IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

Criminal Appeal No. 28 of 1983

Between:

RAMESH CHANDRA s/o Bhagauti — Appellant

and

R E G I N A M — Respondent

Mr. K. Bulewa and Mr. A. Singh for the Appellant
Mr. D. Fatiaki for the Respondent

Date of Hearing: 1st November, 1983

Delivery of Judgment:

JUDGMENT OF THE COURT

Mishra, J.A.

The appellant was convicted by the Magistrate's Court Labasa of Robbery with Violence and Escaping from Lawful Custody and was sentenced to 3 years' imprisonment on the first count and 2 months' imprisonment on the second.

His appeal to the Supreme Court was allowed and conviction, in each case, set aside. On the robbery charge, however, the Supreme Court ordered a new trial.

The appellant now appeals against that order.

At the trial, some of the facts were unchallenged. On 27th November, 1981, a woman, Chandrawati, was found by mill workers in a river nearby shouting for help. She was taken to the hospital and treated for injuries, among them a fractured jaw, two broken teeth and several lacerations around the face, neck and shoulders. She remained in the hospital for six weeks.

Her evidence disputed by the defence, was that the appellant, a younger man, whom she had known intimately for some time had accompanied her to the cinema in Labasa town and then taken her in a taxi to a remote country road outside the town where they got off and walked some distance to a solitary place. Here, she said, he had attacked her causing all those injuries until she had lost consciousness. When she came to several hours later she noticed that her necklace of gold sovereigns was gone. So was the appellant. She walked to the river nearby to drink water and, in her weak state, had fallen in. She had then shouted for help.

The taxi driver who had taken them from the theatre identified both of them. He had known the appellant personally and had been hired by him. He had not known the woman before.

There was also considerable evidence which, if believed, suggested that the appellant knew Chandrawati and frequently met her at the theatre, that they were together at the theatre on the day in question and that Chandrawati did wear a necklace of gold sovereigns.

The appellant in an unsworn statement, denied that he knew the woman. He said he had on the day in question visited several shops in town in connection with

his work and gave an account of his movements. He denied being with Chandrawati in the theatre or going out with her in a taxi. The police, he said, had fabricated evidence against him.

The Magistrate reviewed the evidence in considerable detail in a very lengthy judgment. He accepted the prosecution version, particularly the testimony of the taxi driver Kumar Appa Mudaliar.

He rejected the accused's alibi. In dealing with the alibi, however, he said:-

> "Only if the accused's book had been countersigned and the times marked it would have been a fact proof alibi. Unfortunately for the accused this is not the case. It must be remembered that alibi has to be proved."

The learned Supreme Court Judge who heard the appeal accepted the appellant's submission that this was a serious misdirection as to the burden and standard of proof. He then went on to consider whether the evidence as a whole warranted an order for a new trial and came to the conclusion that it did.

The appellant relies on the following grounds to have the order set aside:-

> "(5) That the learned appellate judge erred in law in ordering a retrial in this case when on the totality of the misdirections of the learned Magistrate, he should have not so ordered.
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> (6) That the learned Appellate judge erred in law when he ordered a retrial under Section 319(c) of the Criminal Procedure Code Cap 21 when he had no jurisdiction to so order.

(7) That the learned Appellate judge erred in law when he failed to distinguish between a new trial or trial denovo, and a retrial."

Grounds 1 to 4 were abandoned at the hearing.

Grounds 6 and 7 were argued together and dealt with first. The appellant contends that the power of the Supreme Court in its appellate jurisdiction to order a new trial is confined to cases where the trial in question has, for same fatal defect, been declared a nullity and does not extend to cases where a conviction is quashed on the ground of a misdirection.

Until 1969 the Supreme Court had no power to order a new trial. It was conferred upon it by the Criminal Procedure (Amendment) Code of that year and the relevant words used in the statute are:-

> "..... the Supreme Court may thereupon confirm, reverse or vary the decision of the Magistrate's Court, or may remit the matter with the decision of the Supreme Court thereon to the Magistrate's Court, or may order a new trial, or may order trial by a court of competent jurisdiction ....."

(now section 319 of the Code).

The order the learned judge of the Supreme Court made in this case is in following terms:-

> "This Court hereby orders that the appellant be retried by another Magistrate on the charge of robbery with violence."

The appellant submits that section 319 of the Code authorises the making of an order for a new trial, not an order for a retrial and, that an order for a new trial can only be made in case of a trial held to be a nullity.

We are unable to accept that view.

In Au Pui-kuen v. The Attorney-General of Hong Kong (1979, 1 All E.R. 769), which was referred to by both counsel and which was also largely relied upon by the learned judge for his decision, the relevant statutory provision under consideration was in following terms:-

> " Where the Court of Appeal allows an appeal against conviction and it appears to the Court of Appeal that the interests of justice so require, it may order the appellant to be retried." (p.771)

Immediately after the wording of the section appears the following:-

> "The power to order a retrial when a conviction is quashed owes its origin not to the common law of England but to the Indian Code of Criminal Procedure more than a 100 years ago. A similar power, not always conferred by identical words, has subsequently been incorporated in the criminal procedure codes of many other Commonwealth jurisdictions. In some, as was the case in Hong Kong before 1972, the power to order a new trial is unqualified by any explicit reference to the requirements of justice; in some 'shall order' is substituted for 'may order' which appears in the Hong Kong Ordinance. In their Lordships' view these minor verbal differences are of no significance. The power to order a new trial must always be exercised judicially."

It is clear from the language used that their Lordships treated the phrase "it may order the appellant to be retried" as bearing the meaning identical with that of the phrase "it may order a new trial".

We respectfully adopt that view. A new trial simply means that the appellant be tried anew, or that he be tried again, or that he be retried.

Section 23(2) of the Court of Appeal Act of Fiji is in words identical with those used in section 14(2) of the Judicature (Appellate Jurisdiction) Act of Jamaica which was considered in Dennis Reid v. The Queen (1980 A.C. 343) both statutes using the words "Order a new trial". In Dennis Reid the issue was adequacy of evidence, not nullity. The appellant does not suggest that this Court's power under section 23(2) of the Court of Appeal Act to order a new trial is in any way restricted to cases of nullity. For instance, this Court exercised that power in Nirmal v. The Queen (1969 15 F.L.R. 194) for reasons connected largely with admissibility and adequacy of evidence and though in Appeal No. 46 of 1970 the Privy Council allowed an appeal against that order, in neither court did any question of nullity arise. Section 319 of the Criminal Procedure Code also uses the words "order a new trial". We are unable to accept that exactly the same words conferring the same kind of power can bear in the Criminal Procedure Code a meaning different from that given to them in the Court of Appeal Act.

Grounds 6 and 7 must, therefore, fail.

Ground 5 complains of other misdirections in the trial Magistrate's judgment and inadequacy of evidence adduced by the prosecution. We accept the respondent's submission that, but for the misdirection relating to the burden of proof in case of an alibi, there is no misdirection of any consequence in the judgment.

As for the adequacy of evidence it will not, in view of the decision we have arrived at, be desirable to comment on it in any detail.

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We accept the learned judge's view that there was evidence before the trial court which, on proper directions, might well lead to a conviction and that the nature of the offence would, in the interests of justice, call for a new trial of the appellant. We, therefore, see no reason for interfering with the exercise of his discretion.

The appeal is dismissed.

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Vice President

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Judge of Appeal

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Judge of Appeal