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IN THE FIJI COURT OF APPEAL

Appellate Jurisdiction

Criminal Appeal No. 54 of 1979

1. HARI KRISHNA REDDY alias SURESH s/o Murgappa Reddy

2. RAMA alias DEO SAGAYAM PILLAI s/o Muthu Sami Pillay — Appellants

v.

REGINAM — Respondent

Mr. S.R. Shankar for the Appellants
Mr. M. Raza for the Respondent

Date of Hearing: 3 June 1980
Delivery of Judgment: 27th June 1980

JUDGMENT

Speight J.A.

This appeal is under section 22(1) of the Court of Appeal Ordinance and is limited to point of law only.

The appellants faced two charges in the Nadi Magistrates Court before the Magistrate Mr. Saunders at a hearing on the 25th and 31st of July 1979. The first charge was of unlawfully converting a Datsun motor car owned by Mr. Amrit Land and the second charge was of stealing motor parts and accessories from the same vehicle to a value of $1,500.

Briefly the prosecution case showed that the vehicle disappeared from the place where it was parked overnight on a date which proves to be the 5th of October 1978. A complaint was made and the following day it was found abandoned on a beach

rubbish dump with wheels, doors and many accessories missing. No parts were every positively traced. There was some inconclusive evidence attempting to link appellant No. 2 with one wheel and tyre but the identification of the exhibit was rejected by the Magistrates Court and no point arises from that.

All the evidence incriminating the appellants came from persons who were either accomplices or in other ways highly suspect. P.W.4 works in the car business and he said that in late October appellant No. 2 attempted to deal with him over motor parts which he acknowledged came from a car he had stolen. The learned Magistrate correctly described this witness as a dealer in stolen property and his evidence was totally ignored. Two others, P.W.10 and P.W.11 who gave evidence persons currently serving prison sentences for offences arising from the taking of this vehicle or its parts. Their evidence varied in some particulars but each in effect said that they together with the two appellants and several others had been together on the evening in question. Appellant No. 2 had wanted a car to be stolen similar to his own to obtain parts. A van owned by one of them was used. The complainant's vehicle was taken and driven by appellant No. 1 to Saweni Beach. There it was stripped and the body pushed into the water.

P.W.8 is a motor mechanic. Although he said that he was not present when the car was taken, he admitted that he assisted later to take off various parts from one Datsun for use on another. He admitted knowing "something was wrong" and the Magistrate correctly treated him too as an accomplice.

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Appellant No. 2 gave evidence. He denied participation and put forward an alibi though in very vague terms. Appellant No. 1 did not give evidence. The Magistrate delivered a judgment reviewing the evidence and relevant principles of law. He dismissed charge one as it was out of time and he convicted both men on charge two. Each appellant lodged an appeal against conviction to the Supreme Court. The wording of the notices of appeal are lengthy and imprecise. In effect appellant No. 1 complained of -

(a) confusion of the dates of the offence by the complainant,
(b) non-identification of the exhibit tyres,
(c) absence of stolen property being found in his possession.

Appellant 2 complained of -

(a) wrong identification of exhibit tyres,
(b) confusion as to dates of offence by complainant,
(c) rejection of his alibi.

The appeal papers were considered by Williams J. on the 17th of October 1979 and he summarily dismissed the appeals pursuant to his powers under section 294 of the Criminal Procedure Code. His minute reads as follows:

"D.R.,

I have perused the record in relation to the appeals of both accuseds. Their appeals are against conviction and no reference is made regarding sentence. The grounds of appeal filed by each accused simply refer to the evidence presented to

the magistrate and complain that it should not have been believed. Their appeals really amount to a complaint that the decision is unreasonable or cannot be supported having regard to the evidence.

In my view there was ample evidence to support the convictions and the magistrate believed the witnesses. The appeal of each accused against his conviction is summarily dismissed.

(Sgd.) J.T. Williams
<u>JUDGE</u> "

From this dismissal both appellants appeal. Their joint notice reads:

"1. THAT the said conviction is unsafe and against weight of the evidence having regard to all the circumstances of the case in that:

(a) That there was no corroborative evidence of the accomplice witnesses.

(b) That the learned trial Magistrate found as a fact that they were self confessed crooks.

(c) That there was material contradiction in the evidence of the said witnesses.

(d) That the independent prosecution witnesses supported the 2nd Appellant's contention that at the material time he was elsewhere.

<u>DATED</u> this 14th day of November, 1979.

G.P. SHANKAR & CO. "

When this Court sat it was apparent that difficulties arose because these grounds appeard to relate solely to matters of fact, namely whether the decision of the Magistrate is unreasonable and cannot be supported having regard to the evidence - and not to a ground which involves a question of law only. Mr. Shankar, counsel for the appellants, had obviously anticipated this problem and with the Crown not opposing, lodged an affidavit setting out certain matters which had transpired at the trial which he had then thought appealable. However, before he could lodge a notice the time for appeal had expired. Meanwhile the appellants had lodged their own appeals in terms which only related to evidential matters and these had been dealt with summarily as already recited.

Mr. Shankar was invited to show how the matter could now continue as an appeal on a point of law when none had been raised before the learned appeal Judge. This Court indicated that consideration would be given if it could be shown that the matter before the Supreme Court could be construed as giving rise (no matter how obliquely) to a question of law - in other words should the learned Judge have discerned that the material before him should be so considered.

With the indulgence of this Court, Mr. Shankar submitted the following revised grounds:

> "1. THAT the said conviction is unsafe having regard the following:
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> That the learned judge of appeal failed to consider that the learned Magistrate once having directed himself on the question of accomplice witnesses evidence on corroboration erred in law in treating the accomplices evidence as corroborating and or supporting each other.

2. THAT the learned trial Magistrate erred in law in informally asking for the fact of the conviction record of the appellant and the learned Prosecutor erred in law so informally informing the Learned Magistrate the fact of First Appellant's criminal record. "

Ground 1.

Mr. Shankar concedes the learned Magistrate correctly directed himself on the danger of convicting on uncorroborated evidence and also that one accomplice cannot corroborate another. He submitted, however, that the Magistrate thereafter fell into the second of these errors by using consistency inter se as corroboration. The passage in the judgment reads:

> "P.W.10 and P.W.11 conflict in their evidences, as pointed out by Counsel for the Defence. They are inconsistent in many matters but these are matters concerned with the actual commission of the offence and not so much with the presence of the accused persons. P.W.10 was considerably drunk and had an accident. It is not clear from his evidence whether he says Accused 2 was in the van when the car was pointed out or not. He said 'Accused 2 came in van and pointed out where the car was. I, Accused 1, Satend came by van.' He then said 'Ram Charan and Accused 2 ahead of us. Showed us the car to be stolen at back of shop in Nadi Town. Accused 2 and Ram Charan showed us and returned and then Accused 1 and myself went to get the car out.' This does not conflict in any great way with the evidence of P.W.11 that they all went in the van, particularly since both P.W.10 and P.W.11 had been drinking for 3 hours by that time."

He then discussed and rejected certain complaints concerning non-acceptance of the alibi. In our view this was a weight of evidence matter and has no place in present deliberations. The judgment then continues:

> "Bearing in mind the warnings I have given myself, I am satisfied beyond reasonable doubt that P.W.8, P.W.10 and P.W.11 are telling the truth when they say that Accused 1 and Accused 2 were with them that night, and stole parts from P.W.1's car."

With all respect to Mr. Shankar we think he confuses absence of contradiction with cross corroboration. It is often the experience of the Courts that counsel, quite legitimately, attack the credibility of an accomplice by showing not only that he is particeps criminis but also that his evidence has passages contradictory of other witnesses. It was proper for Mr. Shankar to point out to the learned Magistrate that apart from being disreputable persons as witnesses they were also inconsistent with each other - a valid submission to back a claim that they were unreliable. It is in this context that the Magistrate's remarks must be read. He said in effect that in so far as they spoke of the accused they were not in conflict. We take this to mean only that the criticisms of contradiction, one with the other, was not totally sustainable. This cannot be elevated in the overall context in which it must be read to the point of saying that the evidence of one was used to corroborate the other. Not only had the learned Magistrate said this a few sentences before, but he again reminded himself of the appropriate precautions two paragraphs later.

Ground No. 2 relates to material contained in Mr. Shankar's affidavit. It appears that in the course of his final address he made some references to a passage in the evidence of P.W.10 when he said in cross-examination:

> "I agree not now for me to get into locked car and start it. In 1975 I got three years. Through liquor and keeping company with these accused."

Appellant 2 gave evidence and in cross-examination the Court had without objection admitted his list of previous convictions. It appears that during Mr. Shankar's final address the Magistrate made some comment that the passage just quoted from the evidence of P.W.10 did not coincide with the list of convictions of appellant 2. Counsel for the Crown then, so it is said, pointed out to the Court that appellant 1's record was not before the Court. It is now submitted on behalf of appellant 1 that this improperly told the Court that he was a convicted person and that this adversely affected his trial.

The first point to note is that there is no record of what in fact transpired. Mr.Shankar has given a summarised view in a few lines of his affidavit. Mr. Raza generously allowed this document in but he was unable to comment on it because he had not appeared at the trial. There is no confirmation one way or the other from the Magistrate.

Even if the matter is as stated we do not think it calls for intervention. If in this indirect way it was suggested that appellant 1 had a criminal record then it was unfortunate and regrettable, but in the absence of detail

of how the matter arose, it would be improper for any censure to be suggested. From the point of view of the Court procedure the matter cannot be ventilated now. It was not raised in the appeal to the Supreme Court. Mr. Shankar acknowledges that not a breath of this material emerged before the learned appeal Judge and he could not be expected to have any knowledge of it. To accept this now would in effect be to grant a right of appeal direct from the Magistrates Court to the Court of Appeal which of course does not lie but in any event we cannot see that a Magistrate, who obviously conducted the entire proceedings with propriety and was well aware of his responsibilities, would have been influenced by a suggestion (and it was no more) that appellant 1 had some undefined convictions.

This Court concludes that there is no substance in either appeal and they are dismissed accordingly.

(Sgd.) T. Gould
VICE PRESIDENT

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

(Sgd.) G.D. Speight
JUDGE OF APPEAL