

IN THE FIJI COURT OF APPEAL
Criminal Appeal No. 20 of 1986

Between:

SHRI KRISHNA PILLAY Appellant

- and -

REGINAM Respondent

Mr. N. Dean for the Appellant
Mr. G. Leung & Mr. Singh for the Respondent

Date of Hearing: 20th October, 1986
Delivery of Judgment: 31st ~~November~~ ^{October}, 1986

JUDGMENT OF THE COURT

Roper, J.A.

This is an appeal against conviction and sentence on four charges of larceny (being counts 5, 6, 8 and 9 in the information).

The appellant was charged with 9 counts of larceny and falsification of accounts but at the conclusion of the prosecution case the Learned Trial Judge held that there was no case to answer on one charge of larceny, and the appellant was subsequently acquitted on the falsification charges and a further charge of larceny. He was sentenced to 18 months imprisonment on each of the four charges the terms to be concurrent.

Each of the counts on which he was convicted alleges that on a certain date the appellant stole a sum of money (\$1,857.40 in total) from Rewa Co-operative Dairy Company Limited.

At all relevant times the appellant was the Transport Manager of Anthony Transport Limited, which held the contract to deliver Rewa's products to retail outlets. The appellant was responsible for all his company's dealing with Rewa. Apart from the delivery of milk products Anthony's drivers were responsible for the collection of empty crates and bottles from retailers and it was within this area of operation that the thefts were alleged to have occurred. The prosecution case in short was that the appellant falsified the records relating to the return of empty crates and bottles and retained the cheques which on the face of the documents were due to the retailers for the empties returned.

The procedure laid down by Rewa for checking the quantities of products taken by Anthony's for delivery, and empty crates and bottles returned is most elaborate, with all manner of checks at various stages in the procedure making it difficult for one person in the chain to operate a fraudulent scheme unaided. It follows that this was a case where the Trial Judge had to be alert to the danger that witnesses might well fall into the category of accomplices, or be otherwise suspect, so calling for a careful direction to the assessors. Almost the whole of the submissions on appeal dealt with the Trial Judge's direction, or lack of it, concerning specific witnesses.

That the Trial Judge was fully aware of the problems in the case is apparent from this direction to the Assessors, which appears at an early stage in his summing up:

" Before I proceed to highlight the evidence for you, I think this is a proper time to refer you to other aspects of the law in this case. You have heard Counsel for the Prosecution and the Defence talking of accomplice and corroboration.

An accomplice is a person who takes part with another or helps another or agrees with another to commit an offence. People such as Nemani Kobiti are accomplices. I shall be telling you who the accomplices are as we go along. But you must remember, as you deliberate that although you may convict on the uncorroborated evidence of an accomplice, it is dangerous to do so. This warning is necessary because accomplices can be convincing witnesses, but they may lie for various reasons. In this case, for example, Lalesh Sharma and Nemani Kobiti may be thinking of keeping their jobs, or they may be influenced by the fact that if they do not adhere to their police statements, they may face prosecution. This is why this warning is given to you that it is dangerous to convict on the evidence of accomplices unless it is corroborated. Corroboration means some other evidence which you accept to be true, which confirms not only that an offence has been committed, but which also points to the accused as having done it. I will point out to evidence, which if accepted by you is capable of corroboration.

Therefore, in dealing with the evidence of an accomplice, first of all, you must accept the evidence of the accomplice as true. If you do believe it to be true in the first place, there is nothing to corroborate. Then you have to believe some other independent evidence which tends to prove the commission of the crime and tends to link the accused as the author of it.

Then, there is evidence of other witnesses who although they are not accomplices, but whose evidence has to be treated with a great deal of caution and care, because they may have possible motives of their own to serve. Witnesses such as Nand Lal Anthony who may be motivated by a desire to protect his son, are witnesses who fall in this category, or witnesses who may be wanting to hide something. "

Thereafter, when dealing with the evidence relating to each count, he names those witnesses who should be regarded as accomplices, whether there was any corroborative evidence, and where it was to be found.

We shall deal now with each count.

On count five, which charged the appellant with stealing \$725.20, one Gaya Prasad, then a driver with Anthony's, gave evidence that at the appellant's request he made out a false invoice for the return of 98 crates of empties of a total value of \$725.20 in the name of a fictitious customer Bal Ram Singh of Semo. There was evidence from other witnesses, whom it is not suggested were accomplices, namely Andrew Moti, Chief Accountant of Rewa, and Mr. M.K. Patel a businessman, that the appellant received that cheque and cashed it at a service station. The Trial Judge quite properly told the assessors that Gaya Prasad was an accomplice (and indeed he had already been charged and convicted) and went on to say that his evidence was uncorroborated.

Mr. Dean's submission was that a Sardar Singh, who also gave evidence on this count, should have been classed as an accomplice. Mr. Singh is a bottle dealer, not employed by Anthony's or Rewa. The sole purpose in calling him was to establish that there was no Bal Ram Singh in Semo who owned a shop or bottle depot so supporting Gaya Prasad's evidence that the name was fictitious. The basis for Mr. Dean's submission was that at some stage Sardar Singh had received \$266.20 in cash from Gaya Prasad for bottles returned. In Mr. Dean's written submissions is this passage -

"This witness was not only suspect but in dealing with the contents of a cheque for which the accused was charged and convicted he admitted dealing with cash."

We have searched the record and as far as we can see the \$266.20 payment had nothing whatsoever to do with any cheque or dealing in which the appellant was involved. We see no basis for branding Sardar Singh as an accomplice, for he was entitled to be paid for bottles he sold the company. In any event despite the Trial Judge's direction there was corroboration of Gaya Prasad's evidence from Moti and in particular Mr. Patel.

Mr. Dean further submitted that the Trial Judge failed to direct the assessors that they must decide whether Gaya Prasad was a witness of truth before the question of corroboration, or lack of it, arose. The Trial Judge did give such a direction in the passage from his summing up already cited. He said,

"In dealing with the evidence of accomplice, first of all, you must accept the evidence of the accomplice as true. If you do not believe it to be true in the first place, there is nothing to corroborate."

In that passage the Trial Judge overstated the position and gave a direction which was too favourable to the appellant. We had occasion to consider this point in Mohammed Lateef v. Reginam (Judgment 20 July, 1985 in appeal 15 of 1985). It is unnecessary to repeat all that was said there. It suffices to say that the purpose of corroborative evidence is to confirm "credible evidence", that is evidence capable of being believed, not evidence which has already been accepted as truthful standing alone.

Count 6

Here the appellant was charged with stealing \$236.80. A cheque for that sum was made out in reliance

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on an invoice which purported to show that one D. Narayan had returned crates and bottles to that value. The invoice is noted "Cheque - hand deliver by driver". There seems to be no dispute that in fact the appellant took delivery of this cheque and ultimately cashed it at Mr. Mahendra Patel's service station.

Staff of both Rewa and Anthony's were involved to some extent in this transaction. Nemani Kobiti a despatch clerk with Rewa said that the appellant had prevailed on him to alter a cartage docket to show that an additional 32 crates of empties had been received when they had not. It was from this docket that the invoice for \$236.80 was eventually made out. Kobiti said that the appellant gave him \$40 for his services. Paras Anthony, son of Anthony's manager, made out the invoice from documentation presented to him but there was no suggestion that he was involved in any dishonest dealing.

Deo Narayan, in whose name it appears the cheque was made out was a lorry boy, employed by Anthony's who on the day when the extra crates were alleged to have been received, was on a truck driven by Ram Hit. He said there was no customer named "D. Narayan" and that the appellant had come to him and said that he had made out a cheque in Narayan's name and cashed it at a service station. He said that if enquiries were made by the police he, Narayan, was to say that the cheque was his. Ram Hit told a rather similar story.

The Trial Judge dealt with the evidence of the various witnesses in this way in his summing up:-

" Nemani Kobiti is clearly an accomplice and the warning I gave earlier about accomplice's evidence applies in this case. Ram Hit, though not a accomplice in this count, would need to have his evidence treated with caution for reasons which will be clear when I later deal with Ram Hit's evidence. I would also be mentioning the evidence of Nemani Kobiti later and it is open to you to assess his total evidence, before deciding which part, if any, of his evidence you can accept.

In this count corroboration of Nemani's evidence and support for Ram Hit's evidence is provided by the evidence of Deo Narayan. However, if you believe Deo Narayan who is not an accomplice the evidence of Nemani Kobiti and Ram Hit becomes immaterial. "

In respect of a later charge (Count 8) the Trial Judge held Ram Hit to be an accomplice.

Mr. Dean's submission was that the Trial Judge erred in leaving Deo Narayan to the assessors as a credible and reliable witness whose testimony was capable of corroborating Kobiti's.

It seems that the Trial Judge throughout his summing up took an unduly restrictive view of the purpose of corroborative evidence. What is required is independent testimony tending to confirm in a material way that the crime in question was committed, and that it was the accused person who committed it, not independent testimony in more or less the same terms and bearing on the same facts as deposed to by the witness requiring corroboration.

It may be that the Trial Judge gave Deo Narayan a status he did not deserve, although we are not entirely satisfied of that. The better view is that Narayan was simply "used". Apart from that there was uncontradicted

evidence from witnesses whose integrity was beyond question that this cheque was received by the appellant and cashed at a service station (as was the Bal Ram cheque). The appellant gave evidence but did not explain why he had cashed cheques ostensibly made out to Rewa customers. There was corroboration of Kobiti's evidence apart from that of Deo Narayan.

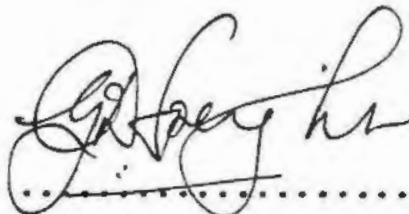
Mr. Dean's submissions on Counts 8 and 9 can be shortly stated and disposed of. He claimed first that the Trial Judge had dealt inadequately with the evidence of a Mr. Rodney Finch, Chief Executive of Rewa, and had failed to draw the assessors' attention to discrepancies between his testimony and that of Mr. Anthony senior. We see no merit in that submission. Mr. Finch's evidence, which was of a formal nature, received as much attention as it deserved, and we fail to see any real discrepancy between his testimony and that of Anthony.

Nemani Kobiti was a witness on Count 9 and the Trial Judge directed the assessors that he was an uncorroborated accomplice. Mr. Dean submitted that the Trial Judge should also have drawn the assessors' attention to the fact that Kobiti's evidence, as they had heard, differed substantially from his statement to the police so that extra care was needed. From the way the Trial Judge dealt with Kobiti's evidence the assessors could have been left in no doubt that it required a cautious approach, and earlier in his summing up he had dealt with the significance of deviations in evidence from earlier statements.

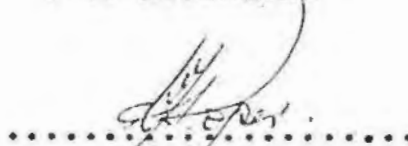
We see no grounds for upsetting the appellant's conviction on any count, nor any reason for interfering with the sentence of 18 months. Having regard for the appellant's previous criminal history he was leniently treated.

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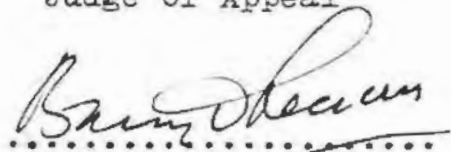
The appeals against conviction and sentence are therefore dismissed.



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Vice-President



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Judge of Appeal



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Judge of Appeal