The Solicitor-General
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IN THE FIJI COURT OF APPEAL
Appellate Jurisdiction
Criminal Appeal No. 15 of 1985.

Between:

MOHAMMED LATEEF — Appellant

- and -

R E G I N A M — Respondent

Mr. S. M. Koya and Mrs F. Adam for the Appellant.
Mr. V. J. Sabharwal for the Respondent.

Date of Hearing : 1st July, 1985.

Delivery of Judgment: 20th July, 1985.

JUDGMENT OF THE COURT

SPEIGHT, VP

The appellant was convicted in the Supreme Court at Suva on 14th February, 1985 on a charge of fraudulently embezzling a cheque for $566.39 the property of his then employer the Guardian Royal Exchange Insurance Limited and he was sentenced to two years imprisonment. He filed an appeal against conviction and sentence.

The appellant was a claims clerk employed in Suva by the Insurance Company which can be referred to as the GRE Company. As part of his duties he was attending to a claim by his company to recover from another insurer costs of repair which it had paid out for a vehicle belonging to

one of Company's clients which had been damaged in a motor accident. Solicitors Mitchell Keil & Company had been instructed to act on behalf of GRE Insurance. Much of the history of the claim can be ascertained from a file of letters and other documents concerning which there will be more discussion later. That file shows that the solicitors were successful in obtaining the amount claimed from the other insurers - the New India Assurance Company Limited - and the solicitors sent a form of release to GRE Insurance for execution. The appellant signed and returned this, and Mitchell Keil & Company then forwarded a cheque for $566.39 on or about the 7th of November, 1978. The cheque was made out to GRE Insurance Limited and crossed "Not Negotiable". The covering letter was noted for the attention of the appellant and he signed a letter of reply acknowledging receipt.

The cheque however was not banked to the Company's account but to the private account of the appellant and the deposit slip produced as an exhibit shows that it was the appellant who made that lodgment. It was said in evidence that the bank does not now require endorsement of a crossed-cheque if it is being banked in the account of the payee; but apparently it was the practice of GRE Company at that time to endorse cheques received, and some samples were produced - showing on the reverse side the Company's stamp and the initial of some employee. Endorsement would of course be necessary if a crossed cheque was being deposited in an account other than that

of the payee, and the cheque which is the subject of this charge, lodged in the appellant's account, bore on its reverse side the stamp of the Company and a signature "R. Chand".

Chand was, at the relevant time, also an employee of the GRE Company - junior in status to the appellant. Apart from the file which has just been mentioned, there was apparently no note any where else in the records of the Company to show receipt by it of this cheque, nor did it receive a credit for the same. The matter did not come to official notice for some years and then enquiry was made. The appellant was interviewed at some length by a police officer and he gave an explanation of how he claimed these funds had appeared in his bank account. He said that the Company from time to time made loans to its employees for housing and also employees lent each other substantial sums. He had at the relevant time asked his fellow employee Chand for a personal loan to purchase some household item. He said that Chand had handed him the cheque in question, already endorsed, saying that he was doing so with the approval of Mr. O'Meagher the Manager. He said that in addition Chand and another fellow employee lent him some cash to make up the needed sum.

If this account was true, then as the learned trial Judge pointed out in his summing-up, it was a very odd explanation. According to the assistant manager, it was not the practice for company money to be advanced to employees except for housing purposes and this was not a

housing loan. Additionally, if a loan had been made by the company it was an odd figure in dollars and cents to be made available. Additionally, it was said that if the Company had made a loan it would have been by way of a cheque from the Company's own cheque book. In addition it would have been recorded in the Company's records and no such note appears, and as the Judge said it would be very odd for a junior employee such as Mr. Chand to be giving an assurance on behalf of the manager in such circumstances. Yet the accused's statement, confirmed by him in evidence, was that it was Chand who was making the loan, but utilising Company money, with Company approval. However as the Judge correctly directed, though it was an unusual hypothesis, the banking of the cheque did not amount to embezzlement unless the court was satisfied beyond doubt that the appellant did not hold an honest belief that he was entitled to have it for his own use.

Chand was a prosecution witness. He denied much of the appellant's story. He said he did not sign the name R. Chand on the back of the cheque nor could he remember having anything to do with it. The only evidence as to handwriting was the opinion of the Assistant Manager who said that if anything the signature looked more like the appellant's writing than that of any other staff member, but the Judge correctly told the assessors that the endorsement really was of little relevance. The witness Chand did not specifically deny that the cheque may have been passed by him to appellant, but he denied saying that

he had Mr. O'Meagher's authority to give it to him. There would of course be the world of difference between the cheque being passed to appellant for processing by him as Claims Clerk and being given with an indication that he could use it for his own purposes. This last point was and is the crux of the whole case - may the appellant have believed that he was authorised to use it or was it shown that he must have known that to do so would be fraudulent.

The case came down to one man's word against another as so often happens in charges of theft by an employee. One man says that another employee gave the stolen article to him or authorized him to take it. The other employee denies it. So Chand was a very important witness. Apparently he was unsatisfactory in some respects in giving evidence. The Judge enumerated these in his summing-up. He had been reluctant to admit that he ever did any banking; he did not concede the amount of borrowing which went on between staff members particularly between himself and the appellant; yet it was shown that on one occasion he paid appellant some $425. The Judge described him as vague and reluctant.

On that basis in the summing-up the Judge described him in words becoming reasonably well-known in this class of case as "a witness with a possible interest to serve" - something less than an accomplice, although Mr. Koya now says that the only basis for so treating Chand would be

the suspicion that he was acting in complicity with appellant. Consequently the Judge gave the standard warning that it would be dangerous to convict on Chand's evidence alone without corroboration though it would be possible to do so. It will be remembered that the live issue was "Did the prosecution prove beyond reasonable doubt that the appellant did not honestly believe he was authorized to have and to use the Company's cheque?" After reciting a number of odd features about the accused's story the Judge made it clear that these were not corroboration, but he said that one piece of evidence was capable of amounting to corroboration. The file already referred to contained all the details that apparently existed of the transaction, including the receipt of the money, and it was found under the bed in the accused's house when it was searched. The accused was evasive about the presence of this file but he agreed that it should have been "filed away". Obviously its place was at the office of the Company and of course the effect of it being in his house was that all traces of the existence or disappearance of the cheque had been removed.

In the original notice of appeal four grounds were cited. These were supplemented at the hearing by an additional three; we think that some of these overlap or were variations on the original grounds. However we deal with them individually in the sequence presented:

GROUND 1 : It was submitted that Chand's evidence was totally unbelievable and that the Judge should have "rejected his evidence".

As to this it is necessary to remember that in this country the decision-making process in a trial in the Supreme Court is a two phase procedure. Initially it is for the assessors to return their opinions based on their assessment of the evidence, and it is no part of the trial Judge's function to direct them what part or parts of admissible evidence they may or may not accept. The proper course is to direct that it is for the assessors to decide what they believe and what they reject, and the learned trial Judge did that in this case in the standard way. At a later stage, and having the assistance of their opinions the Judge must make his own judgment and in so doing there is no duty cast on him to list what evidence he has accepted or rejected. He comes to his decision based on his assessment of the totality of the evidence, with all its strengths and weaknesses as he sees it and from the terms in which the learned Judge had here summed up, it is obvious that he would have treated Chand's evidence with caution - but there is no warrant for a procedure such as this ground of appeal would suggest, namely that he must direct assessors, or himself to reject any particular witness.

GROUND 2 : It was submitted that once the learned Judge had taken the cautious step of declaring the witness Chand to be "a person with a possible interest to serve" he should have required the assessors to determine the reliability of that witness's evidence per se, before searching for corroboration. Mr. Koya's words were that it is wrong to use unsatisfactory evidence to convict if it is bolstered up by evidence corroborative of it.

The starting point to the search for corroborative evidence submitted by Mr. Koya, is that the questioned evidence must first be found to be creditworthy and "completely reliable". Then and only then, he says, is it permissible for the Judge to identify other evidence which can corroborate it. This is in our view a misstatement of the true position. If evidence, from whatever source, is found to be completely reliable then there is no need for it to be corroborated. If evidence is of itself totally unworthy of belief then other evidence which may establish a fact in issue does not do so by being corroborative, but by being primary evidence.

The subject of corroboration covers the middle ground between these two extremes - i.e. evidence which purports to establish a fact in issue, but which may be of doubtful reliability because it comes from a suspect source - an accomplice, a complainant in a sexual case, a co-accused or a person with a possible interest of his own to serve. We digress in respect of this last category to mention this case of Beck (1982) 74 Cr. App. R. 221 and the limitations that case places on the need to warn.

But we wish to make it clear that the cases which discuss the need for corroboration deal with the confirmation of "credible evidence" - i.e. evidence capable of being believed - and not with evidence which has already been accepted as truthful standing alone. The correct position, now universally accepted, is set out in the passage from the speech of Lord Reid in DPP v. Kilbourne

(1973) AC 729 @ 750

> "There is nothing technical in the idea of corroboration. When in the ordinary affairs of life one is doubtful whether or not to believe a particular statement one naturally looks to see whether it fits in with other statements or circumstances relating to the particular matter; the better it fits in, the more one is inclined to believe it. The doubted statement is corroborated to a greater or lesser extent by the other statements or circumstances with which it fits in."

We think that some parts of the observations of Lord Morris of Borth-Y-Gest in Hester's case (1973) AC 296 upon which Mr. Koya attempts to rely have been taken too far and in disregard of this basic principle of seeking to resolve doubtful statements.

In following Lord Morris's observations, Lord Hailsham in Kilbourne's case used the phrase we have already referred to - credible evidence - but we emphasise that that is distinct from and stands part way between incredible evidence on the one hand, and accepted evidence on the other. His words were:-

> "Corroboration can only be afforded to or by a witness who is otherwise to be believed. If a witness's testimony falls of its own inanition the question of his needing, or being capable of giving, corroboration does not arise."

As we have said earlier in this judgment it is no part of a trial Judge's function to tell assessors (or jurors) that a certain witness's evidence must be rejected.

Assessment is for them, and the proper course in appropriate cases as Lord Reid said, is to say that doubts about suspect witnesses should lead to a search for corroboration.

This matter was re-examined and explained by Lord Hailsham himself some two years later in Boardman v. DPP (1975) AC 421 @ 454-5. A convenient reference to the relevant observations in these three cases can be found in Phipson on Evidence (13th Edition) at para. 32-17. (pp 731-2).

Having set out the passage from the speech of Lord Reid in Kilbourne already recited, the text continues:-

> "In the same case Lord Hailsham, obiter, said: "Corroboration can only be afforded to or by a witness who is otherwise to be believed." This dictum for a time led some judges to direct juries that they must be satisfied of the veracity of the "suspect" witness before considering whether his evidence was corroborated. This is inconsistent with Lord Reid's opinion just cited and indeed with common sense. In Boardman v. DPP however Lord Hailsham expressed his concurrence with this passage. He explained that in DPP v. Kilbourne he meant that the suspect witness's evidence should be "intrinsically credible." In R. v. Lucas (1981) QB 720, the Court of Appeal appear to have followed the view expressed by Lord Hailsham in DPP v. Kilbourne which he subsequently retracted in Boardman v. DPP. It is submitted that Lord Reid's opinion states the position correctly as, indeed, Lord Hailsham said. The whole point of looking for corroboration of "suspect" evidence is to see whether it is to be believed."

In Archbold (41st Edition) @ para. 16-4 the same preference for the approach of Lord Reid is expressed - a view which we endorse.

Accordingly we hold that the summing-up was correct in its approach to the question of when corroboration is called for - viz, when there is evidence which may be believable, but which for various reasons may give the listener pause.

Mr. Koya further submitted on this question that the evidence to which the learned Judge referred, viz the finding of the insurance file under the accused's bed was not capable of furnishing corroboration of Chand's evidence on the point in issue - namely that he had not told appellant that the manager had approved him having the cheque.

The submission was that this finding 'did not relate to anything said or done by Ramendra Chand or confirm that Ramendra Chand did not give the cheque to the appellant or confirm that Chand did not inform the appellant that Mr. O'Meagher had not so authorized." - Mr. Koya's words.

With respect we think that this indicates confusion as to what corroboration should do - it does not always (although it frequently does) confirm the statements of the suspect witness. Properly understood it is "independent testimony which affects the accused by connecting or tending to connect him with the crime". Baskerville (1916) 2KB 658.

The only matter in issue was whether the appellant's acceptance (or taking) of the cheque was honest or dishonest. He had said that Chand gave him an assurance that it was authorized. Chand, who was designated as a suspect witness,

denied that he had so informed him. The question was the state of mind which would be brought about if Chand's version was the correct one. The finding of the file, which should properly have been in the custody of the Company, at the home of appellant, with the sinister inference which could be drawn was obviously highly relevant to supporting the prosecution allegation that the appellant could not have believed that he was entitled to have the Company's cheque.

The final word on the subject can be best expressed by quoting a passage from the judgment of Lord Justice Ackner in Beck (supra) @ pp 229 and 230.

> "The submission may be summarised in this way: that evidence is only capable of amounting to corroboration if and in so far as it directly corroborates a piece of evidence given by the accomplice. Thus, if on a particular aspect of the case the accomplice says nothing incriminating the accused, other evidence on that aspect of the case, particularly if it is inconsistent with what the accomplice has said, is incapable of amounting to corroboration, however clearly and strongly it may point the finger of guilt at the accused. We are quite unable to accept this submission which in our judgment is wholly unsupported by authority."

We do not accept this submission.

GROUND 3 : Complains that the learned trial Judge in summing-up omitted to refer to sentence 10 of the Penal Code Cap. 17 which provides that a person acting under an honest but mistaken belief in the existence of a state of facts is not criminally responsible to any greater than if those facts existed. It was further submitted

that the summing-up erred by not stressing that the onus of proof was on the prosecution to disprove honest but mistaken belief. It is true that the specific section was not referred to but there were several clear references to the claim made by appellant to his belief as to authorization, and it was said at least three times that the onus lay on the prosecution to disprove this claim. The summing-up was clear and correct on this aspect of the case and we find no justifiable ground for this criticism.

Similarly it was submitted that the test of belief is a subjective one and not an objective one. We agree, but once again that proposition was made abundantly clear on more than one occasion. The Judge said :

> "By "fraudulent" is meant that he converted the cheque to his own use, knowing that GRE did not consent thereto and knowing that in good faith he had no right thereto. Now such a right need not necessarily have any basis in law or fact: I suppose this is one area of the law where ignorance of the law is an excuse. The test however is this: the prosecution must satisfy you beyond reasonable doubt that the accused himself did not entertain the honest belief, even though a mistaken belief, that he had a right to the cheque. Remember of course that, as with the other ingredients, if you entertain a reasonable doubt as to this or any other ingredient, then your opinion must be that the accused is not guilty."

and again :

> "It is for you now to decide on the issues before you. It is for you to decide whether the accused received the cheque for and on account of his employers and fraudulently lodged it into his bank account knowing full well that he had no

> right whatsoever to do so. Alternatively it is or you to find that, as he says, the accused received the cheque on his own account from another officer of the Company, with the apparent authority of the General Manager, as a loan from the Company, and that he lodged it to his own account in the honest even if mistaken belief that he had the right to do so."

and finally :

> "You must be so satisfied that on the evidence the only reasonable inference is that the accused did not honestly believe that he had any right to lodge the cheque and that the only reasonable inference is the guilt of the accused, before you can render such opinion. If you do not consider or you are in reasonable doubt that any ingredient has been proved, if in particular you are in reasonable doubt as to whether he entertained such honest belief, then you must render the opinion that the accused is not guilty."

This ground cannot be sustained.

GROUND 4 : in effect repeated ground 3 on the question of the onus of proof of destroying the defence of honest belief - nothing need be added to what has just been said.

GROUND 5 : was a variation on the two previous grounds by making an excursion into the area of circumstantial evidence. The burden of this submission as we understand it, is that part of the disproof of honest belief might come from the finding of the file and the inference to be taken from that. Hence it was said that as this was only circumstantial evidence a special formula should be adopted in summing up. 'A cardinal rule" was suggested.

had long since been laid to rest.

We can do no better than reproduce the head note of the report in McGreevy v. DPP (1973) 1 All ER 503 which accurately condenses the judgment of the House of Lords.

> "In a criminal trial it is the duty of the judge to make clear to the jury in terms which are adequate to cover the particular features of the case that they must not convict unless they are satisfied beyond reasonable doubt of the guilt of the accused. There is no rule that, where the prosecution case is based on circumstantial evidence, the judge must, as a matter of law, give a further direction that the jury must not convict unless they are satisfied that the facts proved are not only consistent with the guilt of the accused, but also such as to be inconsistent with any other reasonable conclusion."

We adopt that as definitive of the Law of Fiji and those wishing further enlightenment on this topic will find the speech of Lord Morris of Borth-Y-Gest in that case a comprehensive summary of the correct position.

It may be of interest to note that the New Zealand Court of Appeal had, and by no means for the first time, expressed the same opinion many years earlier - see R. v. Hedge (1956) NZLR 511.

This ground is unsuccessful.

GROUND 6 : This is a repetition of Ground 3 and as before is not successful and for the reasons already given.

GROUND 7 : Finally it was submitted that after the assessors' opinions had been delivered the learned Trial Judge in directing his mind to the guilt or innocence of the appellant fell into error by saying that as he totally rejected the appellant's claims of innocent belief the corollary of guilt must follow.

It is true that in some circumstances the disbelief of an accused does not of necessity mean that the prosecution has proved its case - but each case varies according to its facts. This was a yes or no situation. It was clear that the appellant had taken the Bank's cheque.

He raised an affirmative defence that because of certain events he was entitled to act as he did. For a number of reasons the assessors and the Judge rejected that as a possibility which could not be entertained - that being so the obverse conclusion was the only one available - namely that he had no such honest belief. This ground also fails.

Accordingly the appeal against conviction fails on all grounds. We were advised that appellant abandoned his appeal against sentence.

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Vice-President

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Judge of Appeal