IN THE SUPREME COURT OF FIJI

Appellate Jurisdiction

Criminal Appeal No. 15 of 1961

Between:

SADHU, s/o RAYA — Appellants
RANJIT SINGH, s/o KISHOR SINGH

*v.*

REGINAM — Respondent

View—whether view by trial magistrate amounts to real evidence

The appellants were convicted before the Magistrate's Court, Labasa, of burglary and malicious damage to property. Various grounds were argued upon appeal.

The trial magistrate had viewed the scene of the offence. It was contended before the Supreme Court that the trial magistrate had erred in law in taking into account his own opinion of the viewing of the scene, and not merely treating the view as a means of understanding the evidence already given.

*Held.*—(1) Citing Denning, L.J., in *Buckingham v. Daily News Ltd.* (1956) 2 All E.R. 904 at p. 914, that the judge of fact is entitled to form his own judgment on the real evidence of a view, just as much as on the oral evidence of witnesses.

(2) In conducting a view the court must not go so far as itself to assume the role of an expert witness or detective.

Appeals dismissed.

Cases cited:

*London General Omnibus Co. Ltd. v. Lavell* (1901) 1 Ch. 135.

*Buckingham v. Daily News Ltd.* (1956) 2 All E.R. 904 *Goold v. Evans* 1951 2 T.L.R. 1189.

*K. C. Ramrakha* for the First Appellant.

*A. D. Patel* for the Second Appellant.

*K. C. Gajadhar*, Crown Counsel, for the Crown.

KNOX-MAWER, Ag. J. (18th August, 1961).

Before the Magistrate's Court of the First Class, Labasa, the appellants were convicted and sentenced as follows. Upon the first count they were convicted of burglary contrary to section 326A of the Penal Code and both were sentenced to three years' imprisonment. Upon the second and third counts they were convicted of malicious damage to property contrary to section 353 (1) of the Penal Code. Both appellants were sentenced to six months' imprisonment upon the second count and to one year's imprisonment upon the third count, these sentences being ordered to run concurrently with the sentences imposed upon the first count.

The grounds of appeal advanced by the first appellant against conviction and sentence are as follows:—

1. The sentences are harsh and excessive.
2. The learned trial Judge erred in law and in fact in holding that Your Petitioner's confession was admissible and obtained without infringement of the Judge's Rules.
3. The learned trial Magistrate erred in allowing cross-examination of the witness Ram Rattan by the prosecutor.
4. The learned trial Magistrate erred in law in not holding that the charge in question was defective and that a conviction could not be based thereon.
5. The learned trial Magistrate erred in law in taking his own opinions of the viewing of the scene into account and not merely treating the view as a means of understanding the evidence already given.

Mr. Ramrakha has now abandoned ground 4. I shall refer to the first ground of appeal later in my judgment.

As regards ground 2, the issue as to the admissibility of this appellant's statement was tried with the very greatest care by the learned trial Magistrate. I can see no reason whatsoever to interfere with his finding thereon.

In respect of ground 3, the Crown has conceded that the prosecution witness Ram Rattan was cross-examined by the prosecuting officer. The relevant law is contained in the Criminal Procedure Act 1865, section 3, which provides that—

> " A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; but he may, in case the witness shall in the opinion of the Judge prove adverse, contradict him by other evidence, or, by leave of the Judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement."

Here the prosecuting officer did seek the leave of the court to prove that Ram Rattan had made a previous statement inconsistent with his testimony in the witness box. The learned Magistrate very properly pointed out that the circumstances of the statement had first to be mentioned to the witness who must be asked whether or not he made such a statement. This was apparently done. However the learned Magistrate has not recorded whether his leave was then granted, although further cross-examination of the witness by the Crown apparently continued. Nevertheless, while this point might be decided in favour of the appellant, having regard to the whole of the evidence and to the conclusion reached by the learned Magistrate in his judgment, no miscarriage of justice can be said to have occurred in this regard.

The point raised by Mr. Ramrakha under the fifth ground of appeal is an interesting one. The particular portions of the judgment (relating to the " view ") with which this ground of appeal are concerned, read:—

> " Having seen the accused Sadhu giving evidence and having heard the evidence of himself and his witnesses and considered the circumstances in which his statement was obtained, I am satisfied beyond all reasonable doubt that he is not telling the truth. I have in the

course of inspecting the scene in company with counsel, the accused and the prosecutor, inspected the house from which he claims that he was taken by force by the police and the track to the place where he agrees that the police landrover was parked. It is a rough track over which it would be virtually impossible to take an unwilling person by force, without attracting considerable attention. There are about 20 houses on both sides of the track and the track is such that in places persons have to walk in single file. It took us ten minutes brisk walking to walk from Sadhu's house to the place near Garib's house where the police landrover was parked on the night when Sadhu was taken to the landrover. The evidence is that that was a wet night. The Court's inspection was made on a wet day and I would say that it would take at least 20 minutes or more for the police to take the accused by force along that track at night. The accused Sadhu and his wife contradicated each other's evidence in several particulars in describing what took place at his house. I have also driven along the road from the Court to Nagigi and to Malau and back and am satisfied that it would take at least 1½ hours for the incidents Sadhu describes to take place assuming that the police drove quickly and went about each step with considerable haste . . . .

For this accused " (the Magistrate is here dealing with the second appellant) " to have been a party to the offences as charged, he would have had to be at a place between the main road and the C.S.R. office at about 8.30 p.m. There is a track leading direct from his house to the main road. Very close to the track leading from the main road to the C.S.R. office. That was the track along which the Court travelled in inspecting the scene. It took five minutes to walk from the main road to Ranjit Singh's house in heavy rain along that track. I am satisfied that he could have walked from his house to the place where Kalika Prasad says that he met Ranjit Singh and Sadhu in about seven minutes. The movements of Ranjit Singh between about 8.15 p.m. and about 9.30 p.m. are the most important. I am satisfied that it would take until about 9·30 p.m. for him to have gone to Mr. Parker's house and do all the things alleged against him and return to his house. Two tracks lead to his house from Mr. Parker's house, namely the one that I have just mentioned and another that goes direct from the bottom of the hill below Mr. Parker's house, across the main road and on to Ranjit Singh's house. It was beside this latter track that the rifles and guns were found . . . .

On the question of the possibility of Ranjit Singh leaving his house without attracting attention, I would say that on the day of the Court's inspection no dogs were in evidence at all apart from two dogs at Ranjit Singh's house neither of which barked on the Court's approach to the compound. One of them did bark for a short while when Sgt. Atma Prasad shook a stick at it, but then lay down under the house. Apart from that one short period of barking, there was no barking of dogs although a large party of strange people were moving about the area. The track leading to Ranjit Singh's house along which the Court party walked to his house does not lead through the other compounds and I am satisfied that it would be quite possible for Ranjit Singh to approach his house and leave his house by that track without attracting any undue attention. The track put forward by defence counsel as the usual track does lead right past the compounds of other houses. The Court party took that track on their way out. Again no dogs barked. That

track is much longer and it took fifteen minutes to walk from Ranjit Singh's house to the main road by that track. It is also a slippery and rough track.

On the evidence regarding the bolts to the doors in the room where Ranjit Singh and his witnesses say that Ranjit Singh was lying down. These were tested by the Court. Two bolts on one door are stiff and difficult to open and close. The bolts on the other door however move easily and can be opened without making any noise. I am satisfied beyond all reasonable doubt that Ranjit Singh could have left his house and gone to the place where Kalika Prasad says that he met him on the night of the 4th of March without attracting any undue attention."

In *London General Omnibus Company Ltd. v. Lavell* 1901 1 Ch. 135 the plaintiffs sued in deceit alleging that the defendant's omnibuses were a colourable imitation of the plaintiffs' omnibuses. At first instance, Farwell J., after viewing, with the consent of the parties, the omnibuses in question, come back into court and stated—

" I have seen these two omnibuses: the mere sight of them is enough for me."

He then awarded judgment for the plaintiffs. Reversing the decision of Farwell J. the Court of Appeal, Lord Alverstone C.J. said (at p. 138)—

" In my opinion, the judgment of the Court below cannot stand. It seems to me to have proceeded upon the theory (the deceit being founded upon the suggestion that the defendant had run an omnibus which is likely to divert passengers from the plaintiffs' omnibuses) that the plaintiffs are entitled to succeed on the simple proof of colour and design of their own omnibus, and on the learned judge viewing the defendants' omnibus and the plaintiffs', and comparing them together. In my opinion, that is not sufficient to justify the plaintiffs in obtaining either an injunction of damages. We have no evidence before us as to what is the custom, or practice, or habits of persons who are riders in these omnibuses, nor as to what has grown up to be regarded as the leading features of omnibuses on any particular route; but we are asked to say that the learned judge was right in coming to the conclusion that, because he thought the two omnibuses so resembled one another that they might be mistaken the one for the other, that is sufficient evidence to support an injunction in an action for deceit. In the first place, it appears to me that if such a view were to prevail, a very undesirable and erroneous practice might grow up with reference to the viewing or seeing by the judge of the subject-matter of the action, or anything relating to the subject-matter of an action. It is quite true that by rule 4 of Order L. it is provided that the judge may 'inspect any property or thing concerning which any question may arise' in the action; but I have never heard it said, and, speaking for myself, I should be very sorry to endorse the idea, that the judge is entitled to put a view in the place of evidence. A view, as I have always understood, is for the purpose of enabling the tribunal to understand the questions that are being raised, to follow the evidence, and to apply the evidence."

This latter decision has been distinguished by the Court of Appeal in a recent case, *Buckingham v. Daily News Ltd.* (1956) 2 All E.R. 904, in which the facts were as follows. The plaintiff was injured while cleaning the tucking blades of a rotary press with a swab held in his hand. He brought an action for damages for negligence against his employers, claiming that they had

failed to provide a safe system of work, and at the trial he called witnesses who gave evidence that the use of a swab held in the hand was dangerous. His witnesses were cross-examined, but no rebutting evidence was called by the employers. At the invitation of the parties, the judge of first instance inspected the press and saw a demonstration by the workman showing how it was cleaned. The judge in his judgment reviewed the evidence of the workman's witnesses and held that any adult man using reasonable care would fined no difficulty in cleaning the blades and that the workman's injury was due to his own carelessness. The workman appealed on the ground that the judge had substituted his own opinion formed on his view for the evidence of the workman's witnesses. It was held by the Court of Appeal that upon an issue, not calling for technical evidence, such as whether in a simple case something was dangerous, a judge was entitled to take into consideration his own impression formed on a view of the subject-matter, which constituted part of the evidence in the same way as an exhibit or demonstration in court. In the present case the judge had not relied on his own opinion to the exclusion of other evidence and had not given undue weight to the impression which he had formed on the view and his decision would be upheld.

There are three portions from the judgments of the learned Lord Justices in this case which I wish to set out here. Firstly the words of Denning L. J. in *Goold v. Evans* 1951, 2 T.L.R. 1189 at p. 1191, which are, with approval, cited by Birkett L. J. at p. 908—

> " It is a fundamental principle of our law that a judge must act on the evidence before him and not on outside information; and, further, the evidence on which he acts must be given in the presence of both parties, or, at any rate, each party must be given an opprotunity of being present. Speaking for myself, I think that a view is part of the evidence, just as much as an exhibit. It is real evidence. The tribunal sees the real thing instead of having a drawing or a photograph of it. But, even if a view is not evidence, the same principles apply."

Secondly the observations of Parker L. J. at p. 913—

> " The important question in the case is the submission that, even so, the learned judge was substituting the impression which he had formed at the view for the evidence in the case, and that this he was not entitled to do. It is contended that the only function of an inspection is to enable the judge to follow the evidence, and that it is, as it were, a mere substitute for a plan or a photograph. I cannot think that it is so limited. A judge may have to decide whether steps or a staircase are dangerous in their construction or dangerous having regard to the lighting. He may have to decide whether the system of work is safe, or whether an operation is dangerous; and it seems to me that on inspecting the premises or the operation or the system he must be entitled to form at least a prima facie view whether they are dangerous or safe. No doubt he will listen carefully and consider any evidence which is put before him. Matters may come to light which were not obvious at the inspection, but in a simple case where A says that something is dangerous, and B says it is safe, the judge must be entitled to take into consideration what he saw and the impression that he formed at the view. It seems to me that it makes no difference if B calls no evidence and the only evidence before him is that of A. Again, he is entitled to take into consideration the impression which he had formed at the view in assessing the weight to be given to A's evidence."

The third citation to which I would refer is from the judgment of Denning L.J. at p. 914, where he says—

> " It follows from our decision today that the observations of Lord Alverstone, C.J., in *London General Omnibus Co. Ltd. v. Lavell* (2) ([1901] 1 Ch. 135 at p. 138) unduly restrict the function of a view. Everyday practice in these courts shows that, where the matter for decision is one of ordinary common sense, the judge of fact is entitled to form his own judgment on the real evidence of a view, just as much as on the oral evidence of witnesses."

In my view it is these passages from the judgments delivered in *Buckingham v. Daily News Ltd.* at which the court should look for the law in relation to this fifth ground of appeal, rather than the judgment of Lord Alverstone in *London General Omnibus Co. Ltd. v. Lavell*, this latter decision being one which must now be limited to the very special facts therein arising. On the other hand, it must be stressed that, in conducting a view, the court must not go so far as itself to assume the role of an expert witness or a detective. The court must confine itself to the passive role of observation. It is arguable that the learned trial Magistrate has gone a little too far in the other direction in the present case. Quite apart from the " view " however there were, in my opinion, irresistable grounds for the Magistrate's findings against the first appellant. Again therefore no substantial miscarriage of justice can possibly be said to have occurred in this regard, and this ground of appeal must also fail.

Dealing finally with the first appellant's appeal against conviction (ground 1), it cannot for one moment be said that the sentences imposed were harsh and/or excessive. This was a particularly bad case and merited a stiff penalty. The appeal of the first appellant is accordingly dismissed.

I turn now to the grounds of appeal upon which the second appellant relies. It is common ground, firstly that the only evidence against the second appellant was that of an accomplice, Kalika Prasad, and secondly that the learned Magistrate specifically warned himself, in his judgment, of the danger of convicting an accused upon the uncorroborated evidence of an accomplice. Mr. Patel nevertheless contends (under his grounds of appeal (*a*) and (*b*) ) that the Magistrate cannot in fact have paid any attention to this warning: it was, says Mr. Patel, no more than a formal warning which once recorded, the Magistrate ignored. Mr. Patel urges that Kalika Prasad was so clearly an unreliable witness that the conviction of his client upon such a man's word was unreasonable and should not be sustained. In considering this contention it cannot be over-stressed that the learned Magistrate had the advantage, denied to this Court, of observing this witness Kalika Prasad during several hours of cross-examination. I cannot subscribe to the contention that the Magistrate has ignored the warning he so carefully gave himself. After giving due consideration to any discrepancies thereby revealed and after weighing this witness's testimony in the light of all the other evidence adduced before him, the learned Magistrate concluded that he was undoubtedly telling the truth when he described the part played by the second appellant in the commission of these offences. This appellate court is not therefore prepared to interfere with such a conclusion of fact by a court of first instance.

Mr. Patel bases grounds of appeal (*c*) and (*d*) upon two passages in the judgment to which, he argues, exception must be taken. The first sentence objected to is contained in the fourth paragraph of the judgment, where the learned Magistrate, referring to the first appellant's statement to the police has said—

"In that statement he also named the second accused Ranjit Singh as being the person who had accompanied him and Kalika Prasad to Mr. Parker's house on that night and who had broken into the house with him."

The other passage of which Mr. Patel complains is the fifth paragraph which reads—

"The witness Kalika Prasad has given evidence confirming that he had gone with the two accused to Mr. Parker's house on the night of 4th of March. His evidence in Court is in substantial conformity with the statement obtained from the first accused Sadhu on the 23rd of March and in conformity with his own statement of 22nd of March."

Mr. Patel contends that by such specific references to the fact that Sadhu (the first appellant) had in his police statement incriminated the second appellant, there is an implication that the Magistrate had in fact taken this point into consideration against his client. Mr. Patel argues that had his mind not been influenced thereby, the learned Magistrate must have been in some doubt about accepting the mere word of Kalika Prasad against the second appellant. I consider that this contention has been conclusively answered by the Crown by reference to a later passage in the judgment where the Magistrate states—

"The statement of the accused Sadhu to the police on the 23rd of March is not evidence against the accused Ranjit Singh and must be disregarded in its entirety. The only evidence against him is that of Kalika Prasad."

The learned Magistrate could not have directed himself more categorically in this respect. I cannot therefore find substance in grounds of appeal (*c*) and (*d*).

Grounds of appeal (*e*), (*f*) and (*g*) are as follows—

(*e*) The learned Magistrate erred in arriving at a conclusion to the effect that Ranjit Singh is a powerful and dominating personality as there was no evidence to support such a conclusion, and was influenced by the said conclusion in his judgment.

(*f*) The learned Magistrate erred in arriving at the conclusion that Kalika Prasad like Sadhu is a much weaker character than Ranjit Singh as there was no evidence to support such a conclusion and was influenced by the said conclusion in his judgment.

(*g*) The learned Magistrate erred in concluding that Ranjit Singh was the dominating personality throughout the commission of these offences as there was no evidence to support such a conclusion and was influenced by the said conclusion in his judgment.

The learned Magistrate was able to see the demeanour of the two appellants and Kalika Prasad throughout a long trial, during which each of them was in the witness box for some time. He was perfectly entitled to assess their respective personalities from his own observations. There is nothing in ground of appeal (*h*). As for the final ground of appeal (*l*), I do not accept that the verdict against the second appellant is unreasonable and cannot be supported by the evidence.

In the outcome the appeal of the second appellant against conviction is dismissed. Mr. Patel has not submitted reasons for any interference with the sentences passed upon the second appellant, although it appears from his petition of appeal that this person has appealed against sentence. As I have already indicated this was a serious case and the sentences imposed are neither manifestly excessive nor wrong in principle. The appeal of the second appellant against sentence is also dismissed.