Whether charge was defective for duplicity & failure to give particulars

Criminal Law - Larceny - burden of proof 367

Criminal Law - Charge.

Whether the burden of proof was properly placed on the prosecution

Master and servant - Theft of goods

IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

CRIMINAL APPEAL No.50 OF 1981

Plaintiff convicted for stealing goods from his employer over a period of time while he worked as a salesman.

Between:

WILLIAM RAJ DAYAL s/o Ram Dayal Sharma Appellant

- and -

REGINAM Respondent

R. Krishna for the Appellant
S. Chandra for the Respondent

Date of Hearing: 5th November, 1981
Delivery of Judgment: 27 NOV 1981

JUDGMENT OF THE COURT

Henry J.A.,

This is an appeal on a question of law under Section 22(1) of the Court of Appeal Act. Appellant was convicted and sentenced in the Magistrate's Court to a term of twenty-seven months imprisonment for an offence which was charged as follows :-

"Statement of Offence

LARCENY BY SERVANT: Contrary to Section 306.(a)(i) of the Penal Code, Cap.11.

Particulars of Offence

WILLIAM RAJ DAYAL son of Ram Dayal Sharma between the 1st day of January 1980 and the 1st day of February 1981 at Lautoka in the Western Division being employed as a salesman by Popular Furniture Limited stole assorted hardware goods to the total value of $168.00 the property of the said Popular Furniture Limited."

The questions of law may be posed thus :-

(1) Whether or not the said charge was defective in that (a) it charged more than one offence in one count, or (b) it failed to give full particulars of the items alleged to be stolen;

(2) Whether the learned judge on appeal (and the learned magistrate at the hearing) correctly applied the burden of proof; and,

(3) Whether or not there was sufficient evidence to support the conviction.

Appellant had for some nine years been employed by Popular Furniture Limited as a salesman in their premises at the corner of Navua and Nasoki Streets, Lautoka. A search was made of appellant's home on February 3, 1981 when a number of items were found and seized by the police. After being warned appellant said he had receipts for some of the articles and that others had been given to him by a fellow employee Rup Narayan Verma who was the security officer for Popular Furniture Limited. Receipts were produced for 31 items and these were returned to appellant.

At the trial 24 items valued at $149.65 were identified by the Hardware Manager of Popular Furniture Limited as "Popular Furniture Stock" and a further 11 items to a value $18.35 were identified as new and of the type sold by Popular Furniture Limited. These two items comprised the goods valued at $168 referred to in the particulars of offence. After this evidence was given the prosecutor asked that the charge be amended to include only those 24 items valued at $149.65. Counsel for appellant did not object to the amendment and said there was no need for an adjournment. The new charge was read and explained to appellant who repeated his plea of not guilty.

The premises of Popular Furniture Limited comprise a general store with several departments. Appellant's duties were those of a salesman in the paint department being a section of the hardware department. All the items came from the hardware department. Appellant could move freely round the tools and electrical section of the hardware department and all items were openly displayed. The paint department is next to the tools department.

Rup Narayan Verma denied on oath that he had either given or lent any of the disputed items to appellant. Appellant did not give evidence and nor did he call any witness in his defence. The finding of the learned magistrate was as follows :

> "The court then is left with the facts that the Accused had in his possession at his home goods of his employer Popular Furniture Limited, of recent purchase by the employer, still in pristine condition, diverse articles, bearing the sales information. Pentel-marked by the employer, much in its original packaging. The Accused was employed as a salesman in the paint section but with access over the whole shop. The goods were kept on open counters. The Accused has given no explanation to the court and the court accepts that his explanation to the police was false. The goods number 24 items, value $149.65. There is no direct evidence of theft. The court is asked to infer from these facts the further facts necessary to complete the elements of theft. The court has narrowly examined the evidence and the only and irresistible conclusion to be drawn is that the Accused as servant stole the Exhibit 1 items from his employer. He is guilty as charged and convicted accordingly of larceny by servant of the Exhibit 1 items, total value $149.65."

Before coming to this conclusion the learned magistrate had earlier stated that it is incumbent on the prosecution to prove theft and not for the accused to satisfy the court that he is innocent.

We are of the opinion, and it has not been challenged, that the statement of the Court after discussing the evidence that "it has narrowly examined

the evidence and that the only and irresistible conclusion to be drawn is one of guilt," is a correct and sufficient statement of the onus of proof. But counsel for appellant has argued strongly that in the passage :-

> "The accused has given no explanation to the Court and the Court accepts that the explanation to the police is false."

the learned magistrate had placed an onus on appellant and had drawn an inference of guilt from his failure to testify. Particular emphasis was placed on R. v Bathurst /1968/ 1 All ER 1175. This was a case of comment to a jury on the issue of diminished responsibility. Lord Parker C.J. said :

> "... the form of the comment, if comment is justified in any particular case on a plea of diminished responsibility, is a comment which is undoubtedly different from the comment which is justified when the burden is on the prosecution. Then, as is well known, the accepted form of comment is to inform the jury that, of course, the accused is not bound to give evidence, that he can sit back and see if the prosecution have proved their case, and that, while the jury have been deprived of the opportunity of hearing his story tested in cross-examination, the one thing that they must not do is to assume that he is guilty because he has not gone into the witness box."

R. v Mutch /1973/ 1 All ER 178 was also cited. It was there held that the form of comment made was inappropriate when the sole question was identification and the accused had said nothing. The cases cited are not in point. The learned magistrate did not draw an inference of guilt because appellant failed to give evidence. He was merely deciding the conflict between the sworn evidence of Rup Narayan Verma and the assertion made by appellant in his statement to the police.

We have examined the whole of the judgment of the learned magistrate with care and we can find no

basis for the submission that, in any respect, the burden of proof was placed on appellant. In the end the learned magistrate said he had examined the evidence narrowly and found that the only and irresistible conclusion was guilt. This was a correct approach and placed the burden fairly on the prosecution to exclude any hypothesis except that of guilt. There was ample evidence upon which such an inference of guilt could be drawn. Such evidence was summed up in the passage we have already cited. It must, of course, be read in the light of the whole of the surrounding circumstances. The absence of any evidence to prove a stock shortage has been commented on before us, but that was explained by one of the witnesses and was plainly a matter in the mind of both Courts below. Grounds 2 and 3 must fail.

We turn lastly to the claim that the charge was defective in that it failed to give full particulars of the items alleged to be stolen and was bad for duplicity. On the question of particulars it is not unimportant to note that, when the charge was amended and appellant elected to proceed, the articles were already produced and identified in the presence of appellant and his counsel. We have carefully considered the opinion of the learned judge and we respectfully agree with his conclusion. Although he does not expressly say so, it is clear that he considered that no substantial miscarriage of justice occurred. We are of the same view. On the question of duplicity, this Court in R. v Shantilal and others Cr. App. No. 10/1978, considered a number of counts each alleging the commission by several persons of several separate acts of receiving stolen property over a period between two named dates. The law was reviewed, and, in particular, reference was made to DPP v Merriman [1972] 56 Cr. App. R 766. The opinion then expressed by this Court, on the facts in that case, was that this method of formulating the charges was unobjectionable and was fair in the circumstances. The present case is even stronger in its facts because

the activities alleged were those of a trusted servant who had surreptitiously over a period removed goods from his employer's premises to which he had ready and authorised access. We find it unnecessary to consider any of the cases cited at the Bar in view of Shantilal's case which is a recent decision of this Court. This ground fails.

The appeal is dismissed.

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27 NOV 1981

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