IN THE FIJI COURT OF APPEAL
Criminal Jurisdiction
CRIMINAL APPEAL NO. 14 OF 1980

Between:

JOJI ROKOSUKA — Appellant

- and -

REGINAM — Respondent

Appellant in Person.
Mr. M. Raza for the Respondent.

Date of Hearing: 11th June, 1980
Delivery of Judgment: 27/6/80

JUDGMENT

Spring J.A.

The appellant was convicted by the Magistrate's Court (First Class) at Suva, Fiji on 17th September, 1979 of two offences; namely -

(i) Aiding Prisoners to escape contrary to section 131 (c) of the Penal Code; and

(ii) Receiving stolen property, viz a wrist watch contrary to section 347 (1) (a) of the Penal Code.

He was convicted on both charges and sentenced to 4 years imprisonment in respect of the first offence and 18 months imprisonment on the second offence - both to run concurrently. Appeals against both convictions were heard by the Supreme Court of Fiji at Suva and dismissed on 8th February, 1980.

The notice of appeal set forth particulars of both convictions entered against appellant but from the grounds filed in support thereof it is evident that the appellant appeals to this Court only against his conviction on the charge of aiding prisoners to escape. The appellant appeared in person; he had prepared his own grounds of appeal in prison without the benefit of legal assistance. The notice of appeal does not directly raise any point of law, and a second appeal to this Court is limited by section 22 (1) Court of Appeal Ordinance (Cap. 8) to a question of law only. The petition of appeal to the Supreme Court, prepared by the appellant's former legal adviser, contained a ground whichread:

> "The learned Magistrate failed to direct himself as to the necessity for corroboration and hence brought about a substantial miscarriage of justice."

This ground of appeal is apparent on the face of the record and Crown Counsel acknowledged that a question of law was raised thereby and that the appeal on a question of law was properly before this Court.

The facts may be briefly stated. The appellant aged 25years had been a prison officer for 3 years and at the time of the alleged offence was working as a warder at Naboro Minimum Security Prison Farm. On 6th January, 1979 the appellant and one Jale Antonio were the prison officers on duty at Naboro Prison in charge of "E" Block which is a bure type dormitory in the Naboro Prison containing 20 trusted prisoners. At night the two prison officers were to alternate in patrolling the dormitories and looking after the office. The keys

to "E" Block on the night of 5th January, 1979 were with the appellant and it was customary for the prisoners to be escorted by one of the officers to the toilet block prior to retiring for the night. In the early hours of the morning of 6th January, 1979 three prisoners escaped from the prison; travelled in a converted vehicle to Suva; they broke into a shop; stole some wrist watches and then returned to the prison. The appellant was alleged to have aided the prisoners to escape; on their return the appellant is alleged to have received a wrist watch from one of the prisoners knowing it to have been stolen.

When the charges were gone into before the learned Magistrate the prosecution called Jale Antonio whose evidence incriminated the appellant. Jale Antonio had been granted immunity from prosecution by the Crown. Appellant gave evidence denying his complicity in the offences.

The question is whether the learned Judge was correct in law in dismissing the appeal; the conviction rested upon the evidence of an accomplice, and the learned Magistrate did not direct himself in his judgment as to the necessity for corroboration of the accomplice's evidence. Further, the question arises whether the evidence of Jale Antonio was of such a character as to warrant the conclusion reached by the learned Magistrate that Jale Antonio was a truthful witness worthy of belief, which conclusion was upheld by the learned Judge in the Supreme Court. The duty cast upon a court when it is dealing with the evidence of an accomplice is succinctly set out in Rex v. Ndaria & Ors. (1945) 12 E.A.C.A. 84 at p.86 where it is stated:

" In cases in which the confession or evidence of A can be taken into consideration against B, it will, generally speaking, be considered unsafe to convict B on such accomplice evidence, unless there is some independent corroboration tending to implicate B. On this the leading case is, of course, Rex v. Baskerville (1916), 2 K.B. 658, which should always be referred to in case of difficulty. A point which is sometimes lost sight of in considering accomplice evidence is that the first duty of the Court is to decide whether the accomplice is a credible witness. If the Court, after hearing all the evidence, feels that it cannot believe the accomplice it must reject his evidence, and unless the independent evidence is of itself sufficient to justify a conviction the prosecution must fail. If, however, the Court regards the accomplice as a credible witness, it must then proceed to look for some independent evidence which affects the accused by connecting or tending to connect him with the crime. It need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connexion with the crime. But in every case the Court should record in its judgment whether or not it regards the accomplice as worthy of belief."

The learned Judge in the Supreme Court concluded that while Jale Antonio was an accomplice, the learned Magistrate as a "professional magistrate" would be aware of the necessity for Jale Antonio's evidence to be corroborated in some material particular. However, the learned Judge observed that nowhere in his judgment did the learned Magistrate warn himself or even mention the danger of acting on the evidence of an accomplice unless it was corroborated.

In Chiu Nang Hong v. Public Prosecutor (1964) 1 W.L.R. 1279 was a case where there was no corroboration whatsoever of the complainant's evidence in a sexual case, and, while the circumstances were consistent with the case for the prosecution, they were consistent also with the case for the accused person. The judge had in fact said 'I could not but come to the conclusion that she' the (complainant) 'was speaking the truth, and that in all material circumstances her evidence was corroborated by the facts'.

In the view of their Lordships, the trial Judge was finding corroboration where there was none; and there was thus a miscarriage of justice.

In their judgment the Privy Council at p. 1285 said:

> " Their Lordships would add that even had this been a case where the judge had in mind the risk of convicting without corroboration, but nevertheless decided to do so because he was convinced of the truth of the complainant's evidence, nevertheless they do not think that the conviction could have been left to stand, For in such a case a judge, sitting alone, should, in their Lordships' view, make it clear that he has the risk in question in his mind, but nevertheless is convinced by the evidence, even though uncorroborated, that the case against the accused is established beyond any reasonable doubt. No particular form of words is necessary for this purpose: what is necessary is that the judge's mind upon the matter should be clearly revealed."

It was necessary for the learned Magistrate first to decide whether the evidence of Jale Antonio was worthy of belief. As we state hereafter it is necessary for us to examine the evidence.

Jale Antonio stated before the learned Magistrate:

" Supreintendent Jone Waisele interviewed me.

They started interviewing me at roughly 5 p.m. They finished before 9 p.m.

As a result of that interview I signed a statement.

That is the statement I made to the police after 4 hours. I lied to the police - yes.

.....

I made three statements. The one Defence Counsel is holding now is second one.

I made third one at the Police Station to two police officers.

In that second statement I told the police I knew about Accused releasing the prisoners.

In the first statement I did not admit.

The second statement I gave no general admission.

Now looking at a statement made on 8.5.79 by me. That is my second statement.

They asked me if I knew anything about the general facts and I came up with the release of the prisoners.

In the third statement I told everything. That was when I was given immunity - yes."

He stated also:

" Entries are made every half hour after the rounds.

There would be entries in the books for my rounds that night. I made false

entries into the books for that night. I never did the rounds.

I made the false entries because I was too lazy to do my rounds. I was not feeling too well.....

I made the false entries between 9 p.m. and the morning."

The learned Magistrate in his judgment dealt with Jale Antonio's evidence in this way:

" Under cross examination this witness admitted that he had, at first, lied to the police. He said that when he was given immunity from prosecution he told everything as recorded in his third statement. This witness admitted that he had made false entries in prison registers showing that he had made prison patrols when he had made no such patrols. He gave as his reason that he was too lazy and that he was unwell."

Later the learned Magistrate in considering the accomplice's evidence said:

" At one stage in the witness-box he objected to answering questions put to him by Defence Counsel. I felt it necessary to make it quite clear to this witness that although he had been granted immunity by the Director of Public Prosecutions he had no immunity from perjury and that he was obliged to answer questions put to him."

In concluding his judgment the learned Magistrate said:

" I believe all of the Prosecution Witnesses to have told the truth. I consider that PW7 although 'jittery' and excited to have told in Court exactly what happened between him and Accused on 5-6/1/79 and flowing from him."

The learned Magistrate concluded that Jale Antonio was a credible witness but did not direct himself that Jale Antonio was an accomplice and as such his evidence was suspect and should not be acted upon unless corroborated or confirmed in some material particular. Corroboration is not, and cannot be looked for to bolster up the evidence of a witness who is not intrinsically credible. If the witness whose evidence requires corroboration is not creditworthy then unless there is other independent evidence in the case upon which the defendant can be properly convicted he should be acquitted.

In considering the point of law raised on this appeal we are entitled to examine the evidence and ascertain whether the learned Magistrate misdirected himself in deciding how far it was safe to act upon Jale Antonio's evidence against appellant.

In Director of Public Prosecutions v. Hester (1972) 3 All E.R. 1056 Lord Morris of Borth-y-Gest said at p.1065:

> "The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and satisfactory and credible; and corroborative evidence will only fill its role if it itself is completely credible evidence. All of this emphasises the importance of directing a jury that the evidence of children must be examined with special care. The need for such special care is manifest where vital issues fall to be determined only on the evidence of children."

The same principle applies in this case in which the Crown are seeking to rely on the evidence of an accomplice.

Lord Morris of Borth-y-Gest's comments were referred to with approval by the Lord Chancellor in Director of Public Prosecutions v. Kilbourne (1973) 1 All E.R. 440 at p.452:

> " In addition to the valuable direction to the jury, this summing-up appears to me to contain a proposition which is central to the nature of corroboration, but which does not appear to date to have been emphasised in any reported English decision until the opinion delivered in Director of Public Prosecutions v. Hester by Lord Morris of Borth-y-Gest although it is implicit in them all. Corroboration is only required or afforded if the witness requiring corroboration or giving it is otherwise credible. If his evidence is not credible, a witness's testimony should be rejected and the accused acquitted, even if there could be found evidence capable of being corroboration in other testimony. Corroboration can only be afforded to or by a witness who is otherwise to be believed. If a witness's testimony falls of its own inanition the question of his needing, or being capable of giving, corroboration does not arise. It is for this reason that evidence of complaint is acceptable in rape cases to defeat any presumption of consent and to establish consistency of conduct, but not as corroboration. The jury is entitled to examine any evidence of complaint, in order to consider the question whether the witness is credible at all. It is not entitled to treat that evidence as corroboration because a witness, although otherwise credible 'cannot corroborate himself' - i.e. the evidence is not 'independent testimony'to satisfy the requirements of corroboration in R. v. Baskerville. Of course, the moment

> at which the jury must make up its mind is at the end of the case. They must look at the evidence as a whole before asking themselves whether the evidence of a given witness is credible in itself and whether, if otherwise credible, it is corroborated. Nevertheless, corroboration is a doctrine applying to otherwise credible testimony and not to testimony incredible in itself."

For our part we are of the opinion that the evidence given by Jale Antonio should have raised grave doubts in the learned Magistrate's mind and he should in our view have so directed himself.

We turn now to consider if there was corroboration of Jale Antonio's evidence.

The learned Judge stated:

> " . There was clearly in the appellant's cautioned statement to the police dated 23rd March 1979, which the Magistrate after a trial within a trial admitted into evidence, statements which independently corroborated the story told by Jale Antonio in certain material particularly about his telling that witness 'that the prisoners had come to town and that they had returned to the prison.'"

There was no corroboration other than the cautioned statement of 23rd March, 1979 given by appellant to the police officer.

In the statement appellant admits a failure on his part to report that the prisoners had been absent from about 10 p.m. on 5th January, 1979 until 4 a.m. on 6th January, 1979 when they returned to the prison.

The appellant in his statement made no admission that he assisted, connived at or aided the

prisoners to escape; in his evidence in Court he denied that he lent any such assistance. The statement does not corroborated the criminality of the acts alleged against the appellant by Jale Antonio and in many instances it is equivocal.

In our view the extra judicial statement does not provide strong corroboration of Jale Antonio's evidence. The learned Magistrate in his judgment at p.63 of the record says:

> " Accused told PW7 his duty companion for the night of 5-6/1/79, that that motor vehicle was the one the prisoners had used to effect their return from Suva after the duty free shop had been broken into; that Accused had told PW7 that the prisoners had been to Suva and broken into a shop and stolen watches and that he, Accused had allowed them to be absent from their cell during the period in question."

There is no corroboration coming from an independent source to corroborate any of the foregoing evidence of Jale Antonio; and Jale Antonio cannot of course corroborate himself.

The learned Magistrate in his judgment failed to warn himself that while it was competent for him to convict on the evidence of an accomplice it was dangerous to do so unless the evidence was corroborated in some material particular; this defect in the judgment was noted by the learned Judge in the Supreme Court who said:

> " The learned Magistrate in a lengthy considered judgment fully reviewed the evidence and specifically mentioned that prosecution witness Jale Antonio had been granted immunity by the Director of Public Prosecutions from prosecution for his part in the offences. He did not however mention in his judgment that the evidence of such witness required corroboration."
> .....

> As a professional magistrate he would be aware that Jale Antonio was an accomplice and would be aware of the danger of relying on the uncorroborated evidence of such accomplice."

However, having regard to the particular facts of this case we are of the opinion that it was one in which, notwithstanding that the learned Magistrate was a professional one, it was essential that the record should reveal clearly that he had appreciated the dangers of convicting on the evidence of an accomplice unless it is corroborated.

From a detailed analysis of the evidence of the accomplice Jale Antonio given in the Magistrate's Court, the judgment of the learned Magistrate, and studying the judgment of the learned Judge in the Court below, we are of the opinion that the conviction recorded against the appellant of aiding the prisoners to escape is unsatisfactory. We cannot escape the conclusion that the appellant was convicted upon the basis that the accomplice's evidence was amply corroborated when in fact while there was some corroboration of the accomplice's evidence it was weak and at the best equivocal particularly in relation to the criminality of the acts alleged against appellant. Therefore it is not a case in which, by reason of the strenght of the corroborative evidence it would be safe to disregard the learned Magistrate's failure to direct himself fully in his judgment, on the ground that there was in any event ample corroboration. The corroboration did not in our opinion reach that standard and the error of law must result in the convistion being quashed.

Accordingly for the foregoing reasons we allow the appeal; the conviction of aiding the prisoners to escape contrary to section 131(c) of the Penal Code is quashed, and the sentence of 4 years imprisonment, imposed in respect thereof, set aside. The appellant did not prosecute his appeal against his conviction for Receiving Stolen Property contrary to section 347 (1) (a) of the Penal Code. In any event we have no hesitation in saying that there was ample evidence to justify the conviction and we agree with the learned Judge's conclusions thereon.

Accordingly the conviction entered for Receiving Stolen Goods and the sentence of 18 months imposed in respect thereof remain extant.

(sgd.) T. Gould
VICE PRESIDENT

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

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