IN THE FIJI COURT OF APPEAL

Appellate Jurisdiction

Criminal Appeal No.52 of 1984

Between:

SISA KALISOQO — Appellant

and

REGINAM — Respondent

K. Bulewa for the Appellant
G.E. Leung for the Respondent

Date of Hearing: 6th November, 1984
Delivery of Judgment: 15th November, 1984

JUDGMENT OF THE COURT

O'Regan, J.A.

On the 17th July, 1984 the appellant was convicted on four counts of fraudulent false accounting contrary to section 307 of the Penal Code (Counts 1, 3, 5 and 7) and on four counts of causing payment of money by false pretences contrary to section 309(a) of the Penal Code (Counts 2, 4, 6 and 8).

On the 20th July, 1984 the following sentences were imposed :

On Count 1 - 6 months' imprisonment and a fine of $250 or six months' imprisonment in default of payment.

On Count 2 - 6 months' imprisonment to run concurrently with the sentence on Count 1.

On Count 3 - 6 months' imprisonment and a fine of $250 or six months' imprisonment in default of payment.

On Count 4 - 6 months' imprisonment to run concurrently with the sentence on Count 3.

On Count 5 - 6 months' imprisonment and a fine of $300 or six months' imprisonment in default of payment.

On Count 6 - 6 months' imprisonment to run concurrently with the sentence on Count 5.

On Count 7 - 6 months' imprisonment and a fine of $200 or six months' imprisonment in default of payment.

On Count 8 - 6 months' imprisonment to run concurrently with the sentence on Count 7.

After pronouncing the sentences the learned Judge went on to say :

" The cumulative effect of the above sentence is that the accused will serve 2 years in prison and pay fines totalling $1,000 or serve an additional 2 years in default of payment. "

The appeals are against both the convictions and the sentences.

The first ground of appeal is :

"That the learned trial Judge failed totally to direct the assessors as to the standard of proof that is required with regard to circumstantial evidence. Since the prosecution's evidence was almost entirely circumstantial in nature such a failure amounted to a miscarriage of justice. "

It is implicit in this ground of appeal that there is a standard of proof applicable to cases based upon circumstantial evidence different from the general standard of proof beyond reasonable doubt.

Mr. Bulewa allowed that the decision of the House of Lords in McGreevy (1973) 1 W.L.R. 276 posed a difficulty for him in pressing this submission upon us. Nonetheless, he invited our attention to Dentin (1958) S.R. (N.S.W.) 34 on which the Court of Appeal of New South Wales deplored the omission of the trial Judge to give to the jurors what it termed "the usual direction as to the use of circumstantial evidence" namely "that before they could convict they must be satisfied beyond all reasonable doubt that the facts as found by them were inconsistent with any rational conclusion other than that the accused was guilty." We note, however, that whilst the omission was regarded as "a somewhat unsatisfactory feature" it was one, which standing alone, would not necessarily justify the setting aside of the conviction.

In Horry (1952) N.Z.L.R. 111, 123 Gresson J. in delivering the judgment of the Court of Appeal said "that the circumstantial evidence should be so cogent and compelling as to convince a jury that upon no rational hypothesis other than murder can the facts be accounted for".

In that case the principal issue was whether a person could be convicted of murder when there was no proof either of the fact of murder or of the finding of the dead body. The matter presently under consideration was not argued and the observations must accordingly be

regarded as obiter. In our view, the dramatic use of circumstantial evidence in the case occasioned the amplification of the usual formulation as to onus.

In Plomp (1963) 110 C.L.R. 234, Dixon C.J. at p.243, referred to "the rule that you cannot be satisfied beyond reasonable doubt on circumstantial evidence unless no other explanation than guilt is reasonably compatible with the circumstances".

And, in the same case, Menzies J. at p.252, in the same view, referred to "the customary direction where circumstantial evidence is relied on to prove guilt, that to enable a jury to bring in a verdict of guilty it is necessary not only that it should be a rational inference but the only rational inference that the circumstances would enable them to draw ....." (Our italics).

But Menzies J. went on to say :

> " It was argued, however, that this direction is something separate and distinct and must be kept separate and distinct from the direction that the prosecution must prove its case beyond reasonable doubt. Notwithstanding that the applicant's counsel did find some authority to support their contention - Reg. v. Ducsharm (1955) 113 Can. Cr. Cas. 1 - that contention is unsound for the gravity of the particular direction stems from the more general requirement that guilt must be established beyond reasonable doubt. "

This passage was approved by the House of Lords in McGreevy (supra). But their Lordships did not proscribe or even deprecate the use, in appropriate instances, of illustrative or explanatory expansions of "beyond reasonable doubt". To the contrary, they said :

> " In a case in which inferences have to be drawn by a jury from such facts as are found by them a judge will wish to give the jury guidance as to their approach and in giving that guidance to what was said by Alderson B

(in Hodge (1838) 2 Lewin 227) and Dixon C.J. (in Plomp supra) and others who have given expression to the same line of thought ...."

And, in the end, held that -

" It would be undesirable to lay it down as a rule which would bind judges that a direction to a jury in cases where circumstantial evidence is the basis of the prosecution case must be given in some special form, provided always that in suitable terms it is made plain to a jury that they must not convict unless they are satisfied of guilt beyond all reasonable doubt. "

We respectfully agree and declare it to state the law of this country. In so doing we are not to be understood to fetter in any way the use by Judges of words of explanation and guidance appropriate to the facts and circumstances.

This ground of appeal fails.

The second ground of appeal reads :

" The learned trial Judge erred in law and in fact when he failed to direct the assessors on the status of John Jai Nath in relation to the prosecution's case. That is whether he was an accomplice or whether he was an innocent party. "

John Jai Nath was not a witness at the trial. He was named in each of the counts of causing the payment of money by false pretences as the payee of the moneys allegedly caused to be paid by false pretences, and as the person who benefited therefrom. He had originally been charged jointly with having conspired with the appellant to defraud but that count was quashed.

If Nath had been a witness at the appellant's trial, the Judge would clearly have been obliged to give

the customary accomplice warning but he would not, either in that circumstance or in the circumstances which obtained at the trial, have been called upon to direct the assessors as to whether he had that status. That would have been a matter for the assessors and the Judge would have had to tell them so - Davies (1954) A.C. 378 at pp. 401-2.

And, again, it would be beyond the Judge's role to express an opinion or to give a concluded direction as to Nath's guilt or innocence.

There is nothing to this ground and we reject it.

Ground 3 reads :

> " The learned trial Judge misdirected the assessors in law and fact in relation to the counts alleging that the appellant caused the payment of money by false pretences because - since the evidence showed that payment was made to and received by John Jai Nath - that was not evidence against the appellant since the decision concerning the tendering of the L.P.O.s for payment was entirely at the discretion of John Jai Nath. "

It, of course, cannot be controverted that after John Jai Nath came into possession of purchase orders, it was exclusively a matter for him as to whether he presented them or not. But the evidence was that he did present them and receive payment and the assessors and the Judge obviously accepted such evidence. And, these proven facts were, in the circumstances of the case, facts which they could consider along with other proven facts in their inquiry as to whether or not the guilt of the appellant had been proved beyond reasonable doubt.

This ground of appeal also fails.

Ground 4 reads :

" The learned trial Judge erred in law in rejecting a submission of no case to answer made on behalf of the appellant and by not withdrawing the case from the assessors at the end of the trial -

(1) when there was no evidence to prove that the appellant intended to fraudulently falsify the Local Purchase Orders in question;

(2) when the prosecution is so manifestly unreliable that no reasonable tribunal could safely convict upon it. "

Subsection (1) of section 293 of the Criminal Procedure Code (Cap. 21) provides :

" When the evidence of the witnesses for the prosecution has been concluded and the statement or evidence (if any) of the accused person before the committing court has been given in evidence, the court, if it considers that there is no evidence that the accused ..... committed the offence, shall, after hearing, if necessary, any arguments which the barrister and solicitor for the prosecution or the defence may desire to submit, record a finding of not guilty. "

In the present case a submission of "no case" was made by the appellant's counsel at the end of the case for the prosecution and the Judge heard argument thereon in the absence of the assessors. Even if there had been no such submissions, the Judge would have been obliged to consider the question. And it seems to us that he has to approach the matter on the same basis, whether the accused or his counsel raises the matter, or he is left to consider it pursuant to the duty imposed upon him by section 293(1). In each instance he has to ask himself and answer the question: "Is there no evidence that the accused committed the offence?"

In Barker (1977) 65 Cr. App. R. 287 at p.288 Widgery C.J., dealing with the approach to be adopted by the Judge at the close of the Crown's case on a submission of "no case", had this to say :

> " It cannot be too clearly stated that the Judge's obligation to stop the case is an obligation which is concerned primarily with those cases where the necessary minimum evidence to establish the facts of the crime has not been called. It is not the Judge's job to weigh the evidence, decide who is telling the truth and to stop the case merely because he thinks the witness is lying. To do that would be to usurp the function of the jury ....."

That passage was approved by the Court of Appeal in Galbraith (1981) 2 All E.R. 1060 at 1062 per Lord Lane C.J. In that case the Court laid down guidelines for the Courts :

> " How then should the Judge approach a submission of 'no case'? (1) If there is no evidence that the crime alleged had been committed by the defendant there is no difficulty. The Judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence - (a) where the Judge comes to the conclusion that the Crown's evidence taken at its highest is such that a jury properly directed could not convict on it, it is his duty, on a submission being made, to stop the case. (b) Where, however, the Crown's evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which a jury could properly come to the conclusion that the defendant is guilty, then the Judge should allow the matter to be tried by the jury ....."

In England, however, the matter is not governed by any statutory provision. In our view, the simple and narrow prescription of the section precludes the adoption in his country of paragraph 2(a). It is of application where "there is some evidence .....". And where there is some evidence a Judge cannot say there is no evidence.

In the present case, the Judge said :

" I have considered the position in the light of section 293 of the Criminal Procedure Code and I consider that there is evidence that the accused committed the offences mentioned in the information. "

It was submitted that this was "too casual" a response to the submission. We do not agree. We have of recent times said that in giving a decision after a trial within a trial there are good reasons for the Judge to express himself with an economy of words. We think similar reasons apply here and that the learned Judge said all that was necessary in the circumstances of the case. There was a deal of evidence from which, if it were accepted by the assessors, inferences of guilt could properly be drawn and a review of the evidence pointing to guilt was unnecessary.

As to the first of the two matters specifically referred to there was indeed no direct evidence such as an admission to establish fraudulent intention but there was a deal of evidence from which, if accepted, it could be inferred. As to the second, it is not for consideration by the Judge in a "no case" application.

Ground 5 reads :

" That the learned trial Judge misdirected himself in his summing up when he did not fairly and adequately put to the assessors the appellant's defence at his trial. "

We find ourselves unable to uphold this submission. We have re-read those passages in the summing up to which counsel for the appellant referred us and those to which counsel for the Crown referred us. It is our opinion that the learned Judge put to the assessors all matters of defence raised by or on behalf of the appellant that all in all, the summing up was an eminently fair one.

Ground 6 reads :

" That there was a miscarriage of justice when the appellant was convicted of an inconsistent verdict by the assessors when the offences in question arose from a single criminal act, if any, and further that it was factually and legally impossible for the appellant to cause the payment of money by false pretences since the money was caused to be paid by John Jai Nath to himself whose indictment for a count of conspiracy was quashed by the Court. "

Ground 7 reads :

" The learned trial Judge wrongfully admitted evidence of payment to John Jai Nath when such evidence was highly prejudicial to appellant. "

Mr. Bulewa allowed that these two grounds could be considered together. Indeed Ground 7 and that part of Ground 6 which refers to John Jai Nath raise in different guise the matters raised in and canvassed under Ground 3.

There is no gainsaying that the evidence of payment to John Jai Nath was highly prejudicial to the appellant. But it was also highly relevant to the issues arising in the counts of causing the payment of money by false pretences and was rightly admitted on that basis.

In his submissions on these grounds, Mr. Bulewa contended that the two groups of offences were essentially of the same nature and that each of the one category of offence was alternative to one of the other category and that convictions should not have been entered on both categories.

In support of these submissions he cited and relied upon Roach (1948) N.Z.L.R. 677 on which the New Zealand Court of Appeal held that convictions on counts of buggery and attempted buggery could not stand because the convictions were in respect of the same act and if the verdicts stood the prisoner was in jeopardy

twice in respect of the same act and twice convicted in respect thereof. In doing so it followed Johnson (1913) 9 Cr. App. R. 262, where a general verdict was returned on two charges in respect of the one act, and it was said :

> " It was only the one act and only one conviction is possible ..... In our view the offence was either one or the other. "

We have closely examined the counts here preferred. In our view, they cannot be said to relate to the same act. True, the two groups of charges are complementary to each other but the first relates solely to the making of a false entry in a purchasing order and the second to the acts first of giving the original thereof to Nath and secondly, passing the other copies thereof into the departmental system and thereby setting the stage for the ultimate payment to Nath.

In these circumstances we distinguish Roach's case on the facts and hold against the submission.

Accordingly Grounds 6 and 7 also fail.

Sentence

In support of the appeal against sentence, Mr. Bulewa invited our notice to the inordinate time between the time when the appellant was first interviewed in respect of matters and his being brought to trial - a period of nearly three years - and to the fact that he had also been under interdiction from duty for nearly two years before his conviction and sentence. He allowed that the learned Judge had referred to these matters but submitted that in assessing the penalty he had not given sufficient weight to them. The Judge spoke in very strong

terms of the matter. He deplored the delay and described it as a breach of the appellant's constitutional right to trial within a reasonable time after his being charged (section 10(1) of the Constitution). And he went on to say :

> " ..... I consider that in assessing the proper sentence in this case I am required to take into account the fact that the accused had these proceedings hanging over his head like the Sword of Damocles for a number of years. He has lived in the shadow of a pending trial and its possible consequences. It is something which must now be taken into account. "

In the face of those comments, we make no doubt that had there not been such an inordinate delay with the consequences to which the Judge alluded, the sentence would have been a deal more severe.

Mr. Bulewa referred us to the case of Koresi Wainiqolo (unreported), a Senior Inspector of Police who, on conviction of four counts of fraudulent false accounting and four counts of causing payment of money by false pretences, was sentenced on each count to be imprisoned for 15 months running concurrently. At the time of the offences Wainiqolo was a Senior Inspector of Police and was 43 years of age. His case is almost identical in features with that of the appellant.

The appellant, of course, was, inter alia, sentenced to six months' imprisonment on each of eight counts but in respect of four of them the sentences were not ordered to run concurrently with the result that the appellant, effectively, was sentenced to be imprisoned for two years.

Mr. Bulewa submitted that the effective sentence imposed on the appellant was so disparate from that imposed on Wainiqolo that it should be reduced.

In New Zealand and in England disparity of sentence is accepted as a ground of appeal and it is had regard to only where the disparity appears unjustifiable and gross - see Rameka (1973) 2 N.Z.L.R. 592 and Pitson (1972) 56 Cr. App. R. 391. But, at the end of the day, what has to be shown is that the appellant has received too long a sentence (Richards (1955) 39 Cr. App. R. 191).

On the data we have before us concerning the case of Wainiqolo it appears to us that he was very leniently treated. The fact that one man may have received too short a sentence is not necessarily a ground for interfering with a longer sentence on another.

In our opinion, the sentence of imprisonment imposed on the appellant was amply justified and we decline to reduce it.

In the result, both the appeals against the convictions and the sentences are dismissed.

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Vice President

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Judge of Appeal

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Judge of Appeal