IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

Criminal Appeal No. 67 of 1983

Between:

CHANDAR PAL SINGH s/o Dharam Singh — Appellant

and

R E G I N A M — Respondent

Mr. G.P. Shankar for the Appellant
Mr. A. Gates for the Respondent

Date of Hearing: 29th October, 1984

Delivery of Judgment: 15th November, 1984

JUDGMENT OF THE COURT

Mishra, J.A.

The appellant was convicted on 9th November, 1983 by the Supreme Court, Lautoka of setting fire to crops contrary to section 319 of the Penal Code and sentenced to 18 months' imprisonment.

He appeals against his conviction and sentence.

The evidence before the court was brief. Kapoor Singh, a Tavua cane farmer, had on 2nd November, 1982, part of his cane crop burnt after which he employed

two Fijians Maika and Watisoni who, with Kapoor Singh's son Resham Singh, kept a watch on his canefields every night.

At about 7 p.m. on the night of 4th November, 1982, according to the prosecution evidence, they saw a man setting fire to dry leaves inside the canefield, gave chase and caught him. The appellant was that man. He said he had made a mistake and pleaded with them to let him go. He was taken first to Kapoor Singh's house and, later, to the police station.

According to the appellant, he had just arrived back from Ba town where he had been drinking with friends and was walking home when the two Fijians dragged him from the track into the field and accused him of setting fire to the standing cane. He had made no confession of any kind. Alternatively, the defence suggested that the appellant was incapable, owing to drink, of forming the intent necessary for this offence.

The three assessors advised the Judge unanimously that the accused was guilty.

The first ground complains of the absence, in the Learned Judge's summing-up, of directions on the issue of drunkenness. Whether counsel dealt with it in their addresses is not clear from the record. The question, however, remains whether there was in the evidence material which would require the defence of drunkenness to be left to the assessors.

The record of the trial does not indicate any serious suggestion of drunkenness as a legal defence. Kapoor Singh to whom the appellant was taken immediately after he had been caught said in examination-in-chief, "Accused appeared to be drunk". No question relating to this was put to him by defence counsel in cross-examination.

Resham Singh in examination-in-chief said, "Accused was slightly drunk". The only answer extracted from him in cross-examination was, "Accused looked a bit drunk but not very drunk". Gyan Singh, a comparatively independent witness who also saw the accused at Kapoor Singh's house seemed to have been asked no question at all on this issue. Nor was Dr. Sood who examined the accused at 11 p.m. the same evening. Watisoni who had caught the accused merely said, "Accused said, 'Leave my hand; I am drunk. I want to go home' ". And Maika, "Accused was drunk. I do drink myself. Accused smelt liquor. Accused was not that drunk".

In his own evidence the accused said to his counsel - "At Seggu's house I met Bhowani Chand. I said I was bit drunk and drank water". He was asked no further question. In cross-examination he said that the barman at Ba had warned him and his friends that they would be travelling by car and that they were "a little drunk". Bhowani, called by the defence, said about the accused, "He was drunk. He drank water", and again, "Accused was slightly staggering".

Against all this the accused's evidence relating to his main defence of a frame-up suggested a remarkably clear recollection of the events of that evening.

We accept learned Crown Counsel's submission that a mere suggestion of having consumed liquor or being slightly under the influence of drink is not sufficient to raise the defence of drunkenness negativing intent. Lord Devlin said in Lee Chun-Chuen v. The Queen (1962 3 WLR 1461 at 1469) dealing with the defence of provocation said :-

> " What is essential is that there should be produced, either from as much of the accused's evidence as is acceptable or from the evidence of other witnesses

> or from a reasonable combination of both, a credible narrative of events disclosing material that suggests provocation in law. If no such material is obtainable from the evidence, the jury cannot be invited to construct one. "

The statement, in our view, applies with equal force to the defence of drunkenness in law. We realise the difficulty often faced by Counsel in cases where the evidence necessary to raise an alternative defence would tend to water down the effect of the evidence on the main defence and this may have been such a case. Be it as it may, we are satisfied that the Learned Judge was justified in not putting the issue of drunkenness to the assessors. The ground is, therefore, disallowed.

Ground 2 is :-

> "2. THAT the learned trial Judge did not adequately and properly deal with:-
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> (a) contradictions and inconsistencies in the evidence;
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> (b) effect of prior inconsistent statement;
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> (c) divisibility of credibility. "

Objection is taken to the following passage in the learned Judge's summing-up :-

> "It is for you to analyse the evidence and estimate the credibility of the witnesses who have given it. If a witness has given a completely different account on an earlier occasion from his account in the witness box you are entitled to consider which account the witness regards as true and whether he was deliberately untruthful earlier or in the witness box. However, bear in mind that small differences between a witness's account earlier and

> in this Court may be due to faulty recollections after such a lapse of time. It may simply be due to the way in which he tells his story on different occasions. Pay attention to all these matters when assessing the credibility of a witness. If you have any doubts about a witness's integrity pay no attention to his evidence. "

It is conceded by learned Crown Counsel that the second sentence in this passage, read in isolation, would tend to suggest that a statement made out of court, if considered true, might be treated as evidence for the purposes of a trial. We, however, accept the submission that the passage taken as a whole and read together with the preceding paragraph makes it clear that minor or immaterial discrepancies ought not be given too much weight in assessing credibility and that, on the other hand, where a witness is found to be deliberately lying on a material issue, his evidence ought to be totally disregarded. With that direction there can, in our view, be no serious quarrel.

Even if the impugned sentence referred to above could cause misgiving in the assessors' minds, the seriousness of its effect would depend on the nature of the contradictions and discrepancies to which their attention had been drawn. These, according to Mr. Shankar were, firstly whether Maika had been taken to Kapoor Singh's house for work that evening in a van or whether he had walked and, secondly, whether, after the appellant had been caught, Resham Singh had told him that he, Resham Singh, was a Fijian, not an Indian. Neither of the two discrepancies, even if fully established, could in our view, be of more than of peripheral significance in assessing the central issue of what occurred at the crucial time in the canefield.

The ground, therefore, fails.

The next ground relates to adequacy of directions on admissions allegedly made by the appellant when caught by the three watchmen. There is nothing in the record to suggest that the defence were able to establish omission of this vital evidence from any prior statement made elsewhere which would call for specific directions in terms of Jagdishwar Singh v. R. (8 FLR 159). Even Maika Navuni's statement exhibited at the trial (Exhibit 3) contains the statement - "When we were bringing him to police station he begged Resham Singh to release him and he told us that it was his mistake". The issue, therefore, remained largely one of credibility, prosecution witnesses insisting that he made such an admission and the appellant denying it. As we have already said the directions given by the learned Judge on credibility of witnesses were clear and adequate.

This ground, therefore, also fails.

The last ground complains of the following sentence in the summing-up :-

> " The prosecution witnesses - Kapoor Singh, Resham Singh, Watisoni Vutukia and Maika Navuni were subjected to vigorous cross-examination but they remained unshaken. "

Counsel submits that an expression of such positive opinion in favour of the prosecution prejudiced a fair assessment by the assessors of the defence case. We are unable to agree. Like any part of the summing-up this sentence should not be considered in isolation. At the very beginning the learned Judge advised the assessors of their function as judges of fact and told them to feel free to disagree with him on any issue relating to facts. He repeated this several times and finished his summing-up thus :-

> "Bear in mind that any comments I have made were to guide you in assessing the evidence. Do not think that I have been urging you to accept any particular view about the credibility of the accused or of any witness. I have not done so. Your advice is not binding on me but needless to say that it will carry the greatest possible weight with me. "

Taken in its entirety the summing-up, in our view, was reasonably balanced in this regard and no prejudice can be said to have resulted to the defence from any opinion the learned Judge may have expressed for the assessors' consideration.

The appeal against conviction is dismissed.

As for the sentence learned Counsel refers to the following passage in the record :-

> "A farmer has to go through a lot of difficulties in sending his sugar cane to the mill. This was not the first time Kapoor Singh's sugar cane was burnt. Human nature being what it is crimes of this nature are often committed from a desire for revenge, born from spite and ill-will arising from differences and unpleasant incidents occurring between parties. I do not take the view that accused's conduct would be without motive. The evidence showed that the accused and Resham Singh were not on the best of terms. "

There was no suggestion that the appellant was in any way connected with the fire that had caused damage to Kapoor Singh's cane two nights earlier. It would appear, however, that the learned Judge took into account this earlier fire while assessing the seriousness of the appellant's action on 4th November, 1982. We can find no justification for his so doing.

Learned Counsel for the appellant also suggests that November, being harvesting time, is regarded as 'open season' for fires, some farmers burning their own cane to get harvesting priority. That being so, says he, loss is counterbalanced by advantage and an act such as this should attract no more than a fine or a suspended prison sentence. There was no such evidence before the learned Judge and we find no reason for holding that he was wrong in treating setting fire to sugar cane as a serious matter.

We are, however, of the opinion that, in view of the passage quoted above, the sentence of eighteen months' imprisonment cannot stand. It is set aside and a sentence of nine months' imprisonment is substituted in its place.

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VICE PRESIDENT

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JUDGE OF APPEAL

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JUDGE OF APPEAL