk, that is, to the first appellant, in return for a loading order made out by first appellant from his loading order book (Exhibit 22). The purchaser then presents the loading order to the sirdar at the loading bay. When the sugar is loaded the top copy of the loading order (Exhibit 22) is initialled by the sirdar and the purchaser returns it to the first appellant who retains it and issues a delivery note. So, when the purchaser departs he has the top copy of the delivery note (Exhibit 23) made by first appellant whose duty it is to check the quantity of sugar of which the purchaser has taken delivery. The driver of the lorry signs the delivery note (Exhibit 23) which is the record kept by first appellant. Thus at the conclusion of the transaction first appellant holds all

the top copies of the supply orders from Exhibit 25 which have been issued by the cashier together with the top and carbon copies of all loading orders prepared by him from Exhibit 22 and the duplicates of all the delivery notes from Exhibit 23. The loading order Exhibit 22 and the delivery note Exhibit 23 record the number of the motor lorry, the quantity of sugar together with the purchaser's name and the date of purchase.

Exhibits 25 and 26 were produced by the accountant, Vijay Krishna Naidu, who said that Exhibit 25 was part of the records of the Corporation and that Exhibit 25 was in the handwriting of Mr. Moosad, the cashier. Mr. Moosad was not called to give evidence but he was tendered for cross-examination but both counsel at the trial (who are not counsel on appeal) stated that they did not wish him to be called. This witness gave evidence of the system of accounting adopted by the Corporation. He examined those records and gave an analysis of the results of his examination. He said in evidence:

> "I went back to my office and continued to examine the books to see if there were any more discrepancies. I began my reconciliation on that day, 29/1/76. For that purpose I had the Cashier's order books with me. These are 3 books maintained by the Cashier for the period in question. 3 Cashier's Books Tendered as Exhibit 25. These are the Accountants two receipt books for the same period 2 Receipt Books Tendered as Exhibit 26. The Cashier's Books are in the handwriting of the Cashier at the time, Mr. Moosad."

We turn now to consider the purpose for which Exhibits 25 and 26 were tendered. They were tendered first as part of the proof of the system operated by the Corporation of which first appellant would have knowledge as will be seen from the summary already given. The cashier's order (Exhibit 25) is handed to first appellant who at the end of the transaction holds all top copies of the supply orders for Exhibit 25. The production of the office record was also for the purpose of showing that there was no record of orders authorising the supply of sugar to Midland Transport and Exhibit 26 was produced for the purpose of showing that no monies were recorded as having been received from Midland Transport for sales of sugar during the relevant period.

Khushal Bhai Patel was the managing director of N.Govindji Patel & Co. He normally bought bulk sugar from the Midland Transport Co. and he dealt with second appellant and paid on a monthly basis. When the sugar was delivered it was accompanied by a delivery docket which he kept and which he later handed to the police. Witness produced dockets Exhibit 1, 2, 3 and 4. He also produced two cheques issued in payment for sugar supplied pursuant to the said dockets. These are Exhibits 5 and 7.

The second witness was Chananlal Guraj Patel who was managing director of N.B. Patel & Co. of Nausori. He has dealt with Midland Transport Co. for some six years in the way of purchase of bulk sugar. He gave an account of dealing in general.

Amongst the records were deliveries on October 2, 1975, October 13, 1975 and December 1, 1976. These dates refer to the same date as counts 2 and 10; 3 and 11; 5 and 13. The records in which these transactions appear were produced as Exhibits 8 and 9.

The next witness was Ram Charan Lal who is the managing director of Tip Top Ice Cream Co. (Fiji) Ltd. in Suva, which firm has dealt with the Midland Transport Company by way of the purchase of sugar in bulk. He gave evidence of the system of trade between his firm and Midland Transport Co. This witness produced from the records of his firm delivery dockets in respect of deliveries from Midland Transport Company and cheques paid to them for sugar supplied over the relevant period. These are Exhibits 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21. Witness did not have personal knowledge of the contents of the delivery orders but the records of the firm showed that deliveries of sugar were made by Midland Transport Company and payment was made by cheque to them. From this evidence the learned Magistrate could infer that the firm paid for goods which were actually received by the firm. The matter does not rest there.

Second appellant admitted he cashed cheques Exhibits 16, 17, 18, 19, 20 and 21 and that they were for sugar supplied. When questioned about the identification of the delivery trucks second appellant said:

" Exhibit 16 - Delivery Note shows truck AP 325. That is the correct number.

Exhibit 17 - Cheque dated 14/10/75 AT 265 is the truck number.

Delivery Orders 13/10/75 show vehicles AV 718 and AT 265. Before that AT 265 - 7 tons. Exhibit 19 - Cheque 4/12/75 AV 134. Order Book bears the same number. Exhibit 18 13/11/75 AV 134."

The case for the Crown was that first appellant was a party to the removal of sugar from Ellington by lorries under the control of second appellant and that these lorries delivered similar quantities of sugar on the relevant days to firms who purchased that quantity of sugar from second appellant. The Crown claimed that the coincidence of facts that deliveries were authorised by first appellant from Ellington stocks to lorries controlled by second appellant and the coincidence that the records of M. Govindji Patel and Co. Ltd., Nausori, of N.B. Patel & Co., Nausori and Tip Top Ice Cream Co. (Fiji) Ltd. of Suva disclose corresponding entries and that, although the correctness of the entries has not been sworn to by the maker, it was claimed that these facts proved that payment was actually made to second appellant.

The primary attack by counsel for both appellants is that documents (Exhibits 1 - 4, 6 to 21 and Exhibits 25 and 26) are hearsay. Counsel claim that the contents of these documents were used to establish the truth of the facts stated therein. Counsel for the Crown as a first contention claimed that they were used only for a limited purpose

of establishing the system employed and that the prosecution did not rely upon such documents to establish the truth of the contents. The difficulty which arises is that attention was not paid by the learned Magistrate to any such distinction because the point was not raised before him. The documents were treated as evidence and no question of admissibility arose until the appeal to the Supreme Court. Counsel further submitted that in any event, they were admissible by virtue of section 4 of the Evidence Ordinance Cap. 31.

In Subramaniam v. Public Prosecution (1956) 1 W.L.R. 965, 969 a judicial formulation of the rule against hearsay was as follows:

> "Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made."

In Cross on Evidence 4th Edn. pp. 405-6 it was said:

> "In spite of the absence of English authority on the point, the rule against hearsay would, subject to exceptions, presumably prevent the production of a record as evidence of the non-existence of a fact, although this is a matter concerning which much may depend on the evidence before the court as to the practice with regard to the compilation of the record."

We propose now to examine the case to see whether the Court acted upon the matters set out in Exhibits 25 and 26 as proof of the facts stated in those documents. Mr. Naidu, the accountant for the Board, in calculating shortages of cash and sugar used these exhibits in preparation of the evidence he gave: vide pages 51 and 52 of the case on appeal. The learned Magistrate relied on this evidence as is clearly shown at pages 94 and 95 of his judgment. He also stated that the Crown case against first appellant was that he "stole the sugar in question by having it loaded, without payment, onto lorries belonging to or under the control of second accused". In dealing with the individual counts information gained from Exhibits 25 and 26 was stated as fact. The learned Magistrate said when finally summing up on the eighth count:

> "It is abundantly clear that the 1st Accused deliberately and dishonestly ordered the lorries to be loaded with sugar belonging to his employer knowing full well that no payment therefore had been made. The lorries were so loaded and the sugar taken away at his behest. He stole that sugar and I have no hesitation in convicting him upon the 8th count as charged."

The learned Judge after dealing with section 4 of the Evidence Ordinance Cap. 31 and obviously reviewing facts which could arise only upon the basis that the contents of Exhibits 25 and 26 were being used as proof of the matters set out therein, said:

> "In any event Exs. 25 and 26 were not tendered to prove any facts contained in any document but merely to show that on the relevant dates no cashier's orders were made authorising the supply of sugar to Midland Transport and that no monies were received from Midland Transport."

This, of course, is a statement that the Exhibits were being used for the purpose of establishing facts which could not be established except by relying upon the truth of what was contained in the documents.

Section 4 was enacted to overcome the difficulties caused by the case of Myers v. Director of Public Prosecution (1965) A.C. 1001. It will apply to Exhibits 25 and 26 only if the prosecution can bring them within the provisions of subsection (b) which reads:

> "(b) the person who supplied the information recorded in the document is dead or .... or cannot reasonably be expected (having regard to the time which has elapsed since he supplied the information and to all the circumstances) to have any recollection of the matters dealt with in the information he supplied."

We have omitted those parts which do not apply to this case. The Court must be satisfied that this condition has been complied with.

Counsel for the Crown referred the Court to section 5 and invited the Court to draw the inference that section 4(b) had been complied with. Section 5 provides:

> "5. For the purpose of deciding whether or not a statement is admissible as evidence by virtue of any of the provisions of this Ordinance, the court may draw any reasonable inference from the form or content of the document in which the statement is contained, and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be a certificate of a registered medical practitioner or medical officer."

The position was, however, that the learned Judge dealt with this topic. He said:

> "Ex. 25 is 3 order books maintained by the cashier. According to Ex. 25 the cashier issued no orders for the accused 1 to prepare any of the loading orders Ex. 22, in favour of Midland Transport (accused 2), the subject of the counts 1 to 8. Mr. Koya argued that the cashier, Mr. Moosad, should have given evidence. What evidence would he have given? Mr. Koya did not enlarge upon this. The cashier could scarcely say other than 'I was unaware of the 8 deliveries allegedly made to Midland Transport'. Is it necessary for him to testify that he did not write 8 orders for 8 deliveries of which he was not aware? Although he may recollect writing an occasional order because of something unusual he is unlikely to remember on which days 18 months ago a customer did not make a purchase. All he could say is that if Ex. 25 does not reveal purchase orders favouring Midland Transport on various dates it is because no purchase orders were written.
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> Similar comments apply to Ex. 26 the cashier's receipt book. The duplicated receipt Ex. 26 and the cashier's order Ex. 25 were made at the same time. Could the cashier, Mr. Moosad, say without reference to Ex. 26 on which days one or more of 20 different customers did not pay

> him any money? Could Mr. Moosad have any separate recollection of facts which he could not record because they amounted to something which did not happen? Surely he could not say from recollection that on any particular day more than eighteen months ago Midland Transport did not pay for any sugar and that he did not make out a receipt to Midland Trans port. He would have to refer to his receipt book Ex. 26 and say that it revealed no such payment. Is it necessary to call him to say so?"

The appeal to the Supreme Court was on both, fact and law. The question of the admissibility of Exhibits 25 and 26 was first raised as a ground of appeal in the Supreme Court. It was open to the learned Judge, because the facts were before him, to draw the inferences of fact which were necessary to invoke the provisions of section 4 of the Evidence Act. This he did and came to the conclusion that section 4 had been complied with and the documents were admitted accordingly. The appeal to this Court should have been against that decision but the difficulty which faced appellants was that the decision was one of fact in that there was evidence upon which the learned Judge could draw the inference that section 4 applied. No question of law has been raised in this Court in respect of that finding. The question of fact so determined by the learned Judge must stand. We therefore hold that the Supreme Court correctly treated the contents of the said Exhibits as available evidence. The learned Judge also had before him the other documents to which exception has been taken in this Court. No express finding was made under section 4 in respect of these documents. From a close examination of the

judgement of the learned Judge it would appear that he made use of these documents - to the extent that the witness producing them did not have personal knowledge of the contents - merely on the basis of the fact that the document was made. To succeed on this ground it was not enough for appellants to argue that, per se, the documents are hearsay but to examine the manner in which the learned Judge made use of the documents in the relevant parts of his judgment and to show that there were specific errors of law. This has not been done. It was no part of our duty to search for such errors. On our consideration of the judgement in the Supreme Court as a whole on this part of the case we are unable to say that any error of law is disclosed. The findings of the learned Judge are in our opinion justified in the manner in which he was approached his task and no error of law has been demonstrated to this Court on appeal.

These findings dispose of Grounds 1, 2, 3, 4 and 5 of the first appellant and also grounds 1 and 2 of second appellant's notice of appeal.

Ground 6 (of first appellant) reads:

> "6. WHETHER the Learned Trial Magistrate having arrived at the following conclusion erred in law in not acquitting the Appellant. He said in his Judgment:-
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> 'I agree with the Defence that it might have the assisted Court to hear from some of the drivers concerned or at least the result of the Police inquiry made of them. As it is, it must remain a matter

> of speculation whether they overtly counternanced the 1st Accused's malpractices or whether he made them sign some sort of documents which was later concealed.'"

There is no merit in this ground. This was a matter which the learned Magistrate took into account and was only a part of the process of weighing the evidence. There was no error of law. It fails accordingly.

Ground 7 reads:

> "7. WHETHER the Learned Trial Magistrate misdirected himself by not incorporating the issue raised by the Defence (including Defence of mistake) and by not directing his mind to the Rule that when the Defence known to law is raised it is incumbent upon the Prosecution to disprove such Defence as part of the Prosecution's case and in not directing himself that at no time the Defence had any onus of proof."

The first comment we desire to make is that the use of the words "deliberately and dishonestly" quite clearly raise the question of mistake. It is difficult to know why this ground is put forward. The judgment clearly deals at some length with the claim of mistake. Then again immediately before the passage cited above the learned Magistrate said:

> " The 1st Accused's case is that the accounting system was so poor and the supervisory staff so untrained as to provide a possible explanation of innocent error and, if not that, then any of the employees could have made the apparent omissions and perhaps sought to lay the blame upon the 1st

Accused. There was never any physical count to disclose any actual shortage. Just a mere book discrepancy. Further, there had always been a book deficiency of some sort."

Ground 8 reads:

"8. WHETHER the Learned Trial Magistrate misdirected himself in law by not directing that having regard to the well established rules concerning the onus and the standard of proof in criminal cases, the Appellant was entitled as of right to be acquitted if there was a reasonable doubt upon the review of the whole of the evidence including the evidence adduced by the Defence."

A perusal of the judgment clearly shows that the learned Magistrate applied correct principles in deciding the case. In the instances where he acquitted appellants he was, if anything, too favourable to appellants. This ground fails.

We have dealt with grounds 1 and 2 of the appeal of second appellant.

Ground 3 was divided into (a), (b) and (c). Only (a) was put forward. It reads:

"1. WHETHER the Learned Trial Magistrate erred in law in not holding that the corroborative evidence upon which the Learned Trial Magistrate relied to base his decision to convict the Appellant was inadmissible in law. Without such evidence the Learned Trial Magistrate had ruled that he was not prepared to convict the Appellant. The Appellant was therefore entitled as of right to be acquitted.

PARTICULARS OF INADMISSIBLE EVIDENCE

(a) Evidence of Prosecution witness No. 1 Khushal Bahi Patel and Exhibits (1) (2) (3) (5) and (7);"

This ground can mean only that there was no evidence because second appellant is confined in this Court to a question of law. In our view there was ample evidence to prove mens rea.

Ground 4 reads:

> "4. WHETHER the Learned Trial Magistrate and the Learned Appeal Judge erred in law in not upholding the Appellant's submission of no case to answer at the end of the Prosecution case."

This ground was based on the law set out in R. v. Gibbon (1973) Vol. N.Z.L.R. 376. It was but faintly pressed. The complaint was that because the learned Magistrate found that second appellant had lied this carried undue weight and hence the learned Magistrate found mens rea proved. This is not so. Mens rea was supported by abundant evidence to which the proved untruths of second appellant were properly considered and given appropriate weight. The learned Magistrate exhaustively reviewed all the evidence both for the prosecution and for the defence. He fairly put the onus of proof on the prosecution. This ground fails.

Both appeals will accordingly be dismissed.

(Sgd.) T. Gould
VICE PRESIDENT

(Sgd.) T. Henry
JUDGE OF APPEAL

(Sgd.) B.C. Spring
JUDGE OF APPEAL