IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

CRIMINAL APPEAL NO. 14 OF 1990
(Lautoka Criminal Case No. 3 of 1989)

BETWEEN:

THE STATE — Appellant

- and -

MOSESE TUISAWAU — Respondent

Mr I. Wikramanayake — Counsel for the State
Mr K. Bulewa — Counsel for the Respondent

Date of Hearing: 24 October, 1990
Delivery of Judgment: 15 February 1991

JUDGMENT OF THE COURT

The Respondent was tried before the High Court at Lautoka for an offence of conspiracy to unlawfully import arms and ammunition into Fiji contrary to Section 16(1) of the Arms and Ammunition Act Cap 188 and Section 386 of the Penal Code. The particulars of offence alleged that Mosese Varasikete Tuisawau between 30 of March, 1988 and the 16 of April, 1988 at Lautoka in the western division conspired with two other persons to illegally import arms and ammunition into Fiji from a place outside Fiji.

The details of the arms and ammunition were attached to the information specifying amongst other things the serial numbers of the guns.

The State called seven witnesses. At the end of the prosecution's case the learned counsel for the Respondent Mr Kelemedi Bulewa submitted that there was no case to answer. He relied on sub-section (1) of Section 293 of the Criminal Procedure Code to support his argument.

The learned counsel for the State Mr I. Wikramanayake argued that there was a case to answer as there was some evidence to support the prosecution's case. He, therefore, submitted that Section 293(1) of CPC had no application.

In a reserved judgment delivered on 12 July, 1990 the learned trial Judge upheld the submission of no case to answer. He, therefore, found the Respondent not guilty and acquitted him.

The State now appeals against the order of acquittal exercising its right to do so under Section 21(2)(a) of the Court of Appeal Act (Amendment) Decree 1990. Section 21(2)(a) enables the State to appeal to the Court of Appeal as of right *"against the acquittal of any person on any ground of appeal which involves a question of law alone"*. The grounds of appeal, as given in the Notice of Appeal, are as follows:-

"1. The learned trial Judge erred in law when he stated:

> *"But the question does not depend solely on whether there is some evidence irrespective of its credibility or weight sufficient to put the accused on his defence. A mere scintilla of evidence can never be enough nor can any amount of worthless discredited evidence - Regina v. Jai Chand s/o Jagar Nath Suva Criminal Case No. 11 of 1972. In this case the Court was guided by the Practice Note of former Chief Justice of England, Lord Parker at (1962) 1 All E.R. 448."*

The above statement was the principle of law relied upon by the learned trial Judge in the High Court. The State submits with respect that, that is not the correct principle of law to be applied given the facts of this case.

2. *The learned trial Judge misdirected himself as a matter of practice and law in evaluating the evidence given by the Prosecution witnesses alone in the absence of any evidence to the contrary. This is so more in a case like the present, because of the nature of the offence, given the fact that the State based its case substantially on circumstantial evidence.*

3. *The learned trial Judge erred in fact and in law in stating as follows:*

> *"The prosecution has conceded that there is no evidence linking accused before the arrival of the container at the wharf. The accused nor the Customs officials, Sharif or anyone else (apart from Khan) would have known what was inside the container till it was opened. The documents showed and evidence disclosed that Mohd. Khan was the owner of this container and its contents."*

4. *The learned trial Judge misdirected himself in law, on the correct construction of Section 293(1) of the Criminal Procedure Code, Cap. 21."*

We agree with the learned Counsel for the State that the grounds of appeal can really be compressed into a two-fold complaint. Firstly that the learned trial judge erred in law by misconstruing the provisions of Section 293(1) of the Criminal Procedure Code, Cap. 21 and secondly that he erred in law by upholding the submission of no case to answer having regard to the evidence before the Court. Whilst the first limb of the complaint raises a question of pure law we are satisfied that the second limb also involves a question of law. It has been held that where a submission of no case to answer is made at the close of the prosecution case it calls for a decision of a question of law - See R. v. Abbot (1955) Cr. App. R.141; R. v. Garside (1967) 52 Cr. App. R.85; ARCHBOLD (43rd Ed.) 7-36 p.964.

We shall therefore confine ourselves to the two issues before us.

First Issue

Did the learned Judge misconstrue Section 293 (1) of the C.P.C.?

Convenience and fairness demand that we quote in full, as we do hereunder, what the learned trial Judge said in his Ruling on the subject of construction:

'R U L I N G

.....

Counsel relied on sub-section (1) of section 293 of the Criminal Procedure Code which 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 considering the application of section 293(1) the Fiji Court of Appeal in Sisa Kalisoqo V. Reginam Criminal Appeal No. 52 of 1984 said -

"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 bad been no sucb submissions, tbe 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."

"But the question does not depend solely on whether there is some evidence irrespective of its credibility or weight sufficient to put the accused on his defence. A mere scintilla of evidence can never be enough nor can any amount of worthless discredited evidence" - Regina V. Jai Chand s/o

Jagar Nath Suva Criminal Case No. 11 of 1972. In this case the Court was guided by the Practice Note of former Chief Justice of England Lord Parker at (1962) 1 All E.R. 448

.....'

At the hearing of this appeal Mr Wikramanayake initially argued that the expression *"no evidence"* means no evidence and should be interpreted accordingly as there was no half-way house. Later, following questions from members of this Court he allowed that *"no evidence"* should be interpreted as no evidence that is relevant and admissible. We agree with Mr K. Bulewa that a totally strict interpretation of the expression *"no evidence"* would lead to an absurdity and that even where there is *"some evidence"* its nature has to be examined.

Mr I. Wikramanayake submitted that the trial Judge erred in law when he applied the principle laid down in GALBRAITH namely - *"when a Judge comes to the conclusion that the Crown's evidence taken at its highest is such that a jury appropriately directed could not convict on it, it is his duty to stop the case".* He contended that the following statement by the trial Judge confirms the view that he applied the prohibited Galbraith test 2(a) in the instant case -

"Having analysed the whole of the evidence I am of the opinion the case is not such as to be left to the assessors. On the evidence as it stands no reasonable tribunal could convict the accused." (Page 5 of the judgement).

Mr Wikramanayake submitted that the learned Judge's approach was inconsistent with the Fiji Court of Appeal's decision in

Sisa Kalisoqo's case quoted by him in his ruling. In it the Court of Appeal said referring to GALBRAITH -

> *"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 this country of para (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."*

He argued that there was *"some evidence"* even according to the Judge's own ruling and that therefore he should have left matters of weight and credibility to the assessors rather than upholding the submission of no case to answer and thus acquitting the Respondent.

We are inclined to the view that the Judge did initially approach the case as if there was some evidence before the Court but it was of such a tenuous nature that no reasonable tribunal would convict *"on the evidence as it stands"*. His view that there was some evidence is supported by what he said in regard to importation of arms and ammunition at page 2 of his Ruling -

> *"The prosecution has established that a container loaded with AK-47 rifles, rocket launchers, heavy machine guns and ammunitions was imported by one Mohammed Khan. This container arrived at Lautoka Wharf between 30 March 1988 and 16 April 1988. They were not produced as exhibits but defence did not dispute that a container load of these weapons was imported".*

With respect we think that the learned Judge was in error in making the finding in respect of the contents of the container because the record shows no evidence whatsoever that the container in question contained any arms and ammunition or that the arms and ammunition seized by SSP Govind Raju came from that container. The learned Judge also appears to have proceeded to deal with the credibility of some witnesses and the weight of their evidence. In this respect we refer in particular to the Judge's analysis of the Respondent's evidence.

The learned Judge's citation of the following passage (with obvious approval) from *Jaichand's case* also clearly indicates to us that he was of the opinion that matters of credibility, weight and quality of evidence were within his province at that stage of the trial -

> ***"But the question does not depend solely on whether there is some evidence irrespective of its credibility or weight suffficient to put the accused on his defence. A mere scintilla of evidence can never be enough nor can any amount of worthless discredited evidence."***

Our system of a 3-stage trial at the High Court level envisages that if there is some evidence that the accused committed the offence the Judge will sum up at the end of the prosecution and defence case leaving questions of fact, credibility and weight to the assessors (first stage), the assessors will then express their opinion as to guilt or otherwise of the accused (second stage), and the Judge will thereupon give his decision after taking into consideration the opinions expressed by the assessors (the third stage).

There is of course no objection to the Judge expressing his views on the nature and quality of evidence tendered and even on commenting on the credibility of any particular witness so long as he makes it clear in his summing up that the assessors were not obliged to accept his views on these matters. But the Judge ought not to deprive himself of the assistance to be derived from the opinion of the assessors by withdrawing the case from them merely because he thinks that the prosecution case is weak or tenuous and that a particular witness or witnesses were discredited. To the extent that the trial Judge appears to have taken the view that matters of credibility and weight of evidence were within his province at the first stage of the trial we are of the opinion that he erred in construing section 293(1) of the C.P.C. But that does not mean that he necessarily erred in withdrawing the case from the assessors on the particular facts of this case by misapplying the statutory test which is

".....that there is no evidence that the accused .....committed the offence".

Second Issue

Did the learned Judge err in law in upholding the submission of no case to answer having regard to the evidence before the Court?

The essence of the crime of conspiracy is the agreement between two or more persons to execute an unlawful act or object. The crime is complete as soon as the parties agree and it is quite immaterial that they never put their agreement into effect. In other words no proof of acts in furtherance of agreement is necessary. In this case the alleged unlawful object of the agreement was the illegal importation of arms and ammunition into Fiji. By its very nature the offence of conspiracy is surrounded by secrecy and therefore generally direct or independent evidence is difficult to come by. The prosecution in this case had no direct or independent evidence whatsoever of any agreement between the Respondent and any other person or persons to import illegal arms and ammunition into Fiji. It therefore had to rely wholly on circumstantial evidence to establish inferentially that the Respondent joined the conspiracy at a subsequent stage with Mohammed Khan and one other person. In order to do this the prosecution was obliged to prove the execution of the unlawful object or acts in furtherance of that unlawful object. It therefore set out to prove -

(a) that a container loaded with arms and ammunition arrived at Lautoka wharf from overseas between 13 March 1988 and 16 April 1988;

(b) that the container and its contents were imported by one Mohammed Khan who falsely declared that it contained machinery;

(c) that the Respondent was aware that the container contained prohibited goods;

(d) that the Respondent assisted Mohammed Khan to have the container cleared from the Lautoka Customs area on 15 April 1988 and taken to Ba where it was to have been inspected later on. This the Respondent allegedly did by approaching an army officer and Customs Officers at the behest of Mohammed Khan, on the basis that the container contained machinery;

(e) that the container was found open and empty on Monday 18 April 1988 the contents having been removed by Mohammed Khan.

As to (a) above there was no evidence that the large quantities of arms and ammunition seized by the 7th prosecution witness SSP Govind Raju came out of the container. Indeed there was no evidence whatsoever that even a single item shown in the list attached to the information came from this container.

Mohammed Khan who had opened the container in the absence of the Customs Authorities and also in the absence of the Respondent had claimed that the container was loaded with old machinery and duty was therefore assessed on that basis. Furthermore the prosecution had conceded before the trial Judge that there was no evidence of the Respondent's involvement before the arrival of the container at the Lautoka wharf.

The trial record therefore shows -

(a) that there was no evidence that the container contained contraband goods as alleged and

(b) there was no evidence to show that the Respondent knew that the container had arms and ammunition in them. In fact the trial Judge found to this effect.

In the absence of any evidence in respect of the alleged illegal contents of the container and in the absence of any incriminating knowledge on the part of the Respondent as to the contents of the container there was no evidence from which guilt as to conspiracy to illegally import arms and ammunition into Fiji could be inferred. The illegality attaches to the importation of arms and ammunition into the country without licence and not to the importation of the container.

Mr Wikramanayake also complained that the learned Judge failed to refer to various pieces of prosecution evidence which he claimed were unfavourable to the Respondent. We have examined these items of evidence as listed by him in his written submissions and whilst we agree that it would have been useful for the trial Judge to have referred to them they do not in our view cure the basic flaw in the prosecution's case. At its highest even accepting all the various items of evidence listed by the State Counsel the most that could be said is that the Respondent had agreed with Mohammed Khan to use his chiefly position and status to obtain the release of the container belonging to Mohammed Khan from the Customs at Lautoka even to the extent of claiming that it was his own.

Pursuant to the duty imposed on the trial Judge by Section 293(1) of the C.P.C. he had to consider at the conclusion of the prosecution's case whether there was any evidence that the accused committed the offence. If he considered that there was no evidence that he committed the offence it was his duty to record a finding of not guilty.

In order to come to the conclusion that there was ***"some evidence"*** direct or circumstantial and irrespective of its weight credibility or its tenuous nature, it must be shown that the evidence in question was relevant, admissible and in its totality inculpatory of the accused. This means that the evidence in its totality must at least touch on all the essential ingredients of the offence charged. Assuming that an offence contains 3

essential ingredients, proof of two ingredients only would not justify holding that there was a case to answer if no evidence is led in respect of the 3rd element. In the present case failure on the part of the prosecution to produce any evidence that the arms and ammunition seized by Police came out of the container imported by Mohammed Khan and failure to lead any evidence that the Respondent knew that the contents of the container were illegally imported, means that there was no evidence from which it can be reasonably inferred that the Respondent committed the offence as charged. The learned Judge therefore was right in upholding the submission of no case to answer and in consequence recording a finding of not guilty.

This appeal is therefore dismissed.

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Sir Moti Tikaram
Justice of Appeal

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Sir Ronald Kermode
Justice of Appeal

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D.V. Fatiaki
Justice of Appeal